



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL APPEAL NO. 15 OF 2009**

**EMMANUEL MATEKA NABENDE .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**JUDGMENT**

The appellant was charged with the offence of rape contrary to Section 140 of the Penal Code in Count I and in the alternative to that count he was charged with the offence of indecent assault contrary to 144 (1) of the Penal Code. In Count II he was charged with the offence of stealing from person contrary to Section 279 (a) of the Penal Code. The offences, according to the particulars of the charge, were said to have been committed on 19<sup>th</sup> February, 2004 at Karura forest near old Muthaiga estate.

He denied the offences but after a full trial, he was convicted. Upon conviction the appellant was sentenced to 20 years imprisonment on Count I and in Count II 3 years imprisonment. There is no indication as to whether the sentences were to run either concurrently or consecutively. Aggrieved by the said conviction and sentence the appellant filed this appeal.

In his submission in court, he challenged the conviction on the basis that, the entire trial process was a nullity in that there was a crucial irregularity made in the cause of the trial following the amendment of the charge under Section 214 of the Criminal Procedure code.

It is his case that after the charge sheet was amended, and after the same was read over to him, his reply to the amended charge was not indicated and no plea was entered. Therefore, the provisions of Section 207 of the Criminal Procedure Code were violated and so were his fundamental rights under the constitution. It is further his position that the original or initial charge was rape contrary to Section 140 of the Penal Code while the amendment brought the offence under Section 3 (1) of the Sexual Offences Act No. 3 of 2006. In that regard, he was therefore entitled to the benefit of the least severe of the prescribed punishment as provided under Article 50 (2) (p) of the Constitution. On the foregoing grounds he prays that his appeal be allowed, conviction quashed and sentence set aside.

At the hearing of this appeal the learned counsel for the Republic conceded the appeal on the same ground raised by the appellant; that when the charged was amended, Section 214 of the Criminal Procedure Code was not complied with. That concession notwithstanding, the learned counsel for the Republic asked the court to invoke the provisions of Article 165 (6) (7) of the Constitution as read with Article 159 (2) (d). Having said so, it was his submission that an order for a retrial should be made because this will be in the best interests of justice, and that the appellant does not stand to suffer any prejudice. In any case, the appellant has not raised exculpatory issues except the technicality pointed out and that there was overwhelming evidence against him. The appellant opposed the request for a retrial as he has spent a considerable period in prison and asked for the sentence to be reduced.

It is true that the prosecution applied to amend the charge on 8<sup>th</sup> March, 2007. The learned trial magistrate allowed the application under Section 214 of the Criminal Procedure Code. However, there was a grave omission in that after such an amendment is allowed the court is supposed to call upon the accused person to plead to the altered or amended charge. This was not done although the record shows that it was read over and explained to the appellant in Kiswahili but his plea was not recorded. That omission vitiated the entire proceedings that followed.

That is not only the defect I have seen in the proceedings. The appellant was charged under Section 140 of the Penal Code for the offence said to have been committed on 19<sup>th</sup> February, 2004. As at the time the amendment was being sought by the prosecution, the Sexual Offences Act had come into operation and therefore the amended charge was brought under Section 3 (1) of the Sexual Offences Act No. 3 of 2006, yet the date of the offence remained 19<sup>th</sup> February, 2004.

There is no provision, neither can there be, in the Sexual Offences Act No. 3 of 2006 that it would operate retrospectively. There is the transitional provision in the First Schedule to the effect that, any proceedings commenced under any written law or part thereof repealed by this Act shall continue to their logical conclusion under those written laws. With respect therefore, the acceptance of the amended charge was misplaced and cannot be sustained under the said Act. The charge and proceedings against the appellant should have continued under Section 140 of the Penal Code. On those grounds I believe this appeal should be allowed.

I have considered the submission by the learned counsel for the Republic to order a retrial and the opposition raised by the appellant. A retrial would generally be ordered where the interests of justice dictate and where no prejudice shall be occasioned to the appellant. Other considerations are whether, the witnesses will be available during the retrial if ordered and whether, on the evidence adduced, a conviction would be sustainable.

The appellant herein was sentenced on 8<sup>th</sup> January, 2009. That is about 4 ½ years to date; which means he has spent less than a quarter of the sentence of 20 years imposed by the learned trial magistrate.

The offence of rape upon which the appellant was convicted is very serious and under Section 140 of the Penal Code, under which he was charged, one is liable to imprisonment with hard labour for life. The evidence adduced before the learned trial magistrate in my view was sufficient upon which a conviction would have been founded. It will not be in the interests of justice to acquit the appellant on a technicality because justice must look at both sides. Therefore the interests of justice shall be met if a retrial is ordered in this particular case.

In that regard therefore, this appeal is allowed, conviction quashed and sentences set aside. He shall be released from prison and escorted to Gigiri Police Station which originally handled the complaint and prepared the charge sheet so that a retrial can be initiated within 7 days of his release.

Orders accordingly.

***Dated, signed and delivered at Nairobi this 13<sup>th</sup> Day of June, 2013***

**A. MBOGHOLI MSAGHA**

**JUDGE**