REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 126 OF 2010

NAHASON NJUKI NJIRU.....APPELLANT

VERSUS

REPUBLIC .....PROSECUTOR

From original conviction and sentence in Criminal Case No. 1792 OF 2007 at the Chief Magistrate's Court at Embu by Hon. F.W. MACHARIA – SRM on 26/8/2010

J U D G M E N T

NAHASHON NJUKI NJIRU the Appellant was charged with the offence of defilement of a girl contrary to section 8(1) (3) of the Sexual Offences Act No.3 of 2006.

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

> **NAHASHON NJUKI NJIRU: On the 3rd day of July 2006 in Mbeere District within Eastern Province intentionally and lawfully had canal knowledge of DN a girl aged 6 years.**

He also faced an alternative charge of Indecent Act with a child contrary to section 11(1) of the Sexual Offences Act No.3 of 2006.

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

> **NAHASHON NJUKI NJIRU: On the 3rd day of July 2006 IN Mbeere District within Eastern Province committed an act of indecent with DN a girl aged 6 years by touching her private parts.**

The Appellant was aggrieved by the Judgment and filed this appeal raising the following grounds;

1. ***That the learned trial Magistrate erred in both law and fact by failing to give the Appellant the necessary documents to help him to prepare for his defence.***
2. ***That the learned trial Magistrate erred in both points of law and fact by failing to find the charge sheet was materially defective.***
3. ***That the learned trial Magistrate erred in both points of law and fact by failing to solve the vivid contradictions present in prosecution case in the Appellant's favour and yet they touched the core of the case.***
4. ***That the learned trial Magistrate erred in both points of law and fact by failing to consider the Appellant's defence.***
5. ***That the sentence imposed was manifestly harsh and excessive considering the circumstances***

of the case.

6. ***That the trial Court findings in the Judgment was not supported by evidence adduced thereof.***

When this appeal came before me for hearing the learned State Counsel conceded to the appeal citing the main ground of want of proof of age by the Prosecution. She therefore requested for an order for retrial. The Appellant had presented his written submissions to the Court. In response to the State Counsel's submissions the Appellant told the Court that he was first tried over the same offence and convicted by the Siakago Court. He appealed and the Embu High Court ordered for a retrial in the year 2007. I asked him to give the Court all the particulars in his possession and the file Embu HCCRA NO.2/07 was retrieved. The said appeal originated from Siakago Principal Magistrate's Criminal case number 1032/06 where the accused was NAHASHON NJUKI NJIRU.

The said accused had been charged with the offence of defilement of a girl contrary to section 145(1) of the Penal Code. The Particulars as stated in the charge sheet were as follows;

> **<u>NAHASHON NJUKI NJIRU</u>: On the 3rd day of July 2006 in Mbeere District within Eastern Province intentionally and lawfully had canal knowledge of DN a girl aged fourteen years.**

He also faced an alternative charge of Indecent assault on female contrary to section 144(1) of the Penal Code.

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

> **<u>NAHASHON NJUKI NJIRU</u>: On the 3rd day of July 2006 in Mbeere District within Eastern Province indecently assaulted DN by touching her private parts (vagina).**

I take note of the fact that the complainant DN was said to be aged fourteen (14) years. Justice Khaminwa in Embu HCRA NO.2/07 allowed the appeal on the main count and ordered for a retrial on the alternative count only before the Chief Magistrate Embu. The reason for the State conceding the appeal was the issue of the complainant's age. The retrial order gave rise to Chief Magistrate's Criminal case number 1792/07 the subject of this appeal. Apparently the Appellant faced the same charges including the one which was not in the retrial order. The same issue of age is cropping up in this one. The accused and complainant in both the Siakago and the Embu Criminal cases are the same i.e. Nahashon Njuki Njiru (as accused) and DN (as complainant). There is however a contrast in the age of the complainant. In the Siakago Criminal Case D was aged fourteen (14) years. However in the Embu Criminal Case she is aged six (6) years.

It is clear from the record now that the Appellant was first convicted on 14/12/2006 after a full trial. He was again convicted of the same offence on 26/8/2010 after a full trial. The Appellant has been in Prison since the year 2006. It is established from the records that in both criminal cases the age of the complainant was never established. In one the charge sheet shows she was fourteen (14) years while the other shows she was six (6) years. Would it be just to subject the Appellant to another retrial?

The Court of Appeal in the case of ***EKIMAT –V- REPUBLIC [2005]1 KLR 182*** had this to say on a retrial;

> ***"A retrial should not be ordered unless the Court is of the opinion that on a consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on its particular facts and circumstances but an order for the retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to an accused person".***

And in ***OTIENO –V- REPUBLIC [2006] 1 KLR 241*** the Court of Appeal stated as follows;

> ***"In ordinary circumstances, where a trial was unsatisfactory, a retrial would be ordered.***

However, in the circumstances of this case, the long lapse of time (five years) since the conclusion of the Appellant's trial militated against such a course of action".

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

In general a retrial would be ordered only when the original trial was illegal or defective. It would not be ordered where the convictions 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 when 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.

It is therefore clear that the Court should not use a retrial to assist the Prosecution fill gaps in their evidence. In this case the Appellant has been retried before and the same mistake has been repeated. Subjecting him to another retrial would be infringing on his rights to a fair and speedy trial. I don't think this Court would be serving any interest of justice by making such an order.

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

DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 8TH DAY OF AUGUST 2013.

H.I. ONG'UDI

J U D G E

In the presence of;

Ingahizu for State

Appellant

Kirong – C/c