



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 86 OF 2013

JOHN KIVUITU APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence in Machakos Chief Magistrate's Court Criminal Case No. 1 of 2009 by Hon. S. Gacheru, SRM on 15/12/2010)

JUDGMENT

1. **John Kivuitu**, the Appellant was charged with the offence of **defilement** contrary to **Section 8(3)** of the **Sexual Offences Act**. Particulars of the offence being that on diverse dates between 20th December, 2008 and 13th January, 2009 at (**particulars withheld**) within the **Eastern Province**, unlawfully and intentionally committed an act which caused penetration with **CJ** a girl aged 13 years.
2. In the alternative he was charged with the offence of committing an indecent act contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. Particulars being that on diverse dates between the 20th December, 2008 and 13th January, 2009 at (particulars withheld) within the **Eastern Province** unlawfully and indecently assaulted **CJ** by touching her private parts namely; vagina and breasts.
3. Facts of the case were that on the 20/12/2008, **PW3 CJ** left home going to attend a meeting. After the meeting she encountered the appellant at a hotel where he was walking at **Wamunyu**. She was made to go to the house of the appellant. She was locked therein whereafter he threatened her and proposed to make her his wife. Thereafter the appellant continued having sexual intercourse with her for two (2) weeks. He also caused her to have sex with two (2) other men. The appellant communicated to the family of the complainant his intention to marry her. They reported the matter to the police. The appellant was arrested and charged.
4. In his defence the appellant opted to remain silent.
5. The court evaluated evidence adduced and returned a verdict of guilty. He was convicted and sentenced to 20 years imprisonment.
6. Being aggrieved by the conviction and sentence he appealed on ground that:-
 - i. The entire trial was a nullity since the court failed to comply with **Section 214** of the **Criminal Procedure Code**.

ii. The substantial part of the case was tried by an unqualified prosecutor

7. This being the first appeal, my duty as a court is to re-evaluate the evidence, draw my own inferences and come to a logical conclusion knowing that I did not have an opportunity of seeing or hearing witnesses who testified at the trial court. (*See Okeno versus Republic (1972) E.A. 32*).

9. An amendment of the charge is allowed in law but some conditions must be complied with. **Section 214 1 (i) (ii)** of the **Criminal Procedure Code** provides :-

“(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:

Provided that -

(i). where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;

(ii). where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination”.

9. The appellant was called upon to plead to the amended charge but was not given an opportunity of electing whether or not to have witnesses who had testified recalled to testify afresh or for further cross-examination. He submitted that he was prejudiced. Having learnt of the right to have witnesses re-called, on the 9th June, 2009 he made an application to have PW1 and PW2, re-called for further cross-examination. The application was allowed by the court but the Prosecuting Officer failed to avail the witness as required. The trial could not have been fair in the circumstances. The appellant was prejudiced.

10. It is the contention of the appellant that **P.C. Muye**i was not qualified to prosecute the case. In order for any prosecutor to undertake prosecution of any case, he/she must have been gazetted by the authorizing authority.

(See Section 85(1) of the Criminal Procedure Code). In response to the appeal, learned State Counsel **Mrs Abuga** opposed the appeal on grounds that the charge was proved as required by the law. However, she was silent on the issue whether or not **P.C. Muye**i was qualified to prosecute. Part of the case having been prosecuted by an unqualified prosecutor, means that it was vitiated hence null and void.

11. The issue to be determined is whether a retrial should be ordered. In the case of *Fatehali Manji versus Republic [1966] E.A 343- it was stated* :-

“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 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; and each case must depend on its own facts and circumstances and an order for retrial should only be made where the interest of justice require it.”

12. Evidence adduced established the fact that the complainant was a minor hence not capable of consenting to the act of sexual intercourse. There was proof that she had engaged in sex and according to her with the appellant. She was found inside the house of the appellant and when put on his defence he

exercised his right of remaining silent. Evidence adduced by the prosecution remained unchallenged. It is in the interest of justice that a retrial be ordered.

13. In the premises, I quash the conviction and set aside the sentence imposed. Consequently, I order a retrial. The appellant shall remain in custody and be produced before the **Chief Magistrate Machakos** on the **29th January, 2015** for a **retrial**.

14. It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 20TH day of JANUARY, 2015.

L.N. MUTENDE

JUDGE