



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO 17 OF 2020

MARK SAIITI OMWONGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon S.N. Makila, SRM dated 4th February 2020 at the Magistrate's Court at Kisii Criminal Case No. 70 of 2019)

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to section 8(1) (2) of the Sexual Offences Act No 3 of 2006. The particulars of the charge were that the appellant on 22nd day of December 2016 in Gucha South sub-county intentionally caused his penis to penetrate the vagina of AKC, a child aged 11 years.

2. The appellant denied the charges and the hearing commenced. The prosecution called its first witness, the complainant, before Hon. E.A Obina (PM). After cross-examination of the witness the proceedings were interrupted by the appellant and the court noted that the appellant made the hearing of the suit almost impossible. The court retreated to write a ruling on contempt. Although the court did not convict him pursuant to **section 121 (1) (a) of the Penal Code** the court found that the appellant had been very violent and rude. The magistrate disqualified himself from hearing the case.

3. The matter was taken over by S.N. Makila after complying with **section 200 of the Criminal Procedure Code**. The appellant elected to have the trial start *de novo*. However on 4th February 2020 when the matter came for hearing and the prosecution sought an adjournment, the appellant caused a commotion.

4. The trial court found the appellant guilty of contempt of court pursuant to **section 121 (a) and (c) of the Penal Code** and sentenced him to 18 months imprisonment. In its ruling the court found as follows;

“The accused.....has fought orderlies and disrupted the entire court process by his unruly actions and insults and threats to the court on the face of it.

He has made the court proceedings impossible by his gross misconduct and violence...it took four men and a lady officer to control the situation and apprehend the accused person.

He had by his action, made trial in his presence impossible. I take note of the history of the accused and the facts that he appears keen to delay the hearing of this case.”

5. The trial court after considering the provisions of Article **50 (1) (f) of the Constitution of Kenya** further directed that the matter proceed in the absence of the accused person.

6. The appellant dissatisfied with the finding of the trial magistrate lodged his appeal on 18th February 2020 on both the conviction and sentence. Oral submissions were made before this court by the appellant and Mr. Otieno for the State. I have considered the said submissions and the law applicable.

7. The applicant made oral submissions and explained that on the date of hearing, although the prosecution intimated that the witnesses were not present, the complainant and other witnesses were in court. He therefore opposed the request for adjournment, sat down and directed to be heard.

8. Mr. Otieno, submitted that the appellant's retrial was to take place at Ogembo Law Courts but the appellant caused the matter to be

transferred to Kisii because of his conduct. When the matter came up for hearing before court No. 2 the appellant's conduct caused the magistrate to recuse himself and the appellant was almost punished for contempt. He was taken to Court No.4 and again his conduct made the trial impossible as he became violent. It was submitted that the appellant was violent in his conduct and very contemptuous before Court No.4 as well as all the other courts. Mr. Otieno submitted that the 18 months sentence for contempt of court was a very lenient sentence. He also submitted that the appellant was trying to derail the trial and his appeal should be dismissed.

9. This being the first appellate court, it is my duty to evaluate and reconsider afresh the evidence on record so as to arrive at my own conclusion while taking cognizance of the fact that I did not have the opportunity to see the demeanor of the witnesses (see: **Okeno v Republic [1972] EA 32**).

10. **Article 50 (2) (f) of the Constitution** provides that every accused person has the right to a fair trial, which includes the right to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed. **Section 121 (1) (a) and (c) of the Penal Code** provides that;

1. Any person who—

(a) *within the premises in which any judicial proceeding is being had or taken, or within the precincts of the same, shows disrespect, in speech or manner, to or with reference to such proceeding, or any person before whom such proceeding is being had or taken;*

.....

(c) *causes an obstruction or disturbance in the course of a judicial proceeding*

.....

is guilty of an offence and is liable to imprisonment for three years.

11. In **Suleiman Boi & another v Republic [2016] eKLR** the court held as follows;

“In the summary procedure, the requirement is that the accused is detained in Court and dealt with before the Court rises on the same day. There is no requirement that a charge be formally drawn and read to the accused person who is then called upon to plead. From the categories of cases that the summary procedure applies to as stated in section 121(2) of the Penal Code, it is evident that this procedure is to be adopted in cases of contempt in the face of Court. In the present appeal the alleged contempt took place out of the precincts of the Court at the Makueni Police station, and therefore the summary procedure was not applicable.”

12. The Court of Appeal in **Peter Kamonjo Njoroge v Republic [2019] eKLR** held that;

“9. We appreciate that the impugned trial proceeded and was concluded under the old constitutional regime and so Article 50 of the Constitution is not therefore applicable. We have however found it necessary to make reference to the said article because it replicates the previous provision. This in our view is because however vibrant and robust the current Constitution is in terms of safeguarding an individual's fundamental rights, it is alive to the fact that human beings will not always behave as expected of them by the existing laws and norms of a civilized society. The Constitution may guarantee a party all the rights contained in all the human rights instruments, but cannot force an unwilling citizen to submit himself/ herself to the protection of such instruments if indeed they don't want to.

10. There is a popular African adage that says that you can take the cow to the river but you cannot force it to drink water.

.....

.....All the court is required to do is accord a party an opportunity to be heard. If a party deliberately and adamantly refuses to take such opportunity he cannot thereafter be heard to complain that he was not heard. Furthermore, the appellant cannot seek to benefit from his own misconduct. In this respect, this Court in the case of Daniel Karuma alias Njalu and Republic [2015] eKLR, Criminal Appeal No. 157 of 2014 when determining the issue on exclusion of the accused from trial put it aptly as follows:

“The Appellant's right to be present during the trial was dependent on his conducting himself in a manner consistent with the sobriety of the trial. That being the position the appellant compromised his right to be present during the trial by failing to treat the trial proceedings with the reverence and seriousness that it deserved. He cannot leverage on an outcome brought about by his own misconduct to vilify the proceedings of the trial court.”

Therefore, after considering the record, the submissions by both counsel and the law as articulated in the above authority, we find the appellant's right to fair trial under Section 77 (2) of the retired Constitution was not violated as the appellant was properly excluded from the proceedings due to his conduct. He was taken to the river of justice but he resisted to drink the water that flowed freely from it. The learned magistrate did what she was supposed to do in the circumstances. The appellant was the author of his own misfortune, and he cannot benefit from his own misconduct by seeking to have a second bite at the cherry. The two grounds of appeal urged before us therefore fail.”

13. The proceedings before the trial court reveal that the applicant because of his conduct before the trial court has made it impossible for the trial to proceed. He elected to be violent during trial and the trial court cannot be faulted for its verdict against the appellant. In regard to sentence, I do not find the meted sentence as excessive.

14. In the end, I find that the appeal lacks merit and is hereby dismissed.

DATED AND DELIVERED AT KISII THIS 25TH DAY OF FEBRUARY, 2021.

R. E. OUGO

JUDGE

In the presence of;

Applicant In person

Mr. Otieno Senior State Counsel Office of the DPP

Ms. Rael Court Assistant