REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 130 OF 2015

JOHN NDAMBUKI MUTHUSI .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

Being an appeal from the judgment of the Resident Magistrate's Court at Kilungu

Criminal Case No.540 of 2014 by Hon. E. Onzere (Resident Magistrate on 7th September, 2015.

JUDGMENT OF THE COURT

1. The Appeal arose from the Judgment delivered on the **7th September, 2015** by the **Resident Magistrate Hon E. Onzere** at Kilungu Law Courts. The Appellant had been charged with the offence of Sexual assault contrary to Section 5(1) (a) (i) as read with Section 5(2) of the Sexual Offences Act No. 3 of 2006. He was found guilty, convicted and sentenced to serve ten (10) years imprisonment.

2. Not being satisfied with the conviction and sentence, the Appellant filed this Appeal raising the following grounds of Appeal:-

(a) THAT the complainant was not subjected to the mandatory Voire Dire examination to establish the competence as well as credibility of her evidence.

(b) THAT there was no conclusive evidence adduced to support the court's finding that the Appellant instructed the complainant to claim that she had been injured by a stick.

(c) THAT there was a variation in the evidence adduced by the witnesses contrary to the details of the offence as outlined in the charge sheet.

3. The Appellant prays that the appeal be allowed conviction quashed and sentence set aside.

4. The appeal is conceded by the state through submissions filed herein on 22/08/2016 but that the state urges this Honourable court to order a retrial in the matter taking cognizance of the fact of interest of justice, the overwhelming evidence adduced against the Appellant and that if a retrial is ordered, the rights of the Appellant will not be in any way prejudiced. Respondents counsel further submitted that the Appellant has only served one (1) year in prison in which the trial court had given a minimum sentence of ten years and therefore there is need for a retrial. Further the need for a retrial is necessitated by the fact of the gravity of the offence, availability of witnesses Respondent's Counsel finally urged this court to set aside the trial court's conviction and sentence and order that a retrial does ensue.

5. The Appellant submitted that in view of the failure by the trial court to conduct a voire dire examination before the complainant was allowed to tender her evidence then he should be set free. The Appellant filed amended grounds of appeal upon being served with Respondent's submissions and the said grounds appear not to be grounds of appeal as such but rather a rejoinder to the Respondent's submissions. The Appellant contends that he should not be prejudiced by being ordered to go through a retrial yet he had already served two (2) years yet the mistake was not occasioned by him. He urged the court to reanalyze and re-evaluate the entire evidence and come up with a just decision by setting him to liberty.

6. As this is first appellant court, the duty of this court is to re-evaluate and reanalyze the evidence tendered before the trial court and come to its independent conclusion while bearing in mind that it did not have the benefit of hearing and seeing the witnesses and to make an allowance for that (see **OKENO VS REPUBLIC [1972] 32).** It was the evidence of the complainant who was then aged 7 years that she had gone to collect some milk when she was seized by the Appellant who pulled her into his house where he removed her underpants and laid on top of her and at the same time inserted three of his fingers into her vagina. She screamed for help and the Appellant advised her to tell people that she had been pricked by a stick. Neighbours who heard the screams rushed to the scene and saw the girl emerging from the Appellant's house. The girl was escorted to hospital for examination and Doctor Kasiamani (PW.4) established her hymen had been perforated. The said Doctor produced the P.3 form and treatment notes as exhibits. Appellant was arrested and escorted to Kilome Police station where he was charged. The Appellant was put on his defence and tendered an unsworn statement. He stated that he was going about his duties when he was arrested and taken to Kilome Police Station where he learnt of the allegations. He further stated that the complainant's mother had been his former girl friend with whom he had broken up and who harboured a grudge against him. The trial court later established that the Prosecutions had proved its case and thereby convicted and sentenced him to serve ten (10) years imprisonment.

7. Parties filed written submissions which I have carefully analyzed. The issues necessary for determination are as follows:-

(i) Whether the failure to conduct a voire dire examination rendered the trial a mistrial.

(ii) Whether the evidence adduced against the appellant even in the absence of voire dire examination was overwhelming.

8. As regards the first issue, it is clear from the record of the trial court that a voire dire examination was not conducted before the complainant was invited to tender her evidence. The complainant was said to be aged seven (7) years old and hence was a child of tender years as per the provisions of Section 2 of the Children's Act 2001. That being the position, it was crucial to conduct the aforesaid examination as required under Section 125 of the Evidence Act and Section 19 of the Oaths and Statutory Declaration Act Cap 15 Laws of Kenya. A court is tasked with the duty of assessing the competency of a child of tender years to give evidence in court. Such a duty is dispensed with by conducting a voire dire examination. Such an examination is intended to establish if the child of tender years is capable of understanding the nature of an oath and also to establish if the child is intelligent enough to understand the duty of speaking the truth. The court's have always adhered to this requirement because if it is not followed convictions arrived at have been found to be unsafe. In the case of **SAMUEL WARUI KARIMI =VS= REPUBLIC [2016]eKLR** where the Court of Appeal held that failure by the trial court to conduct a voire dire examination on a minor aged twelve (12) years had the effect of rendering a conviction to be unsafe. The record of the trial court reveals that the trial Magistrate straight away noted that the minor was a child of tender years and directed that she proceeds to give unsworn evidence without first conducting a voire dire examination on the said child as required by Section 125 (1) of the Evidence Act and Section 19(1) of the Oath and Statutory Declaration Act.

Section 125(1) Evidence Act states:-

"***All persons shall be competent to testify unless the court considers that they are prevented from understanding the question put to them or from giving rational answers to those questions, by***

tender years, extreme old age, disease (whether of body or mind) or any similar cause."

Section 19(1) of the Oaths and Statutory Declarations Act states:-

"Where in any proceeding before any court or person having by law or consent of parties authority to receive evidence, any child of tender years, called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth."

As the trial court failed to conduct a voire dire examination upon the complainant aged 7 years old, it became apparent that the evidence of the said minor was not properly received and therefore the conviction of the Appellant became unsafe. The consequence of this failure rendered the trial a mistrial thereby warranting the setting aside of the conviction and sentence of the trial court.

9. As regards the second issue, counsel for the Respondent has submitted that an order for retrial be made since there was overwhelming evidence adduced against the Appellant. The cases of **VINCENT OTIENO ODAWA –VS- REPUBLIC [2006] eKLR and FATEHALI MANJI –VS- REPUBLIC [1966] EA 343** were relied upon.

On the other hand the Appellant urged this court to set him at liberty.

In the case of **FATEHALI MANJI =VS= REPUBLIC [1966] E.A. 343** the court spelt out the factors to be considered when it is faced with an issue of whether or not to order a retrial namely:-

(i) A retrial will be ordered when the original trial was illegal or defective.

(ii) Each case must depend on its own peculiar facts and circumstances.

(iii) That an order or retrial should only be made where the interests of justice require it.

(iv) It will not be ordered if by so doing an injustice or prejudice will be occasioned to the accused.

(v) An order of retrial will not be made for purposes of enabling the prosecution to fill up gaps in the evidence at the first trial.

vi. ***A retrial should not be ordered unless the court is of the opinion that on proper consideration of the admissible and potentially admissible might result (see RATILAL SHAH VS REPUBLIC [1958] E.A. 3).***

Applying the above principles to the circumstances of this case it is clear that non compliance with the provisions of Section 125 of the Evidence Act and Section 19 of the Oaths and Statutory Declarations Act led to a mistrial herein. Indeed the complainant tendered her evidence together with four other witnesses who corroborated her evidence save for the failure by the trial court to conduct a voire dire examination upon the complainant. I am therefore persuaded that a conviction is likely to result. The Respondent has submitted that witnesses will be readily available to testify again in the event that a retrial is ordered. It has not been shown that the prosecution will use the opportunity of a retrial to fill up the gaps in the evidence tendered during the trial. In any event all statements of witnesses are deemed to have been supplied to Appellant and he is at liberty to tackle the witnesses on cross – examination and further the proceedings in the earlier trial is a public record available for reference purposes by both Respondent and Appellant if needed. The Appellant herein has only served about one (1) year of his sentence and further it is noted that he had been treated as a first offender and given the minimum sentence of the offence.

In the circumstances I find the interest of justice demands that an order for retrial is appropriate.

Consequently, the conviction and sentence made by the trial court is hereby set aside and that an order for retrial does ensue. The Appellant is ordered to be produced before the Principal Magistrate's court at Kilungu on the **11th April, 2017** for the retrial to commence before any other Magistrate of competent jurisdiction other than Hon. Onzere E. M. Resident Magistrate who heard the initial case.

Dated, signed and delivered at Machakos this **28th** day of **March,** .2017.

D. K. KEMEI

JUDGE

In the presence of:

John Ndambuki – Appellant.....

Machogu for State.....

C/A: Muoti.....