IN THE COURT OF APPEAL

AT ELDORET

(CORAM): MUSINGA, GATEMBU & MURGOR, JJ.A)

CRIMINAL APPEAL NO. 87 OF 2015

BETWEEN

ANGECHEL LOTIP.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from judgment of the High Court of Kenya at Kitale (J.K. Karanja J, dated 17th June 2009,

in

H.C.CRC No. 2 of 2012)

****

JUDGMENT OF THE COURT

Angechel Lotip, the appellant, was charged with defilement contrary to ***section 8(1)*** read with ***section 8(2)*** of the ***Sexual Offences Act*** in that on the 9th October, 2010 in Turkana County, he defiled the complainant, ***AA,*** a girl aged eight (8) years.

The particulars of the offence are that on the 9th day of October, 2010 in Turkana County, intentionally and unlawfully caused his penis to penetrate the genital organs of AA.

After hearing the case, the trial magistrate upon finding that the main charge was proved, convicted and sentenced the appellant. Dissatisfied with that decision, he appealed to the High Court that upheld the trial court's decision.

The appellant has now preferred an appeal to this Court. In the grounds of appeal and submissions that were presented in Court, the appellant submitted that the charges were defective as the time the offence was committed was not indicated in the charge sheet; that the evidence was contradictory for reasons that the evidence of AA gave the location of defilement as a *lagga* or gulley, while PW 2 stated that it took place in their mother's house. He further complained that he was not provided an opportunity to cross examine AA.

Other complaints were that his defence was not taken into consideration by the trial court; that he did not

undergo any medical examination; that the P3 form had no basis as there were no treatment notes to support the findings; that a grudge existed between the families.

In his submissions, ***Mr. Mulati, Senior Principal Prosecution Counsel,*** opposed the appeal. On the defective charge sheet, counsel submitted that though the time of the incident was not indicated, the date the incident occurred was specified. With regard to the contradictions in the evidence, counsel submitted that the complainant provided a graphic description of the incident, and confirmed that the appellant was known to her. PW 2 was an eye witness who caught the appellant in the act of defiling AA. Following a medical examination of AA, the clinical officer concluded that she had been defiled.

In determining this appeal, we consider it expedient to confine ourselves to the ground that the appellant was not allowed to cross examine the complainant, a matter which was not raised by the appellant in the courts below.

The issue of failure to cross examine a complaint by the accused was addressed. In the case of ***Nicholas Mutula Wambua v Republic, MSA CRA No. 373 of 2006*** where this Court cited with approval the decision of the Supreme Court of Uganda in ***Sula v Uganda [2001] 2 EA 556*** thus;

> ***"The second point we wish to discuss is whether or not a child witness, who gives evidence not on oath is liable to cross-examination. There appears to be a widespread misconception that a child witness who is allowed to give evidence without taking oath because of immature age, should not or cannot be cross-examined.... It would appear that misconception arises from a view that because accused persons are not cross-examined whenever they make unsworn statements in the defence, child witnesses who did not take the oath should be treated in the same way. Such a view is oblivious of the peculiar protection given to an accused person in the form of a right to make an unsworn statement with no liability to be cross-examined".***

And recently, in the case of ***Paul Kinyanjui Kimauku vs Republic [2016] eKLR,*** this Court whilst addressing a similar issue further observed thus;

> ***"…the record reveals that following the evidence of G that was unsworn, the appellant was not given the opportunity to cross-examine the witness. This was a clear violation of the appellant's right to a fair trial. Under Article 50(2) of the Constitution, every accused person has a right to a fair trial. This includes the right of an accused person to challenge the prosecution evidence through cross-examination. Therefore, an accused person is entitled to cross-examine any person who testifies as a prosecution witness. This is so even in the case of a minor witness giving unsworn evidence. A witness including a minor witness, unlike an accused person has no right to refuse to answer questions or not to be subjected to cross-examination. Thus, there is a clear distinction between an accused person who opts under Section 211 of the Criminal Procedure Code to give unsworn evidence in his defence, and a minor witness who gives unsworn evidence as the latter must be cross-examined."***

As in the afore quoted case, the record of the instant case similarly revealed that, the appellant did not cross examine AA who gave unsworn evidence. The record shows that after AA testified, the court went on to hear the evidence of PW 2, without the appellant cross examining AA. No explanation or reasons were provided for this omission. As such, the appellant was denied the opportunity to cross examine the complainant, resulting in a misstep in the criminal justice process, which has led to a mistrial.

As to whether we should acquit the appellant or order a retrial would be dependent on the circumstances of the case. The case of ***Muiruri vs. Republic [2003] KLR 552*** outlined the principles governing whether or not a retrial should be ordered, when it was stated thus;

> ***"Generally whether a retrial should be ordered or not must depend on the circumstances of the case. It will only be made where the interest of justice require it and if it is unlikely to cause injustice to the appellant. Other factors include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant; whether the mistakes***

leading to the quashing of the conviction were entirely the prosecution making or not."

Without going into the merits or circumstances of the case, in the interest of justice we consider it necessary to order that the case be referred back to the trial court for hearing de novo. This is for reasons that, the case was one of defilement where the complainant was 8 years old at the time. The appellant was charged on 14th October 2010, and the proceedings in the trial court were concluded after about a year later. At this point, it would be about six years since the case commenced. Bearing this in mind, we do not consider that there will be serious difficulties in securing the witnesses, or major prejudice that will be occasioned upon the appellant.

As such, we allow the appeal, and quash the conviction and sentence of the appellant by the trial court, and direct that the appellant shall be retried on the same charge before a Magistrate of competent jurisdiction other than Hon. T. Nzioki, and for that purpose, he shall remain in custody and shall be taken before a Senior Resident Magistrate at Lodwar Senior Magistrate's Court to plead to fresh charges within 14 days from the date of this order. We further order that the case be heard on a priority basis.

We so order.

DATED and delivered at Eldoret this 24th day of March, 2017.

D.K MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU FCIArb

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JUDGE OF APPEAL

A.K MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR