



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL APPEAL NO. 20 OF 2018

JOSEPH KAMWANJA KARANI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence dated 21st December 2017 in Criminal Case No. 8 of 2017 in the Principal Magistrate's Court at Kilgoris, Republic v. Joseph Kamwanja Karani)

JUDGEMENT

INTRODUCTION

1. The appellant has appealed against his conviction and sentence of life imprisonment in respect of the offence of defilement contrary to section 8(1) as read with section 8 (2) of the Sexual Offences Act No. 3 of 2006
2. The state has supported both the conviction and sentence.
3. The appellant was convicted on the direct evidence of the complainant (Pw 1) and that of POM (Pw 2).
4. The defence of the appellant was a bare denial, although he testified that he had no grudge with the complainant.

FINDINGS ON THE GROUNDS OF APPEAL

5. The appellant has in his petition of appeal raised ten grounds of appeal. In grounds 1 and 2, the appellant has faulted the trial court for violating his fair trial rights by taking plea and immediately thereafter proceeding with the trial thereby failed to give the appellant a chance and facilities to prepare for his defence. In this regard, the record of the proceedings shows that the appellant took his plea on 23rd January 2017. On the same date the prosecutor told the court that the victim was present in court. Thereafter the trial commenced with the court conducting a *voire dire* examination in respect of the complainant. The trial proceeded and after calling four witnesses, the appellant is recorded as telling the court that: *"I pray for statements."* This was on 20th September 2017. The trial court proceeded to fix the case for hearing on 17th October 2017, without making an order directing the prosecutor to supply those statements to the appellant.

6. Furthermore, it is also clear that the case was only fixed for plea and not for hearing that day. A number of issues are raised by the procedure followed by the court. When was the victim bonded to appear in court to give evidence? The question calls for an answer, since the victim is not required to appear in court during plea taking. There is no answer to that question.

7. Mr. Kibet for the appellant has submitted that the procedure followed by the court violated the fair trial right of the accused to prepare for his defence, which is constitutionally guaranteed by article 50 (2) (c) of the 2010 Constitution. I find there is merit in this submission and I uphold it. In addition, I also find that the right of the appellant: *"to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence"* in terms of article 50 (j) of the Constitution was also violated. I therefore agree with counsel that this procedure amounted to trial by ambush.

8. In ground 3, the appellant has faulted the trial court for failing to conduct a proper *voire dire* examination in respect of the complainant (Pw 1) and POM (Pw 2), both of whom were children of tender years. Mr. Kibet for the appellant has submitted that **section 19 (1) of the Oaths and Statutory Declarations Act (Cap 15) Laws of Kenya** was not followed. He also cited the Court of Appeal decision in **Joseph Opondo Onago v Republic, Criminal Appeal No. 20 of 2018, (Mombasa)**, in which that court ruled that a *voire dire* examination must *"endeavour to ascertain whether the witness understands the meaning, nature and purpose of an oath. The question or questions by the court must be directed to that. If the court from the answer it receives from the witness is satisfied that the witness understands the meaning, nature and purpose of an oath, the witness must then be allowed to give sworn evidence."* That court stressed that that procedure must be followed and should appear on the record of the trial court.

9. In view of the above authoritative statement of the law in respect of the *a voire dire* examination, I find that the trial court did not follow this procedure. It therefore follows that there is merit in ground 3 and for that reason I uphold it.

10. In the light of the foregoing findings, I find that it is moot to make findings in respect of the remaining grounds of appeal, since the appellant did not have a fair trial. I further find that the trial was also defective.

11. The only issue that I have to consider is whether or not I should order for a retrial. I find that the potentially admissible evidence of the prosecution might lead to a conviction. I further find that the trial was defective. I also find that the offence with which the appellant is convicted is a serious one, since the offence carries a sentence of life imprisonment. Finally, I do not agree with Mr. Kibet that the appellant will be prejudiced by the order of a re-trial.

12. The upshot of the foregoing is that the appellant's appeal succeeds with the result that both the conviction and sentence are hereby quashed. The appellant is to be tried by another court other than the court that tried him.

Judgement dated, signed and delivered at Narok in open court this 27th day of March, 2019 in the presence of Mr. Kibet for the appellant and Mr. Omwega for the state.

J. M. Bwonwonga

Judge

27/3/2019