



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 36 OF 2017

PETER MUTHIANI MASAI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the original conviction and sentence of Hon. C. K. Kisiangani (RM) in Machakos Chief Magistrate's Court Criminal Case No. 1529 of 2013 on 19th March, 2015)

JUDGEMENT

1. The Appeal herein arises from the conviction and sentence of Hon. Kisiangani Resident Magistrate in **Machakos Chief Magistrate's Court Criminal Case No. 1529 of 2015** wherein the appellant was convicted and sentenced to ten years for the offence of attempted defilement contrary to section 9 (1) (2) of the Sexual Offences Act No. 3 of 2006.

2. The Appellant being aggrieved with the conviction and sentences raised the following grounds of appeal:

i. That the learned trial magistrate erred in matters of law and facts by convicting the appellant while relying on fabricated evidence that had no truth in it.

ii. That the learned trial magistrate erred in both law and fact by convicting the appellant without considering that proper investigations were never conducted by the prosecution.

iii. That the learned trial magistrate erred in both law and fact by failing to observe that no offence had been committed by the appellant as he had been framed.

iv. That the learned trial magistrate erred in both law and fact by failing to consider the appellant's defence.

3. Parties agreed to canvas the appeal by way of written submissions. The appellant presented his submissions on the 9th October, 2017 with the gist being that the Respondent had not presented its case against him beyond reasonable doubt and hence the conviction should be quashed and sentence set aside. Learned Counsel for the respondent in his submissions dated 9th November, 2017 conceded to the appeal on the ground that a crucial witness had not been called to testify and urged this court to quash the conviction and set aside the sentence and do proceed to order for a re-trial in the interest of justice considering the seriousness of the offence.

4. This being a first appellate court, its duty is to re-evaluate the evidence afresh and come to its own independent conclusion bearing in mind that it neither saw nor heard the witnesses testify and to make an allowance for that (See: **Okeno v. R [1972] E.A. 32**).

5. It emerged from P.M.K. (PW1's) evidence that the appellant whom she had known for sometime as Baba Ngina found her coming from Kayeye AIC church and who informed her that her father had sent him to buy for her meat. They started off together but the appellant advised her that they take an alternative route to Kola market. They reached a banana plantation where the appellant told her to remove her clothes. She failed to do so and the appellant then tore her clothes and told her to lie down. She refused and the appellant laid her down forcefully. He ordered her not to scream and inserted his penis into her vagina. She screamed and people came. The people threw stones and the appellant took to his heels. The appellant's contention is that the prosecution failed to call the witnesses who is alleged to have thrown stones at the appellant and that by that reason the case was not proved beyond reasonable doubt having been convicted on the evidence of a single witness.

6. On the issue of failure to call the witness who threw a stone, I am guided by the Court of Appeal in **Keter v. Republic [2007] 1 EA 135** where it was held that: **"The prosecution is not obliged to call a superfluity of witnesses but only such witnesses that are sufficient to establish the charge beyond any reasonable doubt."**

7. Further section 124 of the Evidence Act Cap 80 of the Laws of Kenya provides as follows:

“Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declarations Act Cap 15, where the evidence of the alleged victim is admitted in accordance with that Section on behalf of the Prosecution in proceedings against any person for an offence the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

Provided that where in a criminal case involving a Sexual offence the only evidence is that of the alleged victim of the offence, the Court shall receive the evidence of the alleged victim and proceed to convict the accused person if reasons to be recorded in the proceedings, the Court is satisfied that the alleged victim is telling the truth.”

8. The trial court conducted voire dire examination and was right to convict the appellant on her evidence having had the opportunity to see her demeanor and made a comment on the same. The Complainant had been in the company of the Appellant as they walked together before he pounced on her. The incident took place in broad daylight and she knew the Appellant as her neighbour. The doctor confirmed the attempted defilement.

9. With regard to the Respondent’s submissions as to retrial, it is important to note that the principles upon which a court can order a retrial were set out in the case of **Ahmed Ali Dharmasi Sumar v. Republic 1964 E.A 481** and restated in **Fatehali Manji v. The Republic 1966 E.A. 343** as follows:

“In general, a re-trial 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 purpose 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 interest of justice require it and should not be ordered where it is likely to cause an injustice to the accused person.”

10. It is clear from the entire record that the trial herein was not illegal or defective and the need for a retrial does not suffice.

11. In the end, I find no merit in this appeal. The same is dismissed. The sentence of the trial court is affirmed.

Orders accordingly.

Dated and delivered at Machakos this 17th day of April, 2018.

D. K. KEMEI

JUDGE

In the presence of:

Peter Muthiani Masai - the Appellant

Machogu - for the Respondent

Kituva - Court Assistant