



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 261 OF 2015.

DAVID MWANGI KIMANI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from judgment of the Senior Resident Magistrate Hon. H.M. Nyaga delivered on 2nd of August 2013 in Molo Cr. Case No. 1804 of 2010.)

JUDGMENT

1. The Appellant was originally charged with a single count of defilement as follows:

Defilement contrary to Section 8(1) as read with Section 8 (2) of the Sexual Offences Act No. 3 of 2006. The particulars were that on the 12th of July 2010 in Molo District within Rift valley province, Nakuru County, did intentionally and unlawfully cause his genital organ penis to penetrate the genital organ vagina of IO a girl aged 10 years.

2. He also faced an alternative charge of indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006. The particulars being that on the 12th of July 2010 in Molo District within Rift valley province, Nakuru County, did intentionally and unlawfully cause his genital organ penis come into contact with the genital organ vagina of IO a girl aged 10 years in violation of he said Act.

3. The Appellant denied the charges and the case proceeded for full trial. After four witnesses had testified, the Prosecution applied to amend the charge sheet to include a second count. The second count was as follows:

Defilement contrary to Section 8(1) as read with Section 8 (2) of the Sexual Offences Act No. 3 of 2006. The particulars were that on the 12th of July 2010 in Molo District within Rift valley province, Nakuru County, did intentionally and unlawfully cause his genital organ penis to penetrate the genital organ vagina of DW, a girl aged 10 years.

4. He also faced an alternative charge of indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006. The particulars being that on the 12th of July 2010 in Molo District within Rift valley province, Nakuru County, did intentionally and unlawfully cause his genital organ penis come into contact with the genital organ vagina of DW, a girl aged 10 years in violation of the said Act.

5. After the charge sheet was amended, the Court called upon the Appellant to take a fresh plea. The Prosecution then called the two remaining witnesses and closed its case. The Learned Trial Magistrate ruled that the Appellant had a case to answer and put him on his defence. The Appellant gave unsworn defence and called 2 witnesses. By a judgment delivered on 2nd of August 2013 the Lower Court found the Appellant guilty of count 1 and convicted him of the offence of defilement. He was sentenced to serve life imprisonment.

6. The Appellant being aggrieved and dissatisfied with the conviction and sentence, acting in person, he filed this appeal through an undated Petition of Appeal and challenged the conviction and sentence on several grounds. The main ground relied on by the Appellant was that the trial was unfair and failed to adhere to the dictates of Article 50 of the Constitution. The Appellant raised two grounds in support of his argument:

a. First, the Appellant complains that he was never supplied with witness statements as 50 (2)(j) of the Constitution.

b. Second, the Appellant complains that he was not given an opportunity to cross-examine the 1st Complainant contrary to Article 50(2)(k) of the Constitution.

7. I have had occasion to peruse the proceedings of the trial as I am required to do as a first appellate Court – see ***Okeno vs. R (1977) EALR 32***. The history of the trial is quite clear that the trial of the Appellant proceeded without him having been supplied with the witness

statements. Further, despite the Court's undertaking to recall PW1 (the Complainant in the first count), the trial concluded without the witness being recalled. The Learned Trial Magistrate, then, ended up relying on the testimony of this witness even though the Appellant did not have an opportunity to confront her in cross-examination.

8. There is a third procedural lapse which the Appellant did not raise but is consequential. When the charge sheet was amended, the Appellant had an informational right that the Trial Court was obligated to inform him that he could elect to recall the four witnesses who had already testified. The Court did not inform the Appellant of this right.

9. These three procedural lapses are consequential and they vitiate the conviction in the trial of the Appellant. See, for example, **Thomas Patrick Gilbert Cholmondeley vs Republic [2008] eKLR**.

10. Consequently, the conviction and sentence are both set aside.

11. 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.

12. 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.

13. 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.

14. 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.

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

- a. The conviction entered in Molo Chief Magistrate's Criminal Case No. 1804 of 2010 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, Molo on Monday, 23rd December, 2019 to take plea.**

16. The Deputy Registrar is directed to send back the Trial Court file in **Molo Chief Magistrate's Criminal Case No. 1804 of 2010** and a copy of this judgment to the Chief Magistrate's Court, Molo for compliance. It should be re-assigned to any magistrate with competent jurisdiction other than the Learned S. Soita and H. Nyaga.

Dated and delivered at Nakuru this 19th day of December, 2019.

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JOEL NGUGI

JUDGE