REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO. 90 OF 2013

ABRAHAM MWANGI NDIRANGU……..…..……APPELLANT

-VERSUS-

REPUBLIC…….……..RESPONDENT

(Being an appeal against sentence in Kigumo Senior Resident Magistrate's Court Criminal Case No. 1358 of 2009 (Hon. M.W. MUTUKU) on 9th November, 2009)

JUDGMENT

The appellant was charged with the offence of defilement of a girl contrary to section **8(1) (3) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that on the 4th day of October, 2009 at *[particulars witheld]* village in Kandara district within the central province, the appellant unlawfully and intentionally had sexual intercourse with J.G.K, a girl with mental disabilities. In the alternative, the appellant was charged with the offence of indecent assault contrary to **section 11 (1)** of the **Sexual Offences Act No. 3 of 2006** the particulars being that on the 4th day of October, 2009 at *[particulars witheld]* village in Kandara district within the central province, the appellant unlawfully and indecently assaulted J.G.K by touching her private parts.

The record shows that the appellant took plea in camera on 5th October, 2009. On that date, a plea of not guilty was entered after which the prosecutor sought to have the appellant remanded in custody to enable him complete investigations. The court ordered that the case be fixed for mention on 15th October, 2009 for purposes of fixing a hearing date. The appellant was remanded in police custody before then.

When the matter was mentioned in court on 15th 0ctober, 2009, the appellant was not brought to court; he was also not brought to court on two subsequent occasions when his case was mentioned. On 5th November, 2009, the case was mentioned in the presence of the appellant and on that date, the court on its own motion said that the case be mentioned on 9th November, 2009 "for facts".

Sure enough, when the case was mentioned on 9th November, 2009 a statement of facts was given though it is not clear from the record who gave this statement of facts. The appellant is recorded to have confirmed the facts to be correct and true. At that point, the prosecutor rose to tell the court that there were no records and the appellant could be treated as the first offender. The appellant is then recorded to have mitigated after which the court sentenced him to serve 25 years in prison.

It is apparent from the record that though the appellant entered a plea of not guilty, he was sentenced as if he had entered a plea of guilty. As noted, after a plea of not guilty was entered on 5th October 2009, the case was to be mentioned again for purposes of fixing a hearing date. Between that date and the date

when the court directed that that the case be mentioned again for a statement of facts, there is nothing on record to suggest that the appellant ever changed his plea or that the charges against him were ever read to him again. There is no explanation as to why the court departed from its earlier direction to fix the case for hearing to sentencing the appellant summarily without taking evidence from the prosecution and the defence. The case ought to have proceeded to full trial as provided for under **section 207 (3)** of the **Criminal Procedure Code** which provides that if the accused person does not admit the truth of the charge, the court shall proceed to hear the case as provided for in the subsequent sections of the code.

It is also curious to note from the record that no conviction was recorded anywhere; assuming that the appellant had entered a plea of guilty, it should have been noted on the record. The learned magistrate proceeded to sentence the appellant without any sought of conviction.

The learned magistrate clearly disregarded the procedure provided under **section 207** of the **Criminal Procedure Code** to the detriment of the appellant herein. If the appellant had admitted the charge then the learned magistrate was under obligation to comply with **section 207** of the **Criminal Procedure Code** which is to the effect that;

207.(2) if the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary;

Provided that after conviction and before passing any sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.

In the trial against the appellant a statement of facts was given and a sentence passed without any conviction; there is no evidence that the appellant admitted the charge otherwise than by a plea agreement and even if there was such a plea it was not recorded as nearly as possible in the words used by the appellant.

In all fairness, the purported trial of the appellant where the learned magistrate sentenced the appellant on the presumption of a plea of guilty without such an unequivocal plea and without any conviction whatsoever and in flagrant disregard of section 207 of the Criminal Procedure Code, was not only a mistrial but also a travesty of justice.

One further thing I have noted is that though the appellant was charged under **section 8(1)(3) of the Sexual Offences Act**, the proper charge, in the light of the particulars, should have been brought under **section 7** of that Act.

Section 8 (1) of the Act defines the offence of defilement; it states as follows:-

8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

Sub-section (3) thereof prescribes the punishment for defilement; it says:-

(*3) A person who commits an offence of defilement with child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than 20 years.*

The age of the complainant was not stated in the particulars of the offence and therefore it is not easy to tell whether the complainant was a child as defined in the Children Act. Indeed the only description given of the complainant is that she was “a girl with mental disabilities” and not a child.

If the focus of the state case was the mental disabilities of the complainant, the appropriate section which appears to cover the charge against the appellant is **section 7** of the **Sexual Offences Act**. This section provides as follows:

7. A person who intentionally commits rape or an indecent act with another within the view of a family member, a child or a person with disabilities is guilty of an offence and is liable upon conviction to imprisonment for a term which shall not be less than ten years.

After consideration of the record and after evaluating the case against the appellant afresh as I ought to at this stage of the proceedings I am left with the inevitable conclusion that the presumed conviction and the sentence against the appellant cannot be allowed to stand for doing so would be tantamount to perpetuating the illegalities initiated in the trial court.

This would have been an appropriate case for a retrial before a magistrate other than the one who handled this case; however, it is now over four years since the appellant was arrested, charged and ultimately sentenced to serve a prison term. His incarceration for all this time, at least for the time that he has served the prison sentence, has no legal basis. To subject him to a fresh trial against this background would, in my view be a miscarriage of justice. I am inclined to set aside the sentence and quash any presumed conviction and set the appellant free. The appellant shall therefore be released and set free unless he is lawfully held.

Signed dated and delivered in open court this 14th day of January, 2014

Ngaah Jairus

JUDGE