



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 2 OF 2018

BETWEEN

PETER IRUNGU NYAMBURA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against both conviction and sentence of life imprisonment in Othaya SRMC Cr. Case (S.O) number 9 of 2017 dated 10th January 2018)

JUDGMENT

Introduction

1. The appellant herein pleaded guilty to a charge of defilement contrary to section 8(1) [as read with section 8](2) of the Sexual Offences Act, the particulars being that on the 19th day of July, 2016 at [particulars withheld] village in Mururwe-ini Sub-County within Nyeri County the appellant intentionally caused his penis to penetrate the vagina of G.W.M, a child age 6 years. Upon conviction, the appellant was sentenced to life imprisonment as by law provided.

The Appeal

2. With the assistance of prison officers, the appellant filed his petition of appeal on 17th January, 2018. The appeal is premised on grounds:-

a. THAT the trial magistrate erred in both law and fact while convicting appellant herein on plea of guilty without inquiring as to what influenced the appellant to plead guiltily after he was ordered for a retrial of the same case.

b. THAT the trial magistrate erred further in law after being impressed with the charges laid down in respect of I the appellant and failed to comply with section 11 of the Penal Code.

c. THAT the trial magistrate further lost direction while sentencing the appellant to serve life sentence without considering his mental status which the prosecution relied on in convincing him to plead guilty.

3. The appellant prays that this appeal be allowed in its entirety.

4. As this is a first appeal arising out of a plea of guilt, this court is under a duty to carefully peruse the record with a view to determining whether the plea of guilty was taken in accordance with the procedure laid down in *Aden versus Republic [1973] EA 445*.

Hearing of the Appeal

5. When the appeal came up for hearing Mr. Gori Advocate took up the conduct of the matter on a pro bono basis. It had initially been difficult for the court to communicate with the appellant even when the proceedings were translated into his mother tongue, and even after Mr. Gori came on board, it was not any easier. As a result, prosecution counsel, M/S Mayeku conceded the appeal and asked the court to remit the case to the lower court for retrial. Mr. Gori was of the same view. The reason for the decision to concede the appeal was that it was not clear whether the appellant was truly found fit to stand trial since a second mental assessment was done after the prosecution had closed its case.

Analysis and Determination

6. After carefully reading through the facts of the case, and on close observation of the appellant during the hearing of the appeal, this court is satisfied that a retrial is in order. In the first place, the offence was allegedly committed in July 2016, which is about two and a half years down the line. I am certain the witnesses are still available. Secondly, the appellant has exhibited signs of mental retardation and/or confusion and because he was sentenced to a long sentence, it would be in the interest of justice for the appellant's mental status to be established afresh before the case proceeds further.

Conclusion

7. For the above reasons, I allow the appeal, quash the conviction and set aside the sentence of life imprisonment. The case is hereby remitted to Othaya SRM's court for retrial. The fresh trial shall be conducted by a magistrate other than B.M Ekhubi (Mr) Senior Resident Magistrate who conducted the previous proceedings.

8. The appellant shall remain in custody pending his production before the Senior Resident Magistrate, Othaya for plea and for further orders as to hearing of the case. The prosecution shall ensure that the appellant is taken for fresh mental assessment before plea is taken.

9. Orders accordingly.

Judgment written and signed at Kapenguria

RUTH. N. SITATI

JUDGE

Judgment delivered, dated and countersigned in open court at Nyeri on this 20th day of December, 2018

HON. A. MSHILA

JUDGE.

In the presence of

Wangari for the appellant

None for respondent

Rahab Court assistant