



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

HCCRA NO. 23 OF 2018

BERNARD OTIENO AMOLO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal against the Judgment and decision of the Chief Magistrate's Court at Kisumu]

(Hon. Rose M. Ndombi RM) dated the 1st March 2017 in Kisumu CMCCR (S.O) No. 15 of 2013]

JUDGMENT

The Appellant, **BERNARD OTIENO AMOLLO**, was convicted for the offence of **Defilement**, contrary to **Section 8 (1)** as read with **Section 8 (3)** of the **Sexual Offences Act**.

1. He was then sentenced to 20 years imprisonment.

2. In his appeal he has raised issues which can be summarized as follows:

1. The gaps in the evidence tendered by *the prosecution, raise doubts about its veracity.*
2. The evidence was littered with material **contradictions and inconsistencies.**
3. The **Burden of Proof** was shifted to the *Accused.*
4. As the conduct of the Complainant was **inconsistent with his evidence, her evidence was totally unbelievable.**
5. Remote Circumstantial Evidence and *Unfounded Suspicion cannot be the basis for conviction.*
6. The lack of material evidence connecting *the appellant to the offence was fatal to the prosecution case.*
7. The trial court did not give due *consideration to the evidence tendered by both the prosecution and the defence.*
8. The evidence tendered by the prosecution *was at variance with the particulars of the charge sheet, especially with regard to the date when the offence was allegedly committed.*
9. Non-compliance with Section 200 (3) of the **Criminal Procedure Code** rendered the *trial a nullity.*
10. Failure to comply with Article 50 of the **Constitution** denied the Appellant a *fair trial.*

a. Date when the Offence was committed

3. The charge sheet cited the date as 8th December 2013.

4. However, the P3 Form indicated that the offence was committed on 8th December 2013.

5. The Appellant submitted that the date when an offence was committed was a very material element of the evidence which the prosecution was duty-bound to prove.

6. The Respondent submitted that;

“... the variance in the year stated in the charge sheet, and that which was mentioned by all prosecution witnesses in their testimonies did not raise a material error that occasioned a failure of justice.”

7. According to the Respondent, the variance can be cured under **Section 382** of the **Criminal Procedure Code**.

8. The Appellant emphasized that **Section 134** of the **Criminal Procedure Code** made it mandatory that a charge or information shall contain a statement of the specific offence with which the accused is charged.

9. He also pointed that it was a requirement of that provision that the charge or information must have particulars which may be necessary for giving reasonable information as to the nature of the offence.

10. In my considered opinion, the fact that the date cited in the charge sheet is different from the date cited by witnesses, as being the date when an offence was committed, is not, of itself, sufficient to render the charge sheet defective.

11. In the case of **JMA Vs REPUBLIC [2009] KLR 671** the court held as follows;

“It was not in all cases in which a defect detected in the charge would render a conviction invalid. Section 38C of the Criminal Procedure Code was meant to cure such an irregularity, where prejudice to the appellant is not discernible.”

12. It therefore follows that when a defect does not cause any discernible prejudice to the accused, a conviction based on the said defective charge shall not be reversed or altered on appeal or on revision.

13. Secondly, when the court is called upon to reverse a conviction, sentence, finding or other order, on the basis of an error in the charge sheet, it is imperative to take into account the proviso to **Section 382** of the **Criminal Procedure Code**, which reads as follows;

“Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised in an earlier stage in the proceedings.”

14. In this case, the particulars of the charge sheet were that the offence was committed on 8th December 2013.

15. On the charge sheet, it is indicated that the Appellant was arrested on 26th August 2013. In effect, that implies that the Appellant was arrested more than 3 months before the offence was committed.

16. Considering that all the prosecution witnesses testified that the incident giving rise to the charges, had taken place on 8th December 2012, it means that there was an error in the charge sheet.

17. Secondly, a perusal of the record of the proceedings reveals that it is Hon. E.A. Obina who was the presiding trial magistrate when the prosecution witnesses testified.

18. After the close of the prosecution case, it is Hon. W. K. Onkunya who delivered the Ruling, through which the Appellant was put to his defence.

19. Thereafter, it is Hon. R. Ndombi who was the presiding trial magistrate when the Appellant testified.

20. Pursuant to the provisions of **Section 200 (3)** of the **Criminal Procedure Code**;

“Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-

summoned and be re-heard, and the succeeding magistrate shall inform the accused person of that right.”

21. A perusal of the record of the proceedings reveals that the succeeding magistrate did not comply with the provisions of **Section 200 (3)**.

22. In the case of **HENRY KAILUTHA NKARICHIA & ANOTHER Vs REPUBLIC, CRIMINAL APPEAL NO. 21 OF 2013**, the Court of Appeal, (sitting at Meru) said;

“The requirement that the court inform *the accused of the right to recall witnesses, is plain, admitting to no obscurity. The duty on the court is mandatory and a failure to comply with it vitiates the trial since it goes to the very heart of an accused person’s right to a fair trial.*”

23. The learned Judges of Appeal went on to restate the following words which they uttered in the case of **DAVID KIMANI NJUGUNA V REPUBLIC (NAKURU) CRIMINAL APPEAL NO. 294 OF 2010**.

“All of these decisions declare that the *provisions of Section 200 (3) of the Criminal Procedure Code are mandatory, and a succeeding Judge or Magistrate must inform the accused person directly and personally of his right to recall witnesses. It is a right exercisable by the accused person himself and not through an advocate, and a Judge or Magistrate complies with it out of statutory duty, requiring no application on the part of an accused person.*”

Further, failure to comply by the court always renders the trial a nullity.”

24. On the strength of those authorities, I hereby declare that the non-compliance with the provisions of **Section 200 (3)** of the **Criminal Procedure Code** rendered the proceedings against the Appellant, a nullity.

25. Having declared the proceedings a nullity, I am obliged to give due consideration to whether or not a re-trial ought to be ordered.

26. A re-trial may only be ordered if the court is satisfied that it is in the interests of justice.

27. In effect, it is not in all cases in which proceedings have been declared a nullity that a retrial is ordered.

28. In the case of **DAVID KIMANI NJUGUNA V REPUBLIC**, (above-cited) the Appellant was alleged to have committed the offence on the night of 5th and 6th February 2007. On 15th July 2010, the trial Judge convicted him for Murder.

29. Being dissatisfied with the decision of the trial court, he appealed to the Court of Appeal. In a Judgment delivered on 12th November 2015, the Court of Appeal ordered for a retrial, after quashing the initial conviction.

30. By comparison, the period between the time when the offence was allegedly committed herein, and the date of today’s determination, I find that a much shorter period has lapsed in this case.

31. It should be fairly easy to trace the witnesses in the circumstances prevailing in the case.

32. I also find that a close scrutiny of the evidence tendered, suggests that a conviction may result if a retrial was conducted.

33. In my considered opinion, the order for a retrial would not occasion any undue prejudice to the Appellant.

34. Accordingly, I now quash the conviction and set aside the sentence which was handed down by the trial court. However, the Appellant shall not be set free, for now.

35. Instead, I order that the Appellant shall be retried by any magistrate of competent jurisdiction, other than Hon. E.A. Obina and Hon. R. Ndombi.

36. In order to facilitate the expeditious retrial, I order that the Appellant shall first be brought before the learned Chief Magistrate within the next **10 Days** from today.

37. The said Chief Magistrate will assign the court that will hear the case afresh, and the said court shall take plea within 7 days from the date when the case has been assigned to it.

DATED, SIGNED and DELIVERED at KISUMU This 25th day of November 2020

FRED A. OCHIENG

JUDGE