REPUBLIC OF KENYA

High Court at Embu

Criminal Appeal 37 of 2009

PATRICK KARIUKI NJAGI..... .....APPELLANT

VERSUS

REPUBLIC…….....…..…..RESPONDENT

From original conviction and sentence in Cr. Case No. 419 OF 2007 at the chief Magistrate's Court at Embu by Hon. E.K. NYUTU – RM on 13/03/2009

J U D G M E N T

PATRICK KARIUKI NJAGI the Appellant was charged with the offence of defilement of a girl contrary to section 8 (1) (2) of the Sexual Offences Amendment Act No.3 of 2006.

The particulars as stated in the charge sheet were as follows;

PATRICK KARIUKI NJAGI: On the 4th day of March 2007 at in Kithimu location in Embu District within Eastern Province intentionally and unlawfully had sexual intercourse with MKN a girl aged 5 years.

The matter proceeded to full hearing and the Appellant was convicted and sentenced to life imprisonment on 13/3/2009. And being aggrieved by the Judgment he appealed raising the following grounds;

1. That the learned trial Magistrate erred in law and facts and caused gross miscarriage of Justice by failing to order PW1 and PW2 to be recalled for further cross-examination as per the Appellant's application contrary to section 150 of the Criminal Procedure Code as read with section 146(4) of the Evidence Act Cap.80 Laws of Kenya hence the proceedings are flawed.

2. That the trial Magistrate erred in law and misdirected herself by relying on PW4's evidence as a corroboration to PW2's allegations in failing to note that PW4 clearly informed the Court that the Hymen was intact hence the issue of the alleged teat in the vagina was of an afterthought and so was the alleged multiple bruises on the labia majora and minora

a) it defeats reasons as to how the victim to the alleged offence could have been kept at home for five days without her parents sorting medication the earliest possible hence was a fabricated matter due to injury sustained on PW2's right side of the face due to the fall from a bicycle N.B. Allegedly

blood – no blood stained pant or any other cloth exhibited.

b) The treatment records as to PW2's hospitalization at Embu Provincial Hospital were never tendered in evidence as a prove of the same.

c) No way could a blunt object have been inserted into PW2's vagina and the hymen fail to be broken or absent. Due to the above, the medical evidence (P3 form) is invalid.

3. That the learned trial Magistrate erred in both law and facts by holding that Prosecution had proved a charge contrary to section 8(1) (2) of the Sexual Offences Act number 3 beyond reasonable doubt whereas if was not.

4. ***That the proceedings in criminal case number 419 of 2007 were illegal, null and void as the Appellant's Constitutional rights as enshrined under section 72 (3) (b) of the repealed Constitutional as read with section 36 of the Criminal procedure Code was violated by being held in police custody for eight (8) days with no explanation on the date of plea from the Prosecution as was codified under section 86 of the repealed Constitution. He contends the Prosecution was manufacturing its evidence against the Appellant during this period.***

When the appeal came for hearing the Appellant presented the Court with written submissions expounding on his grounds of appeal. The State through the learned State Counsel M/s Ing'ahizu opposed the Appeal. She stated that the complainant's age of five (5) years was confirmed by PW4 who examined her. And the evidence of PW2 was corroborated by that of PW1, PW2 and PW4. The medical evidence showed PW2 was bleeding and she was admitted for five (5) days. The Appellant had well been identified she said.

This is a 1st appeal and this Court is enjoined to re-consider and re-evaluate the evidence and come to its own conclusion bearing in mind the findings of the Court below. The Court is also alive to the fact that it did not see or hear the witnesses. Ref:

1. OKENO -V- REPUBLIC [1973] EA 32

2. SIMIYU & ANOTHER -V- REPUBLIC [2005]1 KLR 192

The case presenting itself from the evidence before the Court was that PW2 aged five (5) years was from her grandmother's home. She was carried on a bicycle by the Appellant. On their way the Appellant took her to the bush leaving the bicycle on the road. He removed her panty and ***"urinated"*** on her, and she felt pain as he did so. When he was through he placed her on the bicycle and took her home. She reported to her mother (PW1) and she was taken to hospital. PW1 testified that PW2 had visited the grandmother.

During the day on 4/3/2006, PW1's mother had sent the Appellant to PW1. PW1 in turn sent the Appellant to her mother asking her to release PW2 because the next day was a school day. Later in the evening the Appellant arrived carrying PW2 on his bicycle, and he dropped her with some bananas and left. PW4 a medical officer examined PW2 on 8/3/2007. He confirmed that there had been penetration into the girl's genitalia though the hymen was intact. The child was examined five (5) days after the offence. PW5 confirmed that the child was sent to hospital on 5/3/2007 the same day the Appellant was arrested. The Appellant gave an unsworn statement in his defence denying the charge. He said he was framed up.

The Appellant faced a charge of defilement contrary to section 8(1) as read with section 8 (2) of the Sexual Offences Act. The particulars indicate that the victim was aged five (5) years. Defilement of a victim under section 8 (2) of Sexual Offences Act calls for a sentence of life imprisonment.

It therefore becomes imperative for the Prosecution to first and foremost prove the age of the minor. In the present case there is no single witness who referred to the age of the minor. Her parents

PW1 and PW3 did not mention her age and neither did they produce any document to establish her age. Even PW2 did not know her age. PW4 filled the P3 to ascertain the injuries if any on PW2. He did not carry out any age assessment of this child.

Secondly the record shows that when PW1 and PW2 testified on 10/1/2008 the Appellant did not ask them any questions. And he applied for a date when he could cross-examine them. He also applied for witness statements. And the Court ordered that PW1 and PW2 be availed for further cross-examination and that the Appellant be supplied with witness statements (page 15). Thereafter the statements were supplied but PW1 and PW2 were never availed in Court for cross-examination as ordered. The Prosecution called three (3) more witnesses who testified and the Prosecution case was closed. Infact a look at the record shows the Appellant did not ask PW4 and PW5 any single question.

It is a requirement of procedure that an accused person is given an opportunity to cross-examine witnesses. An accused has also a right to recall and further cross-examine a witness/ witnesses.

PW1 and PW2 were crucial witnesses whose evidence was relied on by the Court to convict the Appellant. There are therefore two (2) defects noted by this Court.

1. The failure by the Prosecution to establish the age of the minor.

2. The failure by the learned trial Magistrate to follow the proper procedure in dealing with the evidence of witnesses as provided for under section 145 and 146 of the Evidence Act.

With the above findings I do not find it necessary to delve into the other grounds raised by the Appellant.

Following the above noted defects my finding is that the conviction by the learned trial Magistrate has been vitiated. The next issue for determination is whether to order for a retrial or not. In the case of ***NJENGA & ANOTHER -V- REPUBLIC [2006] 1 KLR 17*** – the Court of Appeal held;

"Where a conviction is vitiated by a gap in the evidence or other defects for which the Prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial Court for which the Prosecution is not to blame it does not follow that a retrial should be ordered. Each case depends on its own facts and circumstances but an order for retrial should only be made where the interests of justice require it".

And in ***OPICHO -V- REPUBLIC [2009] KLR 369*** the Court of Appeal held;

"In general a retrial would be ordered only when the original trial was illegal or defective. It would not be ordered where the conviction was 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 was vitiated by a mistake of the trial Court for which the Prosecution was 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 required it".

In the present case the conviction has been vitiated because of a mistake of the Court. Considering the nature of the offence and the fact that the Appellant has been behind bars since 12/3/2007 when he was first arraigned and 13/3/2009 since conviction, I do find that ordering a retrial would not be in the interest of justice.

I therefore allow the appeal, conviction is quashed and sentence set aside. The Appellant to be set free unless otherwise lawfully held under a separate warrant.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 23RD DAY OF MAY 2013.

H.I. ONG'UDI
J U D G E

In the presence of;

Mr. Miiri for State
Appellant
Njue – C/c