REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Appeal 566 of 2009

SAMUEL MAINA MBURU .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(From original conviction and sentence in criminal case Number 183 of 2009 in the Chief Magistrate's Court at Kiambu – Mrs. A. Ongeri (SPM) on 1/12/ 2009)

JUDGMENT

1. This appeal arises out of the appellant's conviction by Mrs. Ongeri, Senior Principal Magistrate in **CM Cr. Case No. 183 of 2009,** in the alternative charge of indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act No. 3** of **2006**.

2. The prosecution's case was that the complainant who was an 8 year old minor, was at home on 31st January 2009 with her sister **PW3**. At about 9.00 a.m. **PW3** was washing utensils when she noticed that the minor who had been playing outside with the appellant, was walking strangely. Her legs were spread apart and she was bleeding.

3. **PW3** took the minor into the house and checked her private parts. She found blood both in her pants and in her genitals which were swollen. The minor was crying. She called her mother who was away at work and the appellant was arrested and subsequently charged with defilement of a child contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act No. 3** of **2006**, and in the alternative with indecent acts with a child contrary to **Section 11(1)** of the said Act.

4. The defence case was that on the 31st January 2009 the appellant came home and found one Ngugi and an old man. They told him that a child who used to come to his house was sick. They locked him in his house till the police arrived and arrested him.

5. Upon conviction on the alternative charge, the appellant was sentenced to life imprisonment, hence this appeal. In the amended grounds of the appeal he contends that the trial court failed to comply with **Section 77** of the repealed Constitution, and **Section 208** and **211** of the **Criminal Procedure Code** rendering the trial a nullity. Further that the prosecution's case was not proved beyond reasonable doubt and the sentence imposed upon him was harsh and excessive.

6. I have analysed and re-appraised the evidence afresh in line with the decision in **Odhiambo vs Republic Cr. App No. 280 of 2004 [2005] 1 KLR**, in which the court of Appeal held that:

"On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour".

7. In his written submissions the appellant stated that his constitutional rights under **Section 77** of the repealed Constitution were violated and that he was denied the opportunity to cross examine **PW4** Dr. Ketra Muhombe as required under **Section 208** of the **Criminal Procedure Code**. It was his submission that **section 211** of the **Criminal Procedure Code** too was not complied with.

8. I have perused the typed proceedings as well as the handwritten manuscript and it is evident that the record does not indicate whether or not the appellant was given a chance to cross examine **PW4**. At the close of the testimony of **PW4** the prosecutor immediately requested for an adjournment to avail another witness and the adjournment was granted.

9. Indeed the trial court in exercise of its own jurisdiction must ensure that the rights of the accused person are complied with whether or not the accused raises it. This failure alone is sufficient to vitiate the trial without requiring me to delve into the other grounds that the appellant raised in his appeal.

10. Mr. Kadebe the learned State Counsel did concede the appeal but pointed out that the failure on the part of the court was procedural and did not affect the weight of the evidence in the case. He prayed for a re-trial.

11. In the opinion of Mr. Kadebe a retrial was called for since the prosecution's evidence against the appellant was overwhelming. He urged that the complainant's mother and sister had given strong evidence which was supported by the medical witness and the Government Analyst's report which linked the appellant to the offence.

12. The question 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;"

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

"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.

14. Generally therefore, whether a re-trial should be ordered or not must depend on the circumstances of the case. The alleged offence herein occurred on 31st January 2009 within Nairobi, 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 and the mistakes leading to the quashing of the conviction were not entirely of the prosecution making. Taking into account the circumstances of this case, and the principles set out above, the order which does commends 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 **25th day** of **April 2013.**

L. A. ACHODE

JUDGE