



REPUBLIC OF KENYA

High Court at Eldoret

Criminal Appeal 213 of 2009

JONATHAN KIPYEGON KOSGEI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant **JONATHAN KIPYEGON KOSGEI** was charged with causing penetration of a the genital organ of a man into the genital organ of a person with mental disabilities contrary to Section 7 of the Sexual Offences Act No. 3 of 2006
2. The facts of the case are that the Appellant had on the 13th of May 2007 at Junction Area in Nakuru District within the Rift Valley Province intentionally and unlawfully caused the penetration of the genital organ namely the penis into the genital organ of **A.J.B** a person with mental disability aged 21 years.
3. The Appellant was convicted and sentenced to (10) years imprisonment. Being aggrieved by the said decision, the Appellant preferred this appeal on both conviction and sentence.
4. There were eight (8) Grounds of appeal listed in his Petition of Appeal which are as listed hereunder;
 - (i) That I pleaded guilty to the charge.
 - (ii) That the learned trial magistrate erred in law and fact when he failed to note the fact that no direct evidence was adduced to link me with the said offence.
 - (iii) That the learned trial magistrate misdirected himself when he chose to rely on evidence that was manifestly based on hearsay, assumption and mere speculation.
 - (iv) That nowhere in her testimony did PW1 mention that I had committed the alleged offence.
 - (v) That the medical report only indicated that the complainant was infected with syphilis without disclosing the source.
 - (vi) That it was a miscarriage of justice for the learned trial magistrate to suggest in his judgment that I had also pleaded guilt to the charge, both contrary on record.
 - (vii) That the learned trial magistrate erred in law and fact when he failed to note that the rape allegation were made as an after thought as a result of a grudge between me and the complainant's father.
 - (viii) That the prosecution side failed to discharge its burden of proof to the standard required by the

law.

5. At the hearing of the Appeal the Appellant relied on his Written Submissions whereas the Counsel for the State made oral submissions.

6. The State conceded the Appeal on three grounds. The first being that the charge was fatally defective as Section 7 relates to acts down in the presence of a child or a person with mental disabilities.

7. Secondly that Appellant ought to have been charged under Section 146 of the Penal Code and not Section 7 of the Sexual Offences Act No. 3 of 2006.

8. Thirdly the prosecution witness **PW4 DOMINIC MOSE** who examined the Complainant found that she had contracted a venereal disease, but the Appellant was never examined to confirm whether he too had the STD.

9. Counsel also submitted the the trial magistrate had denied the Appellant the opportunity to cross-examine the Complainant.

10. For those reasons the State prayed that the Appeal be allowed and the conviction be quashed and sentence set aside.

11. After hearing the submissions of Counsel for the State and after reading the Appellants Written Submissions this court finds the following issues for determination;

(i) Defective charge sheet.

(ii) Denial of right to fair trial.

(iii) Retrial.

12. This being the first appellate court, it is incumbent that this court revisits the evidence on record and re-evaluates and re-assess the same so as to arrive at an independent conclusion. Refer to the case of **OKENO -VS- REPUBLIC. (1972) EA 32**

13. Ground one of the Petition of Appeal was the issue of the defective Charge Sheet.

14. Section 7 of the Sexual Offences Act No. 3 of 2006 reads 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 mental disabilities is guilty of an offence and is liable upon conviction to imprisonment for a term which shall not be less than ten years.

15. From the reading of the Section it is clear that the same relates and deals with acts down in the full view of a child or family member or a person with mental disabilities.

16. This court concurs with the submissions of Counsel for the State that the charge is incurably defective and that the Appellant ought to have been charged under Section 146 of the Penal Code.

17. Section 146 of the Penal Code reads as follows;

146. Any person who, knowing a person to be an idiot or imbecile, has or attempts to have unlawful carnal connection with him or her under circumstances not amounting to rape, but which prove that the offender knew at the time of the commission of the offence that the person was an idiot or imbecile, is guilty of a felony and is liable to imprisonment with hard labour for fourteen years.

18. For those reasons, this court finds that the Appellant was convicted on a defective charge and finds that this ground of appeal has merit and the same is hereby allowed.

19. Upon perusing the court record this court finds as a fact that the Appellant was denied the right to cross-examine the Complainant.

20. The court notes that the Appellant engaged Counsel to represent him and the said Counsel was denied the right to recall the prosecution witnesses.

21. All proceedings in a court of law must be fair. In the absence of fairness justice cannot be said to have been served.

22. This court finds that failure by the trial court to observe the right to cross-examine a witness and a right to recall a witness meant that the Appellant did not have a fair chance of dealing with the allegations against him.

23. This court finds that the Appellant was denied the right to a fair trial and this ground of appeal has merit and the same is allowed.

24. On the last issue of a retrial – the state has not sought a retrial and the Appellant has served three (3) years of his ten (10) year sentence.

25. The principles of a retrial are that whether the retrial would occasion prejudice to an accused person or whether the admissible evidence may result in a conviction. Refer to **SIMON GICHIA NGANGA -VS- REPULIC (2006) eKLR.**

26. This court finds that the conditions of the original trial were defective and a retrial would not be proper in the circumstances of this case.

CONCLUSION:

27. For the reasons enumerated above this court finds that the Appeal has merit and the same is hereby allowed.

28. The conviction is hereby quashed and sentence set aside.

29. The Appellant shall be set at liberty unless otherwise lawfully held.

30. It is so ordered.

Dated and delivered at Eldoret this 23rd day of January 2013

A.MSHILA

JUDGE

Coram: Before Hon. A Mshila J

CC: Oscar

Appellant: Present in person.

Counsel for the State: Munene

Language: Kiswahili

A.MSHILA

JUDGE