REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Appeal 379 of 2009

JOHN MBURU WAITHINA.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(From original conviction and sentence in criminal case Number 1608 of 2008 in the Chief Magistrate's Court at Thika)

JUDGMENT

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1. The appellant was tried and convicted by the Senior Resident Magistrate's Court Thika on a charge of attempted rape of a girl contrary to **Section 4** of the **Sexual Offences Act No. 3 of 2006**. He was sentenced to serve 12 years imprisonment.
2. It had been alleged that on 4th May 2008 at [name of place withheld] Village in Thika District within Central Province he intentionally and unlawfully attempted to commit an act which could cause penetration to E. W. W.

3. The gist of the eight grounds advanced in the appellant's appeal is that the entire trial was a nullity as the charge was defective because the name of the complainant in the charge sheet and that of the person who testified materially differed.
4. Miss Aluda, the learned State Counsel opposed the appeal on behalf of the respondent, contending that the variation in the names of the complainant in the charge sheet and the record of the court was curable under **Section 382** of the **Criminal Procedure Code**. She urged that the evidence by **PW3** and **PW4** against the appellant was strong, and that the appellant was not only caught in the act, but was also positively identified. **5.** I have analysed and re-evaluated the evidence on record to make my own findings and draw my own conclusions as is required of me as the first appellate court. In so doing I was mindful of the fact that I did not have the advantage of seeing or hearing the witnesses as they testified.
6. The prosecution's case was that **PW1** the complainant was accosted at her gate, by someone who suddenly held her by the neck and knocked to the ground. The person tried to forcefully remove her panty as he held her in a stranglehold but she resisted his attempts.
7. **PW2,** who witnessed the struggle, saw the man lying on top of the complainant whose skirt was

lifted up and he was holding her by the neck. **PW2** called **PW4** and together they raised an alarm causing the Appellant to flee. They managed to apprehend him with the help of members of the public and take him to the elders and thereafter to the Police.

8. **PW4**, was coming out of her gate when she saw **PW2** whom she knew by the name of K. He called her to help the Complainant. **PW4** found the complainant struggling with the appellant as she lay on the ground. The appellant was strangling her and her panty had partly been removed. **PW4** screamed attracting people who helped to arrest the Appellant.

9. **PW3,** and **PW6,** were police officers on duty at Kihote Police Post on the material date between 9 to 9.30 p.m. when the Appellant was brought by members of the public and the complainant, on claims of having attempted to rape the complainant. The Officers escorted him to Ruiru Police Station, where **PW5** re-arrested him, investigated the case and charged him with the present offence. **PW3** noticed that the appellant had mud on his clothes.

10. **PW7** a Clinical Officer at Ruiru District Hospital examined **PW1** who presented with a history of having been assaulted by someone known to her on 4th May 2008. In her observation the complainant's clothes were stained with mud and her petticoat and panty were torn. She had bruises on the neck and scratch marks on the neck and nose. She classified the degree of injury as harm. Her evidence therefore corroborated that of **PW1** who said that the appellant held her in a stranglehold, and that of **PW2** and **PW4** who said that they saw the appellant strangling the complainant as they struggled on the ground.
11. The appellant's unsworn testimony was that he had been drinking with **PW1** on the evening in question, and that when she demanded for more drinks the Appellant who had run out money to spend, decided to escort her to her home. On reaching outside her house she started to scream attracting people who came and arrested him on claims of trying to rape her. He denied the offence.
12. I have re-evaluated both the evidence of the prosecution and the defence and find, as did the learned trial magistrate, that the appellant's defence was a mere denial in light of the evidence on record. He was placed at the scene by **PW1**, **PW2** and **PW4** and they positively identified him. The evidence of **PW2** and **PW4** corroborated that of **PW1** that they saw the two struggling on the ground. The time was 6.30 p.m. and they were therefore able to observe him in the light of day.

13. The issue for determination therefore, is whether the variance in **PW1**'s name as contained in the charge sheet and in the evidence was a material defect that prejudiced the Appellant as averred in the grounds of appeal, or a curable defect as the learned State counsel Miss Aluda argued.

14. **Section 382** of the **Criminal Procedure Code** provides that: -

"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.""**15.**

The nature of the defect and the need for clarification was an important aspect that went to the core of the prosecution's case, and the substance of the charge against the Appellant. Whom the Appellant is alleged to have attempted to rape was such an important issue that the learned trial magistrate ought, at the very least, to have dealt with the issue in the Judgment. The learned trial magistrate did not do so and in the circumstances of this case the variation in the evidence and the charge sheet prejudiced the appellant's case and is incurable under **Section 382** of the **Criminal Procedure Code.**

16. In view of the proviso to **Section 382** of the **Criminal Procedure Code**, could the objection herein have been raised at an earlier stage in the proceedings? I note that the appellant had no legal

representation at the trial and may have been ill-equipped to deploy all the provisions of the law available at his disposal on this issue. I am however, minded that when evaluating evidence in a criminal trial the court should always bear in mind that the burden of proof rests with the prosecution and never shifts to the defence.

17. In sum, the prosecution's evidence against the appellant is overwhelming, and Appellant's defence did not manage to cast any reasonable doubt thereon. The failure was on the part of the prosecution who did not amend the charge sheet, appropriately, and on the part of the learned trial magistrate who did not notice or correct the anomaly. The prosecution evidence on record was however overwhelming.

18. The question that arises therefore, is whether or not to order a re-trial. The principles upon which a court should order a re-trial were restated in the case of **Fatehali Manji v Rep [1966] EA pg. 343**. The Judges of Appeal Sir Clement de Lestang, Ag. P., spry, Ag V-P and Law, J.A. had this to say:

"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 purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a 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; each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it;"

These principles were reiterated in the more recent case of **Muiruri v Republic [2003] KLR, pg 552**, by Kwach, Githinji & Waki JJA.

19. Generally therefore, whether a re-trial should be ordered or not must depend on the circumstances of the case. It will only be made where the interest of justice require it and if it is unlikely to cause injustice to the appellant. Other factors include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant, whether the mistakes leading to the quashing of the conviction were entirely the prosecution's making or the court's.

20. The offence in the case before me occurred on 4th May 2007 within Thika area and I have not been told that it would be difficult to trace the three main witnesses for a re-trial. Although the trial was defective, there was overwhelming evidence on the part of the prosecution. Taking into account the circumstances of this case, and the principles set out above, the order which does commend itself to me, and which I now make is that there shall be a re-trial.

I therefore quash the conviction, set aside the sentence and order a re-trial.

SIGNED DATED and **DELIVERED** in open court this **29th** day of **April 2013.**

L. A. ACHODE

JUDGE