



IN THE HIGH COURT OF KENYA

AT MURANG'A

CRIMINAL APPEAL NO 106 OF 2014

(Appeal from original conviction and sentence in Kangema

PM Criminal Case No 186 of 2014 – E. M. Kagoni, SRM)

ROBERT MAINA NJOROGE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellant herein, **Robert Maina Njoroge**, was convicted after trial of *attempted defilement of a child* contrary to **section 9 (1) & (2)** of the *Sexual Offences Act, No 3 of 2006*. It was alleged that on 06/05/2014 in Kahuro District within Murang'a County, he intentionally attempted to cause his penis to penetrate the vagina of **D W M**, a child aged five (5) years. He was sentenced to serve fifteen years imprisonment on 10/07/2014. He has appealed against both conviction and sentence.
2. I have read the record of the trial court in order to evaluate the evidence on my own and arrive at my own conclusions regarding the same. This is my duty as the first appellate court. I have borne in mind however, that I neither heard nor saw the witnesses as they testified, and I have given due allowance for that fact.
3. The Appellant was found by PW2 (**Magdalene Munyiva Musyoka**) at about 8 a.m. lying on top of the complainant (PW3) who was naked. He had lowered his trousers to knee level, had one hand on the child's neck and with the other he was holding his penis as he tried to penetrate the child. Upon the intervention of PW2 the Appellant, whom PW2 knew, got off of the child, stood up, did up his trousers and escaped despite PW2's efforts to detain him.
4. Upon examination by PW4 (Amos Mboga), a clinical officer a few hours after the incident, the child had tenderness around the neck, chest and thighs.
5. The Appellant gave sworn testimony and was cross-examined. He denied the charge. He alleged that the complainant's mother owed him money, and implied that the charge was brought against him because of that fact. The complainant's mother, M N K, testified as PW1. The Appellant never once asked her in cross-examination about the alleged debt she owed him.
6. Quite clearly the testimonies of PW2 (an eye-witness) and the corroboration provided by the medical evidence of PW4, proved the charge against the Appellant beyond reasonable doubt, and I would have, without hesitation, dismissed this appeal. However, there is one disturbing aspect of the trial.
7. The complainant herself testified as PW3. She gave an unsworn statement after a *voire dire* examination. The record does not at all show that the Appellant was accorded an opportunity to cross-examine her.
8. An accused person's right to a fair trial guaranteed in the *Bill of Rights* in our Constitution includes the right to challenge evidence. See **Article 50(2) (h)** of the *Constitution of Kenya, 2010*. That right is amplified in **section 208** of the *Criminal Procedure Code* which provides
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“208. (1) If the accused person does not admit the truth of the charge, the court shall proceed to hear the complainant and his witnesses and other evidence (if any).

(2)The accused person or his advocate may put questions to each witness produced against him.

(3) If the accused person does not employ an advocate, the court shall, at the close of the examination of each witness for the prosecution, ask the accused person whether he wishes to put any question to that witness and shall record his answer.”

9. The Appellant cross-examined all the other prosecution witnesses. The record does not show that he was invited by the trial court to put any question to the complainant (PW3) and declined to do so. It appears that the court may have been de-labouring under the all too common misconception that a child of tender years who gives an unsworn statement is not liable to be cross-examined by the accused.

10. The right of an accused person to cross-examine all and any witness called against him is a constitutional right. No kind of witness, even a child of tender years who gives an unsworn statement, is exempted.

11. In the present case, breach of the Appellant’s right to challenge the complainant’s (PW3’s) testimony renders his trial defective and therefore a mistrial. His conviction cannot stand. Both the conviction and the sentence imposed upon him are hereby set aside.

12. I must now determine if in the circumstances of this case I should order a retrial. The Appellant was sentenced on 10/7/2014. He has now served only three (3) years of his term of 15 years. In seeking a retrial in the event that the Appellant’s conviction is set aside, learned prosecution counsel stated that the witnesses are still available. He further submitted that the case presented before the trial court was overwhelming and that another, proper conviction may well result. I agree.

13. Besides, the mistake leading to the setting aside of the conviction herein was entirely the trial court’s, not the prosecution’s.

14. In these circumstances I find that the interests of justice will be better served by ordering a retrial of the Appellant, and I so direct. The Appellant shall be held in custody until arraigned afresh before the *Senior Principal Magistrate’s Court, Kangema* for the same offences and upon the same facts. It is so ordered.

DATED AND SIGNED AT MURANG’A THIS 13TH DAY OF JULY 2017

H P G WAWERU

JUDGE

DELIVERED AT MURANG’A THIS 14TH DAY OF JULY 2017