REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRA CASE NO.108 OF 2013

MOHAMMED ULUFU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(*Being an appeal from the original conviction and sentence in*

Criminal Case No. 3462 of 2010 in the Magistrate Court

at Maua by Hon. J. G. Kingori C.M.)

JUDGMENT

1. The Appellant MOHAMMED ULUFU was charged with a main count of Defilement contrary to section 8 (1) as read with 8 (3) of the sexual offences Act, herein after SOA. In the alternative the Appellant was charged with Indecent Act with a child contrary to section 11 (1) of the SOA. The Appellant was convicted of the main count and sentenced to 20 years imprisonment.

2. The Appellant was aggrieved by the conviction and sentence and therefore filed this appeal. There are sixteen grounds of appeal as follows:

a. That the learned Magistrate erred in law and facts in convicting the Appellant on insufficient and contradictory evidence.

b. That the learned Magistrate erred in law in failing to find the charge and its ingredients were not proved beyond reasonable doubts.

c. That the learned Magistrate erred in law in completely failing to consider the defence/appellant's case and give it the probative value it deserved.

d. That the learned Magistrate erred in law and fact in entering a plea against the appellant who did not understand the charges facing him.

e. That the proceedings were conducted in a language that the appellant did not understand thereby occasioning him miscarriage of justice.

f. That the trial magistrate erred by misdirecting himself that the accused was conversant with the Kiswahili language (page 7 judgment)

g. That the trial magistrate erred in law and fact by relying on the evidence of the doctor which was crystal clear that there was no penetration.

h. That the learned trial magistrate erred in law and fact by insinuating that the broken hymen was due to the alleged defilement.

i. That the learned trial magistrate erred in law and fact by failing to appreciate the doctor's examination and findings were hours after the alleged defilement yet the findings did not support the charge.

j. That the learned Magistrate erred in law and fact by failing to find that the prosecution did not call the wife to the accused who was a key witness and who was a competent although not compellable witness.

k. That the learned Magistrate erred in law and fact by failing to find that the prosecution did not call another key witness called Abdi the brother to the complainant.

l. That the learned Magistrate erred in law and fact by failing to appreciate that the prosecution case was full of contradictions with each witness giving a different account of events.

m. That the evidence of the OCS Garbatulla Police Station was taken in English and no interpretation to Kiswahili "the language witnesses".

n. That the language of the accused as per the record is Kimeru and not the "impeccable Kiswahili"

o. That the accused person is a Borana and is not conversant with Kimeru or Kiswahili as indicated.

3. Ms Thibaru urged the appeal on behalf of the Appellant. In her submissions counsel stated in regard to the issue of the language used at the trial, that the proceedings are not clear on what language was used in court and which one accused understood. Counsel urged that the charge was read in Kiswahili. Subsequently there was interpretation into Borana language which accused understands at page 5. She urged that when PW1 and 2 testified there was interpretation into Borana. Thereafter the proceedings were conducted in English and Kiswahili. Counsel urged that the Appellant's right of interpretation under Article 50(m) of the Constitution and also section 198 (1) of CPC were infringed.

4. Mr. Moses Mungai, prosecution counsel represented the state and did not oppose the appeal. Counsel explained that he was conceding the appeal on the issue of penetration which counsel said was not proved.

5. I have considered this appeal and submissions by counsel. The Appellant's counsel, Ms Thibaru raised the issue of language and urged that it was not clear which language was used at the trial, and that consequently Appellant rights under Art 50 (m) of the Constitution, 2010 and section 198 (1) of the Criminal Procedural Code was infringed.

6. I have perused the record of proceedings in this case. I noted that the typed proceedings bear numerous topographical errors, which gives the impression that either the typed proceedings were not proof read or a shoddy job of it was done. The errors change the effect of the proceedings adversely.

I will give two illustrations out of many which appear from the record. Page 1 of the record shows:

"**27/9/10**

Before: J, Kingori SPM

Pros: CIP muriuki

CC: J, Gitonga

Language: Eng/Kisw

Accused Kimeru"

That record declared accused as Kimeru. One wonders whether accused was present or not and which language he understand."

7. The second illustration is that throughout the proceedings, after the prosecution completed examination in chief of its witnesses, the record shows that the accused Re-examined 'the witnesses. A witness can only be Re-examined by the person who called them. The hand written notes are clear as they show cross-examined which understandably stands for cross-examination.

8. The right to an accused person to understand and follow proceedings by having interpretation, if necessary, to the language an accused person understands has both constitutional and statutory under pinning. It is a right which cannot be compromised. Art 50 (m) of Constitution provides;

"**Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.**

(m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial"

Section 198 (1) of the Criminal Procedure Code stipulates.

"198. (1) whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language which he understands."

9. The proceedings show that there was interpreter sworn in to interpret from English to Borana language. That was at the time PW1 and 2 testified. At the plea stage the charge was read to the Appellant in Kiswahili language. The Appellant also gave his defence in Kiswahili.

10. What is disturbing is what the record shows were the language used by prosecution witnesses to testify. PW1 and 2 for instance are shown to have testified in "Borana-English"

PW4 and 3 spoke in " Kiswahili-English" PW5 and 7 spoke in "Kiswahili". PW6 in "English-Kiswahili"

11. The language of the court is indicated at the court Coram, as should be. It is indicated throughout the proceedings as "Language. Eng/Kiswahili/Kimeru"

12. I agree with Ms. Thibaru for the Appellant that the trial of the Appellant at the lower court was defective on account of language. It is not clear in which language the prosecution witnesses testified. It is also not clear what the language of the court was. Each witness except PW5 and 7, are shown to have spoken in more than one language. It is not clear which language was spoken by the witness, and if there was interpretation, to which language it was made.

13. The issue is whether the defect which occurred in this case is fatal. The defect is fatal to the proceedings as the Appellant cannot be said to have followed the proceedings.

14. As to whether a retrial should be ordered, it is a settled principle of law that a retrial should be ordered where:

a. the conviction is vitiated by a mistake of the trial court. See **Ahmed Sumar v Rep [1964] EA 481**.

b. It is also a settled principle of law that retrial should not be ordered unless the court was of the opinion that on a consideration of the admissible or potentially admissible evidence a conviction right result. See **Braganza vs Rep [1957] EA 152.**

c. It is also an accepted principle of law that each case should be considered on its own merit and further that retrial should only be made where the interests of justice require it. See **Bernard Ekimat vs Rep C.A. NO. 151 of 2004 (Eldoret)**

15. I have considered this case and I am satisfied that the defect in the proceedings were as a result of a mistake by the trial court, that on a consideration of admissible evidence a conviction might result, and finally that the interests of justice require a retrial be ordered.

16. Accordingly I quash the conviction in this case and set aside the sentence. The case should go for retrial at Maua CM'S court before a different magistrate other that Mr. J. Kingori who heard it.

17. In the meantime the Appellant will be held in custody until 14th April, 2014 when he should be produced before CM's court Maua for plea for the same charges.

18. Those are the orders of this court.

DATED AT MERU THIS 9TH DAY OF APRIL, 2014.

LESIIT, J

JUDGE