REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HIGH COURT CRIMINAL APPEAL NO. 47 OF 2017

ORIGINAL CR. CASE NO. 449 OF 2012 AT PM'S COURT AT MAKUENI

MUTUNGA KIILU MAITHYA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The Appellant **Mutunga Kiilu Maithya** was charged with the offence of defilement of a child contrary to ***Section 8(1)*** as read with ***Section 8(2*****)** ***of Sexual Offence Act No. 3 of 2006.***

2. The particulars being that on **26/10/2012** within Makueni County, intentionally and unlawfully caused his penis to penetrate the anus of **FMP**, a boy aged 3 years and **9** months.

3. Alternative charge was indecent act of a child contrary to ***Section 11(1) of the Sexual Offence Act No. 3 of 2006*** particulars being that on **26/10/2012** within Makueni County, unlawfully committed indecent act of causing his penis to touch the anus of FMP a boy aged **3** years and **9** months.

4. The Appellant pleaded not guilty and the matter proceeded to trial.

5. The prosecution called five witnesses to proof the case.

6. After defence the trial court found Appellant guilty and sentenced him to life imprisonment.

7. Being aggrieved by the above decision, the appellant lodged the instant appeal setting out 3 grounds namely:-

- ***The case was not proved beyond reasonable doubt.***

- ***Burden of prove was not discharged.***

- ***The charge was defective?***

8. Subsequently the Appellant filed supplementary grounds of appeal.

9. This being the first Appellate court, it is enjoined to look at the evidence before the trial court afresh, re-evaluate and examine the same and reach its own conclusion whether or not to uphold the conviction of the Appellant.

10. In reaching its decision, the court has bear in mind the fact that it did not have an opportunity of seeing the witnesses as they testified and therefore is not expected to make any findings as to the demeanor of the said witnesses.

11. Finally, this court is expected and mandated to consider the grounds of appeal put forward by the Appellant in reaching its judgment. See **KINYANJUI –VS- R (2004) 2KLR P.364.**

12. PW1 was the minor who testified that while his mother was away, appellant who was looking after the goats went to complainant's home. He took him to his grandmother's house whereupon he removed PW1 shot and his own trouser and defiled him on the bed. The appellant lied on him and inserted his penis. He felt pain and cried. The appellant helped him put on his shot. He also put on his trousers.

13. When PW1 mother came back home he told her what transpired. His mother took him to hospital. He said that he bled from his buttocks.

14. PW2 examined PW1 on 29/10/2012 and saw presence of blood stains on PW1 lower clothing. He put PW1 on treatment. He observed on examination that the PW1 anal region had lacerations but no spermatozoa. He made an opinion that the PW1 was sexually assaulted.

15. PW3, the complainant mother testified that on the material date she left for her work and left the appellant with his son aged about **3 years**. The appellant was grazing cattle and the child was in the care of the grandmother. When she returned at 5.00 p.m., she found the boy sleeping.

16. The following day, the PW1 went to the toilet and he started crying. On examination, she found buttocks were bleeding. She took the child to hospital and he was treated.

17. The matter was later reported to the police. She showed court birth certificate of the PW1 which indicated that he was born on 30/01/2009.

18. PW4 confirmed that he received complaint from the PW1 mother. He referred them to the hospital. He arrested appellant later as he was pointed out by PW1 father. The accused was also examined in the hospital.

19. PW5 issued PW3 with a P3 form which was duly filled.

20. On interrogation the appellant said he was under the influence of *cannabis santiva* when he sexually assaulted the boy.

21. After close of prosecution case, the court put appellant on his defence. He testified and gave unsworn statement. He said that on the material date, he woke up in the morning and went about his daily chores. He was later arrested but he did not know why he was in court.

22. In his submissions which he filed and served, he submits that his rights of fair trial under Article 25 in the Constitution of Kenya were violated; in that when the Trial Magistrate was changed at the middle of the proceedings and matter was partly heard, there was no explanation as to the change and his rights under Section 200(3) CPC were not accorded and especially right to re-summon witnesses.

23. As such Section 200(4) CPC comes to pray in that court ought to order retrial. He relies on **JOHN KARANJA WAINAINA –VS- REPUBLIC CR. APPEAL NO. 61/93** (unreported) where court held that:-

> ***"On appeal the burden is on the appellant to show that the court which convicted him did so in error."*** Same Principle was upheld in **RAMADHAN -VS- (E.A.C.A) 1955 VO. 22 P. 395.**

24. Further he relied on the case of **SAMUEL KURIA IRUNGU & OTHERS -VS- REPUBLIC HCRA 369/2010 NBI** where the court held that:-

"The court of appeal has held that noncompliance with Section 200 CPC is fatal to a trial where it is shown that the omission to comply materially prejudiced the accused. In such circumstances, the appellate court may set aside the conviction and may order new trial."

25. He also relied on **BOB AYUB ALIAS GABRIEL MBWANA ALIAS ROBERT MANDIGA -VS- REPUBLIC HCRA 106/2009** where court of appeal held that:-

"the right under Section 200 CPC was owed to the accused not his/her client and the duty to explain to the accused the right to opt to have the witnesses recalled or trial start afresh was mandatory." Same principle was upheld in **RICHARD CHARO MOLE -VS- REPUBLIC HCRA 135/2004.**

26. On the issue that medical evidence was obtained in a manner that violated Appellant right under Article 50(2), he submits that the PW2 who signed and produced P3 did not say who he was and his rank. He just stated that he was working at Mavindini Health Centre as in-charge. Thus such evidence ought to be excluded.

27. On burden of prove, the appellant submits that PW2 examined the victim but never specifically explained as to whether there was penetration as stipulated by Section 2 of Sexual Offence Act No. 3 of 2006. He only said that anal region had laceration but no sperms and thus there was sexual assault. He thus concludes that in view of the all the above errors of law, the conviction was unsafe.

28. In opposing the appeal Mr. Orinda submitted that the PW2 clinical officer confirmed that there was sexual assault. P3 form and treatment notes were produced. The defence was a mere denial.

29. The appellant agreed to proceed with matter from where it had reached. As to the age of the child, it was in evidence of mother, clinical officer and the court also noted. Thus the burden of prove was discharged.

30. The sentence was lawful and mandatory.

31. After going through the evidence on record and the submissions tendered, I find the following issues emerge:-

a. Whether the Appellant was accorded a fair trial?

b. ***Whether the burden of prove was discharged by the prosecution as required by the law***?

32. The appellant was charged with defilement contrary to Section 8(2) Sexual Offences Act in that he was alleged to have penetrated anus of a boy aged **3 years** and **9 months**. Alternative charge was that he committed an indecent act by touching same child anus with his penis.

33. The mandatory sentence is life imprisonment in event of conviction under the cited provisions.

34. Though the appellant was unrepresented, he ought to have been accorded fair trial. I note on record that on 07/02/2013 the trial court ordered trial to proceed regardless of the plea by the Appellant to be supplied with the witness statements.

35. No reason was recorded as to why the Appellant could not be accorded the right of access of the same statement before PW1 testified.

36. Further after PW1 testified the court did not invite the Appellant to cross examine the witness. No reason as to why the trial court did not allow the cross examination to proceed.

37. On 26/08/2013, Ochieng Ag. Senior Resident Magistrate took over the proceedings after PW1, PW2 and PW3 had testified. He did not state what had happened to the Trial Magistrate R. Yator Ag. Senior

Resident Magistrate. On 26/09/2013 without any record showing whether he explained to the Appellant his rights under Section 200 CPC, he proceeded to record *Accused saying* ***"let case proceed from where it reached."***

38. Thereafter PW4 and PW5 testified on 05/11/2013. Under Article 50 of the Constitution, the Appellant was entitled to the witness statements to prepare for trial. Same were never supplied and there is no evidence that they were ever supplied in the entire trial process.

39. The Appellant was entitled to cross examine PW1. There is no reason recorded as to why he was denied same right as stipulated under Article 50 of the constitution. The provisions of Section 200 CPC were not complied with according to the record. The Trial Magistrate who took over the ongoing trial and did not explain the Appellant right of option of demanding afresh trail or recalling of the witnesses. This is contrary to the holding of the court of appeal in **MANDIGA VS- REPUBLIC (SUPRA)** where the court held that:-

> ***"Court has duty to explain to the accused the right to opt to have the witnesses recalled or trial start fresh and same duty is mandatory".***

40. In **HCRA No. 135/2004 Plole -vs- Republic (Supra),** the court held that:-

> ***"Failure to comply with the provisions of Section 200 CPC would in appropriate case render the trial a nullity."***

41. Section 200(4) CPC gives court Appellate court latitude to order new trial in event the accused was materially prejudiced by noncompliance with provisions of Section 200(3).

42. The above legal errors observed by this court are enough to compel this court to set aside conviction. The court notes that the offence is alleged to have been committed on 20/10/2012. It is now 5 years or there about since then.

43. However, the witnesses noted are the victim, the mother, health officer and police officers. There would be no difficulties in getting same for retrial.

44. The court thus sets aside the sentence and orders the matter to be retried by any other Magistrate save Hon. Yator and Hon. Ochieng who had committed the errors which have rendered the nullification of the trial.

45. The final orders are:-

> ***1) The Appeal is allowed.***
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> ***2) Conviction is quashed.***
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> ***3) Sentence is set aside.***
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> ***4) A fresh trial is to be undertaken by any other Magistrate save R. Yator Ag. S.R.M and M. Ochieng Ag. S.R.M.***

SIGNED, DATED, AND DELIVERED AT MAKUENI THIS 8TH DAY OF JUNE, 2017.

C. KARIUKI

JUDGE

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