REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPLEAL NO 81 OF 2018

CHARLES NDERITU NDUNGU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant (Charles Nderitu Ndung'u) was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006 at the Nakuru Chief Magistrate's Court in Criminal Case No. 179 of 2014. The particulars of the charge were that on the 27th day of July, 2014 at [particulars withheld] Primary School within Nyandarua County intentionally and unlawfully committed an act of inserting a male genital organ (penis) into the female genital organ (vagina) of SMM a child aged 9 years which caused penetration.

2. The Appellant faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act based on the same facts.

3. The Appellant pleaded not guilty to the offence and a fully-fledged trial ensued. The Prosecution called five witnesses. At the conclusion of the Prosecution case, the Learned Trial Magistrate returned a verdict that the Appellant had a case to answer. The Appellant gave a sworn statement. The Court then proceeded, upon consideration, to convict him of the main charge. He was then sentenced to life imprisonment as provided by law.

4. The Appellant is dissatisfied with the conviction and sentence and has appealed to this Court. Through his advocate, Mr. Wambeyi, the Appellant filed the following grounds of appeal:

> 1) That the learned trial magistrate erred both in fact and law in convicting the Appellant when the evidence before her was flimsy
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> 2) That the learned trial magistrate erred both in fact and law in convicting the Appellant on uncorroborated evidences and that key witnesses mention were never called to testify during the trial.
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> 3) That the learned trial magistrate erred both in fact and law by shifting the burden of proof from the prosecution to the Appellant.
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> 4) That the learned trial magistrate erred both in fact and law in convicting the Appellant when the charge, the elements and facts thereof against him were not proved to the required standards.

5. The Appellant filed written submissions to the appeal and both the State Counsel and Mr. Wambeyi, Counsel for the Appellant, addressed me during the hearing of the appeal.

6. One of the points taken up by the Counsel for the Appellant was that PW2 (LMG) was never cross examined. I have looked at the record of the Trial Court. PW2 testified on 05/05/2015. The Appellant's counsel was not in Court on that day. It would appear that a Mr. Simiyu held his brief. Mr. Simiyu informed the Court that Mr. Wambeyi (Appellant's Counsel) had a sick child and could not be in Court. The Prosecutor pointed out that the Appellant had waived his right to have legal representation but the Court decided to stand down the witness after examination-in-chief so that she could be cross-examined by the Appellant's Counsel. Further hearing was scheduled for 22/06/2015 when PW2 was to be recalled for cross-examination. However, the matter was further re-scheduled on that day.

7. Trial eventually resumed on 21/02/2017 after a few other adjournments. On that day, PW3 was put on the witness stand. PW2 was never recalled. It would seem that neither the Court nor the Defence Counsel adverted their mind to the issue again. Trial was concluded and the Appellant was convicted.

8. The right to cross-examination is a constitutional right aimed at ensuring fair trials. In criminal actions, it is guaranteed under 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.

9. Needless to say, that opportunity was not afforded to the Appellant in this case. Neither the Appellant nor his Counsel had the opportunity to cross examine PW2 who was a crucial Prosecution witness. While true that the Appellant's counsel bears a big part of the blame for the oversight, the fact remains that the irreducible core of the right to fair trial in a criminal action was breached here. On that score alone, the conviction and the sentence cannot stand.

10. 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.

11. 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*.

12. 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.*

13. 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.

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

> **a) The conviction entered in *Nakuru Chief Magistrate's Criminal Case No. 179 of 2014* is hereby set aside.**
>
> **b) The sentenced imposed on the Appellant is hereby consequently set aside.**
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> **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.**
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> d) **The Appellant shall be presented before the Chief Magistrate's Court, Nakuru on Monday, 15th August, 2019 to take plea.**

15. The Deputy Registrar is directed to send back the Trial Court file in ***Nakuru Chief Magistrate's Criminal Case No. 179 of 2014*** and a copy of this ruling to the Chief Magistrate's Court, Nakuru for compliance. It should be re-assigned to any magistrate with competent jurisdiction other than the Learned E. Kelly.

Dated and delivered at Nakuru this 7th day of August, 2019.

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JOEL NGUGI

JUDGE