



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO 239 OF 2014

ZACHARIA LONGULE LONGOLE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of Honourable J. N. Nthuku, Senior Resident Magistrate, delivered on 15th September, 2014 in Nakuru Chief Magistrate's Court Adult Criminal Case No. 248 of 2012)

JUDGMENT

1. The Appellant, Zacharia Longule Longole, was arraigned before the Chief Magistrate's Court in Nakuru charged with a single count of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence as contained in the charge sheet were that on the 30th day of September, 2012 in Nakuru District of the Rift Valley Province, the Appellant unlawfully and intentionally committed an Act which caused penetration by inserting his genital organ namely penis into the female genital organ (vagina) of BA a child aged 13 years.

2. The Appellant also faced an alternative charge of committing an indecent Act with a child contrary to Section 11(I) of the Sexual Offence Act No. 3 of 2006. The particulars of this alternative charge are basically the same as those of the main charge.

3. The Appellant pleaded not guilty. Trial kicked off on 14/01/2013 when the Complainant testified. The matter was then adjourned. When hearing was to resume on 06/02/2013, the Appellant said he was unwell and asked for an adjournment. The matter was slated for 03/04/2013. On that day, the Appellant informed the Court that he did not have witness statements. The Learned Trial Magistrate granted him a "last adjournment" and rescheduled the hearing. It eventually came up on 30/05/2013. The Appellant applied for the Complainant to be recalled for cross-examination now that he had the witness statements. The Court acquiesced to the request.

4. The Court made a similar ruling on 25/07/2013 when the Appellant changed his request to one requiring the Complainant to testify afresh. The Learned Trial Magistrate dismissed that request but maintained her earlier order that the Complainant was to be recalled for further cross-examination by the Appellant.

5. The trial proceeded from there. Unfortunately, the trial concluded before the Complainant was called for further cross-examination. This, obviously, fatally vitiated the trial. The right to cross-examination is crucial in a criminal trial and is guaranteed in the Constitution at Article

6. Article 50(2)(k) of the Constitution which guarantees every person charged with a Criminal offence of an opportunity to adduce evidence and to challenge the evidence marshalled against him or her. It is the Court's duty to ensure that the opportunity is availed to every Accused Person.

7. Needless to say, that opportunity was unduly limited for the Appellant in this case. While true that the Appellant ought to have reminded the Court to recall the witness for cross-examination, the onus ultimately lay with the Court to ensure that the Appellant's right to fair trial was observed. The right to cross examination is an irreducible core of the right to fair trial; and it was breached here. On that score alone, the conviction and the sentence cannot stand.

8. I have looked at the other grounds of appeal proffered by the Appellant. Due to the orders I have given in the appeal, I will not delve into the other grounds of appeal. The lesser I say, the better.

9. Having set aside the conviction and sentence, I must now consider whether this is a fit case for re-trial. The principles governing whether or not a retrial should be ordered are now well settled. The East Africa Court of Appeal captured the principles succinctly in ***Fatehali Manji v Republic [1966] EA 343*** as follows:

In general, a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause injustice to the accused person.

10. The Court of Appeal added an important consideration in ***Mwangi v Republic [1983] KLR 522***:

We are aware that a retrial should not be ordered unless the appellate court is of the opinion, that on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result. In our view, there was evidence on record which might support the conviction of the appellant.

11. The main question here, then, is whether on a proper consideration of the admissible or potentially admissible evidence a conviction might result from a retrial. Given the nature of the offence; the interests of the victims of the crime; the availability of witnesses; and the reason for setting aside the conviction and sentence, after perusing the Trial Court record as part of this appeal, I have come to the conclusion that this is a fit case for re-trial.

12. Consequently, the orders and directions of the Court are as follows:

a. The conviction entered in Nakuru Chief Magistrate's Criminal Case No. A/CR. 248 of 2012 is hereby set aside.

b. The sentenced imposed on the Appellant is hereby consequently set aside.

c. The Appellant shall be released from Prison forthwith and shall, instead, be placed on remand pending his presentation before the Magistrates' Court for a retrial.

d. The Appellant shall be presented before the Chief Magistrate's Court, Nakuru on Wednesday, 29th January, 2020 to take plea.

13. The Deputy Registrar is directed to send back the Trial Court file in ***Nakuru Chief Magistrate's Criminal Case No. No. A/CR. 248 of 2012*** and a copy of this judgment to the Chief Magistrate's Court, Nakuru for compliance. It should be re-assigned to any magistrate with competent jurisdiction other than the Learned J. Nthuku.

Dated and delivered at Nakuru this 27th day of January, 2020.

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JOEL NGUGI

JUDGE