



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

CRIMINAL APPEAL NO. 52 OF 2016

SIMON NGIGE KAMAU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence dated 5th July 2013

in the Chief Magistrate's Court at Narok, in Criminal Case No. 585 of 2012,

Republic versus Simon Ngige Kamau).

JUDGEMENT

Introduction

1. The appellant has appealed against his conviction and sentence of twenty years imprisonment in respect of defilement of a boy contrary to section 8 (1) (3) of the Sexual Offences Act No 3 of 2006.
2. The state has supported the conviction, but has conceded sentence; since the paramount interests of the child were not taken into account by the trial court in respect of sentence.

The grounds of appeal against conviction and findings thereon.

3. In his amended petition of appeal to this court, the appellant has raised five grounds of appeal. I find from the grounds of appeal that ground four is the most important and for this reason I will consider it first. In ground four the appellant has faulted the trial court both in law and fact for conducting a trial in a manner that was unfair and prejudicial to him. In his written submissions, the appellant has submitted that the trial was conducted in breach of article 50 of the 2010 Constitution of Kenya. He has further submitted that the second succeeding magistrate did not comply with the provisions of section 200 of the Criminal Procedure Code (Cap 75) Laws of Kenya. In this regard, the record of the proceedings shows that the first trial magistrate took the evidence of Enoc Kotikot (Pw 1) and S. S. M (initials) (Pw 2), and was thereafter transferred. She was therefore unable to complete the trial. The second succeeding magistrate took over the trial on 21st August 2012. The rights of the appellant under section 200 of the Criminal Procedure Code were then explained to him. He responded by stating: "Accused- wish to proceed from where the trial magistrate reached."
4. Thereafter the case was adjourned several times until it was set down for hearing on 15th October 2012. On this date, the appellant told the court that he wanted the case to start afresh. The prosecution opposed the application on the ground that the appellant had told the court earlier on that the trial was to proceed from where it had reached and that if it were to start afresh it would lead to delay. The court agreed with the prosecution and rejected the application. It ordered the trial to start on 5th November 2012. The trial did not proceed until 28th November 2012, when No 54575 Sgt Wagane Haile (Pw 3), who was the investigating officer testified, after which the prosecution closed its case. The appellant was then placed on his defence.
5. I have considered the refusal of the trial court to grant the appellant's application for a de novo trial. The appellant was not represented by an advocate. He may not have understood the legal implications of agreeing to the trial to continue from where it had reached. Furthermore, the key prosecution witnesses namely the complainant and the clinical officer had testified before the first trial magistrate. The demeanour of Pw 1 and Pw 2 was going to be crucial to the second magistrate. In the circumstances, I find that the court should have granted the application of the appellant. I therefore find that his fair trial rights under article 50 of the Constitution were violated.
6. The upshot of the foregoing is that both the conviction and sentence imposed upon the appellant are hereby quashed.

7. The only issue for consideration is whether or not I should order a new trial. In this regard, I find that the appellant has been both in the remand and prison custody for about eight years. I further find that although there is potentially admissible evidence, which might lead to his conviction, it is not in the interests of justice to order a new trial.

8. In the light of the foregoing finding, I find that it is a moot or academic point to consider the four remaining grounds.

9. Since I have quashed the appellant's conviction and sentence, I hereby order for his release from custody, unless he is otherwise held on other lawful warrants.

Judgement dated, signed and delivered at Narok in open court this 19th day of June, 2019 in the presence of the appellant and Mr. Omwega for the respondent.

J. M. Bwonwonga

Judge

19/6/2019