Case Number:	Criminal Appeal 8 of 2020
Date Delivered:	14 Jun 2021
Case Class:	Criminal
Court:	High Court at Kapenguria
Case Action:	Judgment
Judge:	Justus Momanyi Bwonwong'a
Citation:	Issa Maruti v Republic [2021] eKLR
Advocates:	Mr. Sitati for the respondent
Case Summary:	-
Court Division:	Criminal
History Magistrates:	Hon S.K. Mutai - SPM
County:	West Pokot
Docket Number:	-
History Docket Number:	Criminal Case No 24 of 2019
Case Outcome:	Appeal allowed
History County:	West Pokot
Representation By Advocates:	One party or some parties represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAPENGURIA

CRIMINAL APPEAL NO 8 OF 2020

ISSA MARUTI ALIAS BABA FATUMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(*Being an appeal from the original judgement and sentence of Hon S.K. Mutai,SPM, dated 16th April 2020 in Sexual Offence Criminal Case No 24 of 2019 in the Senior Principal Magistrate's Court at Kapenguria, Republic v* Issa Maruti Alias Baba Fatuma)

JUDGEMENT

In his petition to this court, the appellant has challenged the judgement and sentence of fifteen years' imprisonment in respect of the offence of defilement contrary to section 8 (1) of the Sexual Offences Act No. 3 of 2006.

The appellant has raised five grounds in his petition.

In ground 1 the appellant has stated the undisputed fact that he did not plead guilty.

In ground 2 the appellant has faulted the trial court in law and fact in convicting him without giving him enough time to cross examine the witnesses. In this regard, the record of the proceedings indicates that MN (Pw 2) was a minor, who was subjected to a *voire dire* examination. And at the end of the *voire dire* examination the court declared her incompetent to give evidence on oath. The court then proceeded to allow her to make an unsworn statement. In that unsworn statement, Pw 2 stated that the appellant forcefully had sexual intercourse with her. She also stated that she was four years old and that the appellant was her friend. She further stated that the appellant removed her clothes and "slept" on her in his house. She felt pain in her private parts. She did not scream because she feared the appellant. Thereafter she told her sister and her mother what the appellant had done to her.

After making her statement, the trial court did not allow the appellant to cross examine her. Instead the court proceeded to call and take the evidence of JW (Pw 3), who was her sister.

It is clear from the magisterial judgement that the trial court relied on the evidence of Pw 2; which had not been subjected to cross examination, to convict the appellant. It is a cardinal rule of law that all witnesses who testify in a criminal trial must be cross examined. This is clear from the 2010 Constitution of Kenya in article 50 (2) (k), which guarantee to an accused, the right to cross examine witnesses and those provisions read as follows. *"(2) Every accused person has a right to a fair trial, which includes the right-*

(k) to adduce and challenge evidence."

It is also clear that the trial court acted in breach of the fair trial right of the appellant to cross examine his accusers; which is a universal rule of practice. It therefore follows that the trial of the appellant was rendered fundamentally defective.

Furthermore, although section 151 of the Criminal Procedure Code requires every witness in a criminal trial to be sworn, a special provision is made under the Oaths and Statutory and Declarations Oath (Cap 19) Laws of Kenya, to allow for the reception of unsworn evidence of minor children who may not qualify to testify on oath.

The fact that the minor child did not testify on oath did not justify the denial of the appellant's right to cross examine the four year old minor child. In this regard, this court in *Dennis Kemboi v Republic, Kabarnet High Court, Criminal Appeal No 63 of 2019,* pronounced itself as follows: *"In this regard, it is important to point out that Pw 4 made an unsworn statement and was cross examined by the appellant. She testified after being affirmed (sic). This procedure is authorized by section 19 (a) of the Oaths and Statutory and Declarations Oath (Cap 19) Laws of Kenya; which reads as follows:*

"Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years 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) Laws of Kenya, shall be deemed to be a deposition within the meaning of that section."

In addition to the above statutory provisions, the courts have approved the above procedure in a series of cases. These cases include *Samwel Muriithi Mwangi v Republic [2019] e-KLR,* in which the Court of Appeal pronounced itself as follows:

"*...To be convicted and sentenced to death on evidence which is not sworn must of necessity be prejudicial to an accused."*

Furthermore, the Court of Appeal in *Jamaar Omari Hussein v Republic [2019] e-KLR* considered the issue of the unsworn evidence of a child of tender years and said that:

"This is nonetheless not to say that unsworn evidence is totally worthless. It only means that the court considering such evidence has to consider it with circumspection and look for corroboration from other evidence adduced in the matter."

The upshot of the foregoing is that it is academic or moot to proceed with considering the other grounds of appeal; since the foregoing ground 2 of the petition has disposed of the appeal.

The only issue left for determination is whether I should order for a re-trial. On the evidence presented in the trial court, I find that if it is believed, it might result in a conviction.

Furthermore, I find that the appellant has been in both pre-trial and post sentence custody for about one year and seven months. A longer custody period militates against ordering a new trial. Additionally the offence with which the appellant is charged carries a sentence of life imprisonment. These are the conditions a court ought to consider before ordering a re-trial.

After taking into account all the foregoing matters and the fact that the victim was a four year old child, I find that an order of a re-trial will serve the interests of justice.

In the premises, the appeal of the appellant succeeds with the result that it is hereby allowed and both the conviction and sentence are quashed.

Pursuant to the powers vested in this court by section 354 (3) (a) (i) of the Criminal Procedure Code (Cap 75) Laws of Kenya, I hereby order that the appellant be tried by another magistrate of competent jurisdiction excluding the one who convicted and sentence him.

In the interim period, the appellant is remanded in custody until he is produced in magisterial court for re-trial purposes as soon as practicable.

JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAPENGURIA THIS 14TH DAY OF JUNE 2021.

J M BWONWONG'A

JUDGE

In the presence of:

Mr Juma and Ms Hellen, court assistants

The appellant

Mr. Sitati, for the respondent