



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI
CRIMINAL APPEAL NO 52 OF 2015

ALOIS MWASHIGADI..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(From original conviction and sentence in Criminal Case Number 323 of 2011 in the Senior Resident Magistrate's Court at Wundanyi delivered by Hon K. I. Orenge (SRM) on 13th October 2011)

JUDGMENT

INTRODUCTION

1. The Appellant herein, Alois Mwashigadi, was tried and convicted by Hon K.I. Orenge, Senior Resident Magistrate on two Counts of defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act No 3 of 2006. He was sentenced to serve fifteen (15) years imprisonment. He had also been charged with the two (2) alternative charges of committing indecent act with a child contrary to Section 11(1) of the said Act.
2. Being dissatisfied with the said judgment, on 8th December 2011, the Appellant filed a Notice of Motion application seeking leave to file his appeal out of time. The said application was allowed and the Petition of Appeal deemed to have been duly filed and served. He relied on six(6) Grounds of Appeal. He filed his Written Submissions on 13th June 2017.
3. The State was to file its Written Submissions by 4th July 2017. However, when the matter came up in court on 11th July 2017, counsel for the State indicated that the State had opted not to file its Written Submissions because it was conceding to the Appeal herein.
4. It pointed out that it was not clear why the matter was reported in 2011 whereas the Complainant, R M (hereinafter referred to as "PW 2") was said to have been defiled in 2009 and 2010. It added that no birth certificate was adduced in evidence to confirm that PW 2 was seventeen (17) years at the material time and that there was no indication of the date of the alleged defilement in the P3 Form due to the duration of time that was taken to report the incident herein.
5. In his Written Submissions, the Appellant also questioned why the matter was reported in 2011. He contended that by the time the P3 Form was being filled, PW 2 was twenty four (24) months and not thirty two (32) weeks as the Clinical Officer, Abraham Kipchumba (hereinafter referred to as "PW 1") had testified. He was emphatic that there had been a grudge between him and PW 2's parents which led to him being framed for the offence against PW 2.

6. Despite the State having conceded to the Appeal herein, this court found it prudent to consider if the reasons it gave for conceding to the appeal were fair and reasonable. Appreciably, an appellate court should consider the facts of a case even where the State has conceded to an appeal to establish if such a concession should be granted.

7. In the case of **Mwanguo Gwede Mwarua vs Republic [2015] eKLR**, the Court of Appeal made a similar observation when it stated as follows:-

“The concession notwithstanding, it is still our duty as a second appellate Court to consider the issues of law raised by the respondent as grounds for conceding the appeal in order to determine whether the said concession is merited.”(See **NORMAN AMBICH MIERO & ANOTHER VS REPUBLIC, CR.APP.NO.279 OF 2005 (NYERI)**).

8. A perusal of the proceedings showed although PW 2 stated that she was seventeen (17) years of age, she did not adduce in evidence any documentary proof of the same. Notably, in an offence of defilement, the prosecution has to prove the following ingredients :-

a. That there must be penetration of the vagina or anus of a victim by a perpetrator;

b. That the victim must be under the age of eighteen (18) years.

9. In the absence of proof of PW 2's age, the Prosecution could not be said to have proved the offence of defilement that had been preferred against the Appellant because the two (2) ingredients aforementioned cannot be severed.

10. Undoubtedly, the long duration PW 2 took in reporting the matter worked against her because there did exist an opportunity for any other person, other than the Appellant to have impregnated her. In addition, in the absence of any explanation for the delay in reporting the incident, the possibility of a grudge having existed between PW 2 or her family and the Appellant as he had contended did not appear to have been far-fetched.

11. Further, the investigators failed to exhaust all angles that the Appellant could have raised in appeal. The investigators ought to have taken him for medical examination when they arrested him on 27th July 2011 because PW 1 was examined on 12th July 2011 and found to have had syphilis, a sexually transmitted disease.

12. Whereas the time between December 2010 when the alleged defilement occurred and July 2011 when the Appellant was arrested was long enough to have enabled the Appellant seek treatment and be cured of the syphilis, the fact that the investigators did not establish his status weakened the Prosecution's case considerably because the Appellant was emphatic that he did not have syphilis.

13. Going further, if we are to go by PW 1's calculation of how many weeks PW 2 was pregnant, it meant that she would have been nine (9) months by the time the trial was being concluded in September 2011. Nothing would have been easier than for the Learned Trial Magistrate to have ordered for a DNA test before writing the judgment. Indeed, this would have been a certain method of having ascertained the veracity of PW 2's assertions to the effect that the Appellant had defiled her.

14. Ordinarily, if so much time had not elapsed herein, this case would have been a good one to refer for re-trial or for this court to call for a DNA test under its powers to call for additional evidence during when hearing an appeal so as to establish whether or not the Appellant was the father of PW 2's baby. Having said so, a re-trial in this case would not be appropriate because it would prejudice or cause grave injustice to the Appellant.

15. In this regard, this court fully associated itself with the holdings in the cases of **Ahmedi Ali Dharamsi Sumar vs Republic [1964] E.A. 481** and re-stated in **Fatehaji Manji vs Republic [1966] E.A. 343** that Mutende and Thuraira Jaden JJ cited in the case of **Jackson Mutunga Matheka vs**

Republic [2015] eKLR where it was stated as follows:-

“... a retrial will only be ordered when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence of for the purpose of enabling the prosecution 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 particular facts and circumstances and an order for retrial should only be made where the interest of justice required it and not ordered where it is likely to cause an injustice to the accused.”

16. For the reason that this court found that there were several unexplained gaps in the Prosecution’s case, it did not find this case to have been a suitable case to refer for a re-trial. Indeed, referring the matter for a re-trial would be giving the Prosecution a second bite at the cherry to panel beat its case and fill in the gaps which could in turn cause great prejudice and injustice to the Appellant herein.

DISPOSITION

17. For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s Appeal that was lodged on 8th December 2011 was successful and there was merit in the State conceding to the said Appeal. The same is hereby allowed.

18. This court hereby quashes the conviction and sets aside the sentence that was meted upon the Appellant by the Trial Court as it would be clearly unsafe to confirm the same. The court hereby orders that the Appellant be set free forthwith unless held or detained for any other lawful reason.

19. It is so ordered.

DATED and DELIVERED at VOI this 27TH day of JULY 2017

J. KAMAU

JUDGE

In the presence of:-

Alois Mwashigadi-Appellant

Miss Anyumba for State

Josephat Mavu– Court Clerk