



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL CASE NO. 29 OF 2012

SAMUEL KINGORI MUNGAI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

Being an appeal from the judgment of the Senior Resident Magistrate's Court (J. N. Mwaniki), Baricho Criminal Case Number 513 of 2011 delivered on 30th January, 2012)

JUDGMENT

1. **SAMUEL KINGORI MUNGAI** the appellant herein was charged with attempted defilement of a child with mental disabilities contrary to **Section 7** of the **Sexual Offences Act No. 3 of 2006** before Baricho Senior Resident Magistrate's Court Criminal Case No. 513 of 2011. The particulars were that on the 27th day of July, 2011 in Kirinyaga West District of the then Central Province he intentionally attempted to defile F N a child aged 13 years. He also faced an alternative charge of indecent act with a child contrary to **Section 11 (1)** of the **Sexual Offences Act No. 3 of 2006**.

2. The Appellant denied committing the offence and case went for hearing and upon full trial, the trial court found him guilty and convicted him sentencing him to serve 15 years imprisonment. The Appellant was dissatisfied and filed this appeal raising ten (10) grounds as follows:

(i). That the learned magistrate erred in law and fact in denying him his constitutional right to interpretation under Article 50(2) of the Constitution and Sections 197 and 198 of the Criminal Procedure Code.

(ii). That the learned trial magistrate erred in both law and facts by denying him his constitutional right to a fair hearing under Article 50 (k) of the constitution by denying him a chance to challenge evidence through cross-examination.

(iii). That the learned magistrate erred in law and fact by not considering that the complainant was not summoned to court to prove that she really existed.

(iv). That the learned magistrate erred both in law and facts in convicting the appellant on the basis of a single witness.

(v). That the evidence relied on by the learned trial magistrate were hearsay, contradicting and uncorroborated.

(vi). That the learned trial magistrate erred by relying on assumptions.

(vii). That the learned trial magistrate erred by failing to note that a key witness (Dr. Thuo) was not called to testify.

(viii). That the learned trial magistrate failed to note that P.W.1 was malicious and not credible.

(ix). That his defence was not considered.

(x). That the sentence was harsh and excessive as the trial magistrate never considered mitigating circumstances.

3. The brief facts of the prosecution case at the trial indicated that the complainant who was said to be aged 13 years and mentally retarded had on 27th July, 2011 accompanied the Appellant a neighbor, who had been hired to work on a farm. After a while, P N M (P.W. 1) a sister to the complainant heard screams emanating from the farm and rushed to check only to find the Appellant lying on the complainant with his trousers drawn down the legs and the complainant lying down without her clothes. The witness alerted the neighbours who came and assisted the complainant to dress up after which they reported the incident to other neighbours and later to the Police where the action to charge the Appellant was taken. The complainant was taken to Kerugoya District Hospital for examination where clinical officer (P.W.5) noted that the patient was mentally retarded. He however never found any evidence of defilement.

4. The main ground of this appeal is that the trial was conducted in a manner that violated the Appellant's constitutional rights and subjected him to unfair trial.

The evidence tendered by the investigating officer **Halkano Golicha** (P.W. 6) showed that the investigating officer visited the scene of the crime which he said was a maize plantation and issued the complainant with a P3 and also took her for psychiatric assessment at Embu where the doctor allegedly found her mentally challenged. The report by the doctor was inexplicably produced by the investigating officer, a police officer who was not an expert in the medical field leave alone being conversant with the handwriting of the expert witness. This was the genesis of the problem that eventually rendered the trial of the Appellant a mistrial on the following reasons:

(i). The prosecution case against the Appellant going by the charge sheet hinged on the expert opinion on the mental status of the complainant. The investigating officer did well by taking the complainant for mental assessment but should have summoned the doctor to come and produce the report because he was not qualified in law to produce the report. By purporting to produce the said report, he inadvertently rendered the expert report hearsay and the trial court fell into error by admitting the report as evidence contrary to the provisions of **Section 48** and **50** of the **Evidence Act** which requires that the experts themselves either give the evidence or persons acquainted with the handwriting or signatures of the experts tender the report as evidence in place of the maker(s).

(ii). The appellant appears to have been denied his constitutional right to cross-examine the expert (doctor) on his report contrary to the provisions of **Article 50 (h)** which entitles an accused person a fair trial that includes *inter alia* right to challenge any evidence tendered against him. In this regard the 1st and 2nd ground of appeal by the Appellant are well founded. These two grounds in my considered view are enough to dispose of this appeal and in view of the final decision of this appeal it is unnecessary to consider the other grounds for both the interest of justice and interest of time.

5. However, having said that it is important to mention that it was erroneous for the prosecution not to avail the complainant to court to enable the trial court satisfy itself of the existence of the complainant and her mental condition or state of mind. There was absolutely no explanation given by the prosecution for failing to bring the complainant before court even if she would be unable to testify. The trial court erred in law when it failed to ensure that the Complainant was brought in order to see if there was a necessity to invoke the provisions of **Section 31** of the **Sexual Offences Act** to address the vulnerability of such a witness if at all. In my considered view failure to avail the complainant to court was fatal to prosecution case. This is something that was also discussed in a similar situation in the case of

FRANCIS CHOMBA NGIRI -VS- R (2013) eKLR. The Respondent through the Office of the Director of Public Prosecution has conceded to this appeal and for good reason because there was a clear miscarriage of justice. Why would a Police officer produce medical evidence when the medical experts are available to properly produce the same and answer questions or defend such reports? The prosecution and the trial court knew that the Appellant had denied the offence. It was incumbent for the prosecution to conduct their case well and tender evidence in accordance with the law to discharge their burden. I have gone through the evidence and the Police cannot be faulted for the investigation which was well done though perhaps they could have done better in drafting the particulars of the offence well. The prosecution failed in presenting the evidence gathered to the trial court and caused injustice to both the victim and Appellant.

In the premises taking everything into consideration and the sentiments by both the Respondent and the Appellant, I find merit in this appeal. The same is allowed. Both the conviction and sentence are quashed and set aside. However, this Court finds that in the interest of justice and particularly in regard to the victim, it is fair that a retrial be done. I shall therefore direct that the Appellant be escorted to Sagana Police Station for purposes of a retrial before a different court with jurisdiction to try the case at Baricho Law Courts. It is so ordered.

Dated and delivered at Kerugoya this 26th day of July, 2016.

R. K. LIMO

JUDGE

26.7.2016

Before Hon. Justice R. Limo J.,

State Counsel Omayo

Court Assistant Willy Mwangi

Appellant present

Interpretation English-Kikuyu

Omayo for Respondent present

Samuel Kingori Mungai present in person

COURT: Judgment signed, dated and delivered in the open court in presence of Omayo for State and Samuel Kingori Mungai appearing in person.

R. K. LIMO

JUDGE

26.7.2016