



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 177 OF 2016

JARED NYANGURE OPATI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from judgment of the Senior Resident Magistrate Hon. J. Nthuku delivered on 24th November, 2014 in Nakuru Cr. Case No. 289 of 2014.)

JUDGMENT

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

Defilement contrary to Section 8(1) as read with Section 8 (3) of the Sexual Offences Act No. 3 of 2006. The particulars were that on the 24th day of November, 2014 at around 16:00 Hrs at [particulars withheld] area within Nakuru county unlawfully and intentionally committed an act by inserting his genital organ namely penis into the female genital organ namely vagina of EIA, a child aged 5 years.

2. He also faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006. The alternative involved the same child, place and time.

3. The Appellant denied the charges and the case proceeded for full trial. The Prosecution called six witnesses. The Appellant gave an unsworn statement. At the conclusion of the trial, the Learned Trial Magistrate was persuaded that the Prosecution had established its case beyond reasonable doubt and convicted the Appellant of the main charge. The Learned Trial Magistrate then sentenced the Appellant to life imprisonment.

4. The Appellant is aggrieved by both the conviction and sentence and filed an appeal to this Court. On the day of the hearing of the appeal, the Appellant filed Amended Grounds of Appeal. He listed three grounds of appeal. He also filed Written Submissions in support of the Amended Grounds of Appeal.

5. 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 record shows that the Complainant testified on 30/03/2015. She was led in her examination-in-chief after the Learned Trial Magistrate conducted voir dire and confirmed that she understood the nature and meaning of oath and was sworn in. After she gave her testimony during her examination-in-chief, the Appellant told the Court that he was unwell and unable to conduct cross-examination on that day. The Court, then, adjourned the case to 18/06/2015.

6. On 18/06/2015, none of the witnesses was present in Court prompting the Prosecutor to ask for an adjournment. It was granted and hearing was scheduled for 13/08/2015. The Complainant was expected to be present for cross-examination when trial resumed on 13/08/2015 for cross-examination by the Appellant. However, the trial record shows that, instead, the second Prosecution witness was put on the stand. The trial proceeded from there with the other witnesses being called to testify and for cross-examination. The trial ended and the verdict of guilt returned before the Complainant was recalled for cross-examination.

7. Hence, 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. Needless to say, these inadvertent procedural lapse is consequential and it vitiates the conviction in the trial of the Appellant. Article 50(2)(k) is quite explicit that an Accused Person has a right to adduce and challenge evidence. See, for example, ***Moses Ndichu Kariuki Vs Republic Criminal Appeal No. 228 of 2008 (2009) eKLR***. In this case, the Court of Appeal considered the provisions of section 77 of the repealed Constitution which is similar to Article 50 of the present Constitution and remarked as follows:-

a. In our determination, the right to cross-examine is the linchpin of the concept of a fair trial in that, it has a bearing on the principle of the equality of hearing and the equality of arms without which a trial cannot be said to have been conducted fairly. On our view, denial to cross-examine in turn means that the defence was not treated fairly and the two requirements of equality of hearing and equality of arms were not satisfied. Our view on this is reinforced by the marginal notes in Section (Article) 77 in that the entire provision is entitled the provisions to secure protection of law. Clearly the failure to recall the complainant for purposes of further cross-examination by the appellant caused prejudice to the appellant.

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

9. 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 them.

10. 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.

11. 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.

12. 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.

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

- a. The conviction entered in Nakuru Chief Magistrate's Criminal Case A/CR. No. 289 of 2014 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, Nakuru on Friday, 27th December, 2019 to take plea.**

14. The Deputy Registrar is directed to send back the Trial Court file and a copy of this judgment to the Chief Magistrate's Court, Nakuru for compliance. It should be re-assigned to any magistrate with competent jurisdiction other than the Learned J. Nthuku.

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

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JOEL NGUGI

JUDGE