



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO. 165 OF 2013

DAVID MASHUA TUMBO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an appeal from the original conviction and sentence in Kajiado*

*Principal Magistrate's Court Criminal Case No. 135 of 2013*

*by Hon. P. A. Olengo P M on 17/07/13)*

### J U D G M E N T

1. **David Tumbo Mashua**, “the appellant” was charged with the offence of **Defilement of a Child** contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act, No. 3 of 2006**. Particulars of the offence were that on the **2<sup>nd</sup> day of March, 2013** at around **18.30 hours** at **Particulars withheld** in **Kajiado South District** within **Kajiado County** intentionally and unlawfully caused his penis to penetrate the vagina of **G S**, a child aged **15 years**.

2. Facts of the case were that on the **2<sup>nd</sup> March, 2013** at about **6.30 p.m.** PW1, **G S** was on her way to the shop when she encountered the Appellant who asked her why her sister had rejected him. She did not answer him. She went to the shop. On her way back he held her neck and took her to the maize plantation owned by one **Wairimu**. He removed his shirt and used it to tie her neck. He then removed his pair of short trousers as she lay down. He stepped on her legs and removed her inner pant. He went on to insert his penis into her vagina and they had sex. He cautioned her not to tell anyone. However, she went home and told her mother, PW2, **S R**. Being her first encounter with a man she bled.

3. The matter was reported to the police. She was subjected to medical examination by PW5, **Francis Nana**, a Clinical Officer who found her neck tender, her clothes were torn, the inner pant was blood stained. The thorax and abdomen were tender. The upper elbow was bruised. The genitalia had a tear on the labia majora/minora and she had lost her hymen. The Appellant was arrested and consequently charged.

4. When put on his defence the Appellant stated that he encountered two (2) men who arrested him and took him to the police station. It was alleged that he had defiled a child but he denied.

5. The Appellant was taken through trial. The learned trial magistrate evaluated evidence adduced and

reached a finding that there was no mistaken identity as to the Complainant's assailant and there was proof of penetration. He found the Appellant guilty, convicted and sentenced him to **twenty (20) years imprisonment**.

6. Being dissatisfied with the judgment and conviction of the court the Appellant appealed on grounds that:

- The magistrate disregarded **Section 19** of the **Oaths and Statutory Declarations Act (Cap 15) Laws of Kenya**.
- The evidence of the Complainant was not corroborated.
- The defence was not considered.
- Evidence of PW5 contradicted in material substance that of PW1.
- The introduction of P.Exhibit "B" in evidence was unacceptable.

7. This being the first appeal, the court is duty bound to subject evidence adduced at trial to a fresh review and scrutiny and come up to its own conclusion bearing in mind that it neither heard nor saw witnesses who testified. (See **Okeno vs. Republic (1972) EA 32**).

8. **Section 19** of the **Oaths and Statutory Declarations Act Cap (15) Laws of Kenya** provides thus:

*"(1) Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender year called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section.*

*(2) If any child whose evidence is received under subsection (1) wilfully gives false evidence in such circumstances that he would, if the evidence had been given on oath, have been guilty of perjury, he shall be guilty of an offence and liable to be dealt with as if he had been guilty of an offence punishable in the case of an adult with imprisonment."*

9. The learned trial magistrate has been faulted for not establishing if the Complainant understood the meaning of the oath. **Section 2** of the **Children Act 2001 (Laws of Kenya)** defines a child of tender years as:

*"A child under the age of ten years."*

10. It is submitted by the Appellant that when the offence is alleged to have been committed the Complainant was **14 years and two (2) and a half months old** having been born on **24<sup>th</sup> December, 1998**. Evidence of a birth certificate which established the age of the Complainant was adduced in evidence. At the time of testifying, the Complainant was a minor aged **15 years**. In the cited case of **R. vs. Campbell (1) (1956) 2 All ER 271 Lord Godard** stated:

*"whether the child is of tender years is a matter of the good sense of the court....."*

11. The learned trial magistrate did not subject the child to *voire dire* examination having been satisfied that she was not of tender years. As a court, the trial magistrate had no obligation to do so. The child testified and was subjected to cross-examination, though brief. As a court, the trial magistrate was not

obligated to subject the minor to the preliminary examination.

12. It is however argued that the Complainant whose sole evidence was a basis of conviction was neither sworn nor affirmed. **Section 151** of the **Criminal Procedure Code** provides thus:

***“Every witness in a criminal cause or matter shall be examined upon oath, and the court before which any witness shall appear shall have full power and authority to administer the usual oath.”***

13. From the foregoing it is a requirement of the law for a witness testifying to give evidence on oath or on solemn affirmation. In the instant case the court found PW1 to be a child but not of tender years. this means that the court ought to have given direction on how the case was to proceed. The record reads thus:

***“PW1 FEMALE CHILD OF 15 YEARS STATES IN KISWAHILI”***

Circumstances in which the child was subjected to cross examination are not indicated. This court is therefore left to guess whether or not the child was sworn because she did not understand the nature of the oath or if she was not intelligent.

14. Further, in order for a person to be cross examined, an oath should have been administered. **(See Section 17 & 18 of the Oaths and Statutory Declarations Act Cap 15 Laws of Kenya)**. Therefore what transpired was contrary to the provisions of the law and a procedural error/defect on the part of the court.

15. There having been an error on the part of the court, I must consider whether or not a retrial should be ordered? In the case of **Pascal Clement Braganza vs. R. (1951) EA 152** the court stated that:

***“..... a retrial should not be ordered unless the court was of the opinion that on consideration of admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of the case but an order for the retrial should only be made where the interest of justice required it and should not be ordered when it is likely to cause an injustice to the accused person.”***

16. I had re-considered evidence adduced by the Complainant. the Appellant was a person well known to her. She reported the incident immediately after the act to her mother. She was subjected to medical examination where it was established that she was defiled. Such evidence did not necessarily require corroboration. With such evidence a conviction might result. It will therefore be in the interest of justice for the Appellant to be retried.

17. Consequently, the appeal is allowed, the conviction is quashed and sentence set aside. The Appellant shall be produced before the Senior Principal Magistrate Kajiado for a retrial on the **16<sup>th</sup> February, 2016**. In the mean time he will be remanded in custody.

18. It is so ordered.

**Dated, Signed and Delivered at Kitui this 10<sup>th</sup> day of February, 2016.**

**L. N. MUTENDE**

**JUDGE**