



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 154 OF 2014

SAMMY NGANGA KAMAU.....APPELLANT

VERSUS

REPUBLICSTATE

(Appeal from the Ruling of the Chief Magistrate's Court at Nakuru Hon. J Nthuku –Senior Resident Magistrate delivered on the 9th July, 2014 in CMCR Case No. 39 of 2012)

JUDGMENT

The appellant has filed this appeal challenging his conviction and sentence by the learned senior Resident Magistrate sitting at Nakuru Law Court. The appeal was opposed.

The appellant was brought before the trial court on 13/2/2012 facing a charge of **DEFILEMENT CONTRARY TO SECTION 8(1) (2) OF THE SEXUAL OFFENCES ACT 2006**. He pleaded 'Not Guilty' to the charge and after a full trial the learned trial magistrate convicted the appellant and eventually sentenced him to life imprisonment.

Before I delve into any analysis of the merits or other wise of this appeal, I feel it is important at the outset to raise a matter of grave importance.

The complainant a child aged 10 years testified on 14/11/2012. Before the child was called upon to testify the record indicates as follows at page 13 line 6.

“Prosecution - I have two witnesses

Accused – I do not have witness statements”

I have perused the handwritten record of the proceedings and confirm that this is an accurate representation of what happened in court on that date. Surprisingly the trial court totally ignored this plea by the accused about his lack of witness statement. The complainant was placed on the stand and the hearing proceeded. This means that the appellant was compelled to proceed with his trial and was compelled to cross-examine the witnesses without the benefit of having been supplied with witness statements prior to the trial.

Article 50 (2) (c) of the Constitution of Kenya – 2010 provides that every accused person has the right

“(c) to have adequate time and facilities to prepare a defence”

It is a cardinal principle of a fair trial that an accused person is entitled to be supplied with all witness statements as well as copies of all other exhibits (documents) the prosecution will be relying upon to prove their case. The courts as custodians of the law have a duty to ensure that these rights are upheld.

It was therefore a gross dereliction of her duty for the trial magistrate to simply ignore the appellant’s plea to be provided with witness statements. Although none of the parties in this appeal have raised this matter, this court cannot simply gloss over that omission.

I find that it was improper and the trial court erred in proceeding to conduct the trial when she had full knowledge that the accused had not been supplied with witness statements. This amounted to denying the **accused ‘adequate time and facilities to prepare his defence’**. The trial magistrate ought to have adjourned the trial and ensured that witness statement was supplied to the accused before taking any evidence. I am mindful there may have been need to proceed expeditiously given that the complainant was a minor. However an adjournment of a few days or even a few hours if need be would have sufficed. I find that a miscarriage of justice occurred in this matter. The appellant was denied one of his fair trial rights and as a result was prejudiced in mounting his defence to the charge. I note that this miscarriage was occasioned not by the prosecution, nor by the defence, but by the court itself. I will therefore not proceed to analyze this appeal. Given that the charge involved a minor, and that the offence is serious I do hereby direct that a re-trial be conducted. I quash the appellant’s conviction and set aside the term of life imprisonment imposed on him I direct that the appellant be presented before the Chief Magistrate Nakuru on 28/4/2017 for his plea to be taken afresh. The new trial to be conducted by any magistrate of competent jurisdiction other than **Hon. Nthuku**. It is so ordered.

Dated in Nakuru this 24th day of April 2017.

Appellant in prison

Mr Motende for accused

Maureen A. Odero

Judge