



REPUBLIC OF KENYA

High Court at Nakuru

Criminal Appeal 296 of 2010

(From original conviction and sentence in Criminal Case No.255 of 2009 of the Chief Magistrate’s Court at Nakuru O. B. KITUYI, RM)

SAMUEL KAMAU WAITHAKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Samuel Kamau Waithaka, the appellant herein, was charged with the offence of defilement of a child contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act No. 3 of 2006**. In the alternative, he was charged with committing an indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. He was alleged to have committed the offence on 9/2/2002, at {particulars withheld}, Nakuru District. The trial court convicted him on the alternative charge. He was sentenced to 10 years imprisonment. Being aggrieved by the conviction and sentence, he filed this appeal based on the grounds of appeal filed in court on 8/10/2010. He also filed supplementary grounds together with submissions. When the appellant made oral submissions he added another ground which I need to deal with even before considering the other grounds. He asked the court whether the law can apply retrospectively because he had earlier been charged with the same offence in 2002 under the Penal Code, before the **Sexual Offences Act No. 3 of 2006** was enacted but that during the re-trial he was charged under the **Sexual Offences Act**.

The learned State Counsel, Mr. Marete, opposed the appeal but did not address the issue raised by the appellant, on which law was applicable to the charges that the appellant faced in the trial court, was it the **Penal Code** or **Sexual Offences Act 2006**.

The charge is clear, that the offence was committed on 9/1/2002. Back then, the law applicable to defilement cases was the **Penal Code Cap 63 Laws of Kenya**.

From the scanty evidence on record, it seems that the appellant had been charged in Criminal Case No. 321/2002. The proceedings before B. Kituyi, Resident Magistrate in 2009, were a re-trial. It is not clear how the case came to be re-tried. If there was a High Court order to that effect then the proceedings in the earlier case were not availed. That notwithstanding, it is clear that the offence was allegedly committed in 2002, when the **Sexual Offences Act No. 3 of 2006**, was not yet in operation. That **Act** came into operation on 21/7/2006. Under **Article 3** of the **1st Schedule**, of the Sexual Offences Act, all the proceedings commenced under the old **Statutes**, in this case, under the **Penal Code**, were to proceed under that law to their logical conclusion. It reads as follows:-

“Article 3. Any proceedings commenced under any written law or part thereof repealed by this Act shall continue to their logical conclusion under those written laws.”

The law cannot apply retrospectively unless the specific statute provides for that. The **Sexual Offences Act** does not provide that it had retroactive application. The appellant should have been re-tried under the Penal Code. The charges under the **Sexual Offences Act** were illegal and the whole proceedings before B. Kituyi, Resident Magistrate, are a nullity.

What should the court do? Can it order a re-trial? For the court to order a re-trial, the pre-conditions that must exist were considered in the case of **Patel Ali Manji v Rep [1960] EA 343** and **Pascal Clement Braganza v Rep [1951] EA 52**. In **Patel's** case the court said:-

- (1) **“In general a re-trial will be ordered when the original trial was illegal or defective;**
- (2) **Each case must depend on its own facts and circumstances;**
- (3) **That an order of re-trial should only be ordered where the interest of justice require it;**
- (4) **A re-trial will not be ordered if by so doing an injustice will be caused or occasioned.”**

In the case of **Alloys Awori v Uganda [1972] EA 469**, the court went a notch higher and held:-

- (5) **“A re-trial will not be granted for purposes of enabling the prosecution to fill up the gaps in its evidence at the first trial.”**

In **Ratital Shah v Rep [1958] ER 3**, the court held:-

- (6) **“A re-trial should be ordered when the court is of the opinion that on a proper consideration of the admissible or potentially admissible evidence a conviction might result.”**

I have considered the evidence on record. In 2002 when the offence was allegedly committed, the complainant was only 4 years old. This court wonders whether 5 years later, in 2009, when she testified during the re-trial, she could so vividly recall what happened to her at the hands of the rapist when she was only four years old. The complainant's testimony before the court in 2009, is questionable, that she could recall what happened to her in 2005. Otherwise, the complainant was indeed defiled as the Doctor found her to have a mucal discharge, labia majora was bruised, vulva inflamed but the hymen was intact. The Doctor found there to have been some form of defilement. Although the defilement was completed by virtue of some penetration having occurred, what would have been left is the victim's identification of the culprit, which, in my view, was questionable for the reasons I have considered above. In my considered view, even if a re-trial was ordered, the potentially admissible evidence might not result in a conviction.

In addition, the appellant was arrested in early 2002. He claims to have been in custody till his conviction, in 2010. It is over 10 years ago. In my view, it will be prejudicial to the appellant if the court were to order a re-trial after 10 years. The circumstances dictate that I do not order a re-trial.

I find it unnecessary to address the other grounds of appeal touching on the merits of the trial court's decision since this ground alone determines the appeal. In the end, I quash the conviction, set aside the sentence and direct that the appellant be set at liberty forthwith unless otherwise lawfully held.

DATED and DELIVERED this 23rd day of January, 2013.

R.P.V. WENDOH
JUDGE

PRESENT:

Appellant in person

Ms Idagwa for the State

Kennedy – Court Clerk