



REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL 302 OF 2013

SAMWEL NGANGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal arising out of the conviction by Hon. S.O.Temu SRM and sentence of Hon. M.A Ochieng SRM delivered on 19th July 2013 in Criminal Case No. 1561 of 2011 in the Principal Magistrate's Court at Kajiado)

JUDGMENT

The Appellant was convicted and sentenced to serve life imprisonment for the offence of defilement of a child, contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act. The particulars of the offence were that 6th December 2011 at about 11.30 pm at Illasit trading center in Loitoktok District within Rift Valley Province, the Appellant intentionally and unlawfully caused his penis to penetrate the anus of P T, a child aged 10 years.

The Appellant pleaded not guilty to the charge. The hearing commenced before Hon. S. O Temu who convicted the Appellant in a judgment delivered on his behalf by Hon Ochieng SRM. Hon. Ochieng then proceeded to sentence the Appellant.

The Appellant being aggrieved has appealed the conviction and sentence meted by the trial magistrate. The Appellant's grounds of appeal are stated in his Amended Memorandum of Appeal dated 10th February 2016 availed to this Court. In summary, the Appellant alleges that the prosecution had not proved the offence beyond reasonable doubt; there was doubtful evidence given on the identification of the Appellant, and that the Appellant's constitutional rights were flouted. The Appellant also availed to the Court two sets of written submissions wherein he detailed out arguments as to the evidence given on his identification, penetration and the victims age, and on the credibility of the complainant's evidence.

Ms Rita Rono, the learned prosecution counsel, also availed written submissions filed on 15th March 2016. It was urged therein that the prosecution through the testimony of four witnesses had proved the charges against the Appellant beyond reasonable doubt, and proceeded to analyse the evidence in light of the issues raised in the appeal as regards identification, penetration and the Appellant's defence.

As this is a first appeal, I would ordinarily be required to re-evaluate the evidence tendered in the trial Court, and come to an independent conclusion as to whether or not to uphold the conviction and sentence. However, at the hearing of the appeal on 21st June 2016, the Appellant made oral submissions in Court wherein he referred to the proceedings and record of the trial Court, and stated that the record showed that he severally asked for the witness statements which were not availed to him. Ms. Rono in reply conceded

that indeed the Appellant had requested for the statements, and that it would be in the interests of justice that a retrial is held. The Appellant then stated that he did not object to a retrial.

I have perused the record of the trial court, and note that the Appellant did severally request for witness statements on 18th April 2012, 17th July 2012, 30th October 2012, and 8th January 2013 before the trial commenced. On 17th July 2012 the trial magistrate ordered that the statements be availed to the Appellant at his own cost, and again made orders that the statements be supplied to the Appellant on 30th October 2012 and 8th January 2013. On 15th April 2013 after the trial had commenced, the Appellant made an application before the second witness could testify, that he was not ready to proceed as the investigation officer had taken his statements. The trial magistrate thereupon ordered that the Appellant be supplied with witness statements. The hearing then proceeded at the next hearing date, and there is no record of the witness statements having been supplied to the Appellant.

Article 50(2)(j) of the Constitution in this regard provides that the right to a fair trial includes the right of an accused person to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence. This right was explained in **Dennis Edmond Apaa and Others v Ethics and Anti-Corruption Commission, Nairobi Petition No. 317 of 2012 [2012] eKLR** as follows:

***“The words of Article 50(2)(j) that guarantee the right “to be informed in advance” cannot be read restrictively to mean in advance of the trial. The duty imposed on the court is to ensure a fair trial for the accused and this right of disclosure is protected by the accused being informed of the evidence before it is produced and the accused having reasonable access to it. This right is to be read together with the other rights that constitute the right to a fair trial. Article 50(2)(c) guarantees the accused the right, “to have adequate facilities to prepare a defence.*”**

This means the duty is cast on the prosecution to disclose all the evidence, material and witnesses to the defence during the pre-trial stage and throughout the trial. Whenever a disclosure is made during the trial the accused must be given adequate facilities to prepare his or her defence The obligation to disclose was a continuing one and was to be updated when additional information was received.”

In the present appeal, the omission to indicate in the court record if the Appellant was availed with witness statements can only be construed in the Appellant's favour, as he had a right to receive the witness statement before proceeding with the trial and during the trial. The appeal therefore succeeds on the ground that the Appellant's right to a fair trial as enshrined in the Constitution were violated, as it is not evident that he was availed the evidence that the prosecution was relying on.

I am of the view that the ground of failure to afford the Appellant the witness statements is sufficient to dispose of the appeal, and it is not prudent to address the other substantive grounds of the appeal in light of the request for a retrial. In this regard, the principles governing a retrial were enunciated in **Fatehali Manji v Republic [1966] EA 343** by the East Africa Court of Appeal as follows:

“In general, a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to 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 its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause injustice to the accused person.”

I have reviewed the evidence before the trial Court and it is my view that it raises the possibility of a conviction, and taking into account the time that has lapsed since the Appellant's arrest at the end of 2011, and number of prosecution witnesses, it would be possible to undertake the trial without unduly prejudicing the Appellant.

I accordingly allow the Appellant's appeal, and quash the conviction and sentence of the Appellant by the trial Court for the offence of defilement of a child, contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act. I direct that the Appellant shall be retried by any magistrate other than Hon. S.O Temu at the Kajiado Law Courts, and for that purpose he shall remain in custody and shall be taken before the Resident Magistrate at Kajiado Law Courts on **28th September 2016** to plead to fresh charges.

It is so ordered.

DATED AT MACHAKOS THIS 21ST DAY OF SEPTEMBER 2016.

P. NYAMWEYA

JUDGE