REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL APPEAL NO. 101 OF 2015

(FORMERLY NAKURU CRIMINAL APPEAL 69 OF 2014)

(Being An Appeal From Original Conviction And Sentence In The Chief Magistrate's Court At Narok Criminal Case No. 826 Of 2012 - Z. Abdul, Rm)

ROBERT SANG KIMETO…….....APPELLANT

-VERSUS-

REPUBLIC……...RESPONDENT

J U D G M E N T

1. The Appellant herein Robert Sang Kimeto, was tried in the Chief Magistrate's Court Narok for the offence of Defilement Contrary to Section 8 (1) (3) (sic) of the Sexual Offences Act. The particulars of the charge stated that on the 15th day of July 2012 at [Particulars Withheld]in Narok South District within Rift Valley province, he intentionally caused his penis to penetrate the vagina of **K N** a child aged 12 years and with mental disability.

2. At the close of the trial, the Appellant was found guilty, convicted and sentenced to serve 20 years imprisonment. He has filed an appeal against conviction, citing five grounds in the amended grounds as follows:-

> **"(1) THAT the learned trial magistrate erred in law and facts in convicting the Appellant in reliance of hearsay evidence alone.**
>
> **(2) THAT she erred in law and facts in not finding that the adduced evidence was inconsistent with the charge sheet – thus the latter was defective under Section 214 of the Criminal Procedure Code Cap 75 Laws of Kenya.**
>
> **(3) THAT she erred in law and facts in not finding that the absence of the Complainant or her evidence rendered the prosecution case fatal.**
>
> **(4) THAT she erred in law and facts in not finding that there was no medical evidence to prove the inability of the Complainant to testify and be cross-examined, and if that was the reason for dispensing with the testimony then PW1's allegations that she was informed by the Complainant of the incidence becomes void.**
>
> **(5) THAT she erred in law and facts in not finding that the trial in respect to PW3 and PW4 was conducted by one PC Ihaji as the court prosecutor who was not qualified in law to do so as provided in Section 85 and 88 of the Criminal Procedure Code."**

3. At the hearing of the appeal the Appellant relied on his grounds and written submissions. To the effect that, in the absence of an eye witness and the Complainant's inability to testify, there was no evidence to link him with the offence. Further, that the said inability was not proved at the trial.

4. He took objection to the framing of the charge as being contrary to "Section 8 (1) (3)" of the Sexual Offences Act, which charge is non-existent. Moreover, he asserts that with regard to age, the evidence tendered was contradictory. All in all his submissions are that the prosecution evidence was insufficient to support the charge.

5. Further, he took issue with the prosecution of the case by one **PC Ihaji** whom he describes as unqualified under Section 85 of the Criminal Procedure Code. Other issues not contained in Amended grounds but raised in submissions relate to the failure by the trial court to comply with Section 211 of the Criminal Procedure Code, the failure by the prosecution to call those who effected arrest, namely a chief and some police officers, the non-compliance by police on arresting him and by the court at plea time, with Article 50 (2 (g) and (h) of the Constitution.

6. Finally, he lamented that the sentence imposed was harsh and takes issue with the judgment which he says "**was not grounded in any law**."

7. The Director of Public Prosecutions was represented by Miss Waweru. In opposing the appeal, she submitted that the Appellant was properly identified by the victim who called his name pointing to the Appellant's house in the same homestead. She further argued that the elements of penetration and the age of the minor were duly proved and that the trial court properly analysed the evidence.

8. The duty of the first appellate court was stated in **Okeno -Vs- Republic 1973 E.A. 322** to be as follows:

> **"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya –Vs- R [1957] EA 336) and to the Appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala –Vs- R [1957] EA 570. It is not the function of the first appellate court merely to scrutinize the evidence to see there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters –Vs- Sunday Post [1958] EA 424.**"

9. The prosecution case in the trial court was that the Complainant **K N** was a mentally handicapped girl aged 15 years, and residing with her mother (**N N**) (**PW1**) at [Particulars Withheld]. The Appellant was housed in the homestead as **PW1's** labourer. On 15/7/2012 the victim remained at home as **PW1** went to church in the morning. Upon return, **PW1** found that the victim had been defiled and was crying while mentioning Appellant's name – "Robert" – while pointing in the direction of the Appellant's house.

10. The local Chief was notified and arrested the Appellant immediately. He was escorted to Ololulunga Police Station. **K N** was referred to Ololulunga District Hospital. A Clinical Officer, **Teresia Wahu** (**PW3**) examined the victim. She confirmed penetration and the mental handicap of the minor, whose age was assessed at 15 years.

11. In an unsworn defence statement, the Appellant stated that on the day of his arrest, his employer threw out his belongings and locked him out while he was out shopping. He was eventually allowed in only to be arrested later in the night for allegedly doing "**bad things**" to the employer's child.

12. I have reviewed the evidence in light of the submissions made in the appeal. The key complaint made by the Appellant is that the court convicted him on hearsay evidence as the Complainant was never brought in to court to testify. In my opinion the Complaint is valid and serves to dispose of this appeal. It

seems from the record, that the learned trial magistrate did not guide the prosecution accordingly in this case.

13. From the evidence of **PW1**, the victim's mother, the victim can communicate even though handicapped. The trial court should have availed itself of the procedure provided under Section 31 (1) a, b, and c of the Sexual Offences Acts which states:-

> **"(1) A court, in criminal proceedings involving the alleged commission of a sexual offence, may declare a witness, other than the accused, who is to give evidence in those proceedings a vulnerable witness if such witness is:-**
>
> **(a) the alleged victim in the proceedings pending before the court;**
>
> **(b) a child; or**
>
> **(c) a person with mental disabilities.**

14. In order for the declaration to be made, the witness ought to have been presented to the court. Further, under Section 31 (4) b), the court having declared the minor victim a vulnerable witness should have appointed an intermediary, in this case her mother. By not following this procedure the trial magistrate fell into error and effectively received what the Appellant now calls "**hearsay evidence**."

15. The trial was therefore defective in that neither the Complainant testified nor was the mother who testified appointed by the court as an intermediary. It seems that the victim was not presented to the court by the prosecution in order for the court to assess her condition and make appropriate orders and directions, under the Sexual Offences Act.

16. In a recent case, **Republic –Vs- Edward Kirui [2014] KLR** the Court of Appeal, dealt with a different irregularity namely, the non-compliance with Section 169 (3) of the Criminal Procedure Code and declared a mistrial. The court cited the definition of mistrial in Black's Law Dictionary (9th Edition) as:

> **"a trial that the judge brings to an end, without a determination on the merits, because of a procedural error or serious misconduct occurring during the proceedings."**

17. The court also cited with approval a portion of the judgment of the Supreme Court of India in **Murugan & Another –Vs- State by Prosecutor, Tamil Nadu & Another [2008] INSC 1668** where the case of **Bhagwan Singh –Vs- State of M. P. [2002]4 SCC. 85** was cited, as follows**:-**

> ***"The paramount consideration of the court is to ensure that miscarriage of justice is avoided. A miscarriage of justice which may arise from the acquittal of the guilty is no less than from the conviction of an innocent. In a case where the trial court has taken a view ignoring the admissible evidence, a duty is cast upon the High Court to re-appreciate the evidence in acquittal appeal for the purpose of ascertaining as to whether all or any of the accused has committed any offence or not."***

18. Applying the foregoing to the facts of this case, it is my view that not only was the Appellant denied the opportunity to hear/see the Complainant herself, but also, the court was denied the opportunity to ascertain for itself whether this was a proper case for the appointment of an intermediary. Also denied was the chance for the Complainant, who on all accounts, appears to suffer from a certain mental handicap, to be seen and heard. For the reasons above, I declare the proceedings in the lower court a mistrial. I quash the conviction and set aside the sentence.

19. The next question is whether or not this court should order a retrial. The applicable principles were restated by the Court of Appeal in **Pius Olima & Another –Vs- Republic [1993] eKLR** as follows:

"Our attention was drawn to authorities that deal with the principles that should be applied when considering whether a retrial should be ordered or not. These are:- Ahmed Sumar – Vs- Republic [1964] EA 481; Manji –Vs-Republic [1966] EA 343; Mujimba –Vs- Uganda, [1969] and Merali & Others –Vs- Republic, [1971] 221. The principles that emerge are that a retrial may be ordered where the original trial as was found by the High Court……is defective, if the interests of justice so require and if no prejudice is caused to the accused. Whether an order for retrial should be made ultimately depends on the particular facts and circumstances of each case."

20. Similarly, in Richard **Charo Mole –Vs- Republic [2010] eKLR and Joseph Macharia Miano & Others –Vs- Republic [2009] eKLR**, the Court of Appeal allowed a retrial notwithstanding the fact that the Appellants therein had served 17 and 8 years in prison, respectively. The court considered the serious nature of the charges, in both cases robbery, the weight of potentially admissible evidence, the nature of the irregularities and who was responsible – the court or prosecution – for the same, as well as the interests of justice.

21. The question whether **PC Ihaji** was a competent prosecutor has been raised in this, and other appeals emanating from Narok. Although Section 85 of the Criminal Procedure Code has been amended to expand the discretion of the Director of Public Prosecutions in appointing police prosecutors, I think that for complex cases, there is need for newly-appointed professional prosecutors and there are adequate numbers, to take charge of the prosecution. The Director of Public Prosecutions ought to address the situation appropriately.

22. In this case, the Appellant was charged with a serious charge of defilement of a handicapped complainant. The potentially admissible evidence appears likely to lead to a conviction. Besides, irregularities in the lower court proceedings were occasioned by the court for the most part, through failure to give proper guidance. Despite the Appellant having served about 4 ½ years of his sentence, it is my view that the interests of justice in this case justify a retrial.

23. I do therefore direct that a retrial be conducted before a different magistrate at the Chief Magistrate's Court Narok. For this purpose I order that the Appellant shall be produced before the Chief Magistrate's Court at Narok on 2nd August, 2016 to plead afresh to the charge of Defilement Contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act.

Delivered and signed at Naivasha 29th this day of July, 2016.

In the presence of:-

For the DPP : Miss Waweru

For the Appellant : N/A

Court Assistant : Barasa

Appellant : Present in person

C. MEOLI

JUDGE