REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 185 OF 2009

STANLEY MWANIKI ……..... APPELLANT

VERSUS

REPUBLIC .....PROSECUTOR

From original conviction and sentence in Criminal Case No. 301 of 2007 at the Chief Magistrate's Court at Embu by Hon. L.K. MUTAI – PM on 15/09/2009

R U L I N G

STANLEY MWANIKI the Appellant herein was charged with the offence of Defilement of a child contrary to section 8(i) (3) of the sexual Offences Amendment Act 3 of 2006.

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

STANLEY MWANIKI: On the month of August 2006 Embu District within Eastern Province, intentionally and unlawfully had sexual intercourse with DM a minor aged 14 years.

The Appellant had pleaded not guilty and the case proceeded to full hearing and the Appellant was convicted and sentenced to twenty (20) years imprisonment. He was aggrieved by the Judgment and filed this appeal raising the following grounds;

1. ***The trial Magistrate failed to consider the fact that the Appellant pleaded not guilty to the charge.***
2. ***The trial Magistrate erred in law and order when he failed to consider the fact that the Appellant's constitutional rights were violated when he was kept in police custody for seventy two (72) hours before being taken for plea.***
3. ***The trial Magistrate erred in law and order when he failed to consider the fact that the Prosecution failed to give dates and time of the alleged offence.***
4. ***The trial Magistrate failed to consider the fact that the arresting officers never wrote any statements nor did they testify during the trial.***
5. ***The trial Magistrate erred in law and order when he failed to consider the fact that the Appellant's DNA test was done without following due process of the law in that;***

a. ***There was no Court order to that effect.***
b. ***It took a year for the results to be out instead of the three (3) months he was promised***
c. ***The lawyer did not witness test thus his signature was not appended on the results.***
d. ***The blood sample was taken to the testing doctor without his presence or his lawyer.***
e. ***The FIDA association did not sign the report.***
f. ***The trial Magistrate did not give adequate reasons as to why his defence was rejected.***

The appeal first came for hearing on the 6th June 2013. On this date the learned State Counsel Mr. Wanyonyi informed the Court that he was not ready to proceed as the record served on him did not contain a copy of the Judgment. I took time to go through the Court record and the original lower Court file but was unable to trace any Judgment (whether typed or handwritten). The Deputy Registrar/Chief Magistrate was directed to avail a copy of the typed or handwritten Judgment. On 20/6/2013 she reported that the Judgment was never typed in the first place as it was never in the original file. However the typist did not inform the Chief Magistrate of the missing Judgment. Even the officers who prepared the records and the table of contents misled the Court into believing that the record was complete with the Judgment at page 51-52 of the record.

Mr. Momanyi who appeared for the Appellant in the lower Court did confirm to this Court on 20/6/2013 that indeed the learned trial Magistrate delivered the Judgment in this case. The State was given time to liase with the DCIO/OCS concerned about the availability of the police file and witnesses. After all efforts had been put in place, the State through learned State Counsel M/s Ingahizu reported that the OCS was unable to trace the police file and they would therefore not be able to trace witnesses.

This is a clear case of interference of the Court process to benefit an individual. This case is a peculiar one because the original file is available with all the Court proceedings (hand written and typed). It is only the Judgment that is missing.

In the case of ***MWANGI –V- REPUBLIC [2005]1 KLR 495*** it was held thus;

1. ***Loss of files does not mean that an acquittal would automatically follow***
2. ***The circumstances of this case were exceptional***

In an earlier case of ***PIUS MUKABE MULEWA & ANOTHER –V- REPUBLIC CRIMIAL APPEAL NO.103/01 (UNREPORTED) THE COURT OF APPEAL*** had stated thus;

What we can take from Zaver's case is that the Courts must try to hold the scales of justice and in doing so must consider all the circumstances under which the loss has occurred. Who stands to gain from the loss? It is merely a coincidence that both the Magistrate's file and that of the police are lost? Does the available evidence point to anyone as being responsible for the loss? And if so, can such a party be allowed to benefit from a situation of his own making? In the final analysis, the question to be answered must be whether the order proposed to be made is the one which serves the best interest of justice. We reject any proposition that in cases where a file has disappeared, and it is not reasonable feasible to order a retrial an acquittal must follow as a matter of course. After all person who has been tried or has pleaded guilty before a Court has lost the benefit of the presumption of innocence give to him by section 77(2) of the Constitution and on appeal the burden is on him to show that the Court which convicted him did so in error. The loss of the file may deprive him of the ability to discharge the burden, but it by no means follow that he must of necessity be treated as innocent and automatically acquitted. The interest of justice as a whole must be considered".

Had the typist and the officers in the High Court Criminal Registry acted diligently this omission would have been arrested on time as the learned trial Magistrate was still in the Station. Where this matter has reached the said learned trial Magistrate cannot be asked to rewrite her Judgment. Considering the evidence on record including the fact that the DNA results showed the Appellant as the father of the child born to the complainant as a result of the defilement, I would not have hesitated to order for a retrial. However the relevant police file is also said to be missing. What a coincidence that the Judgment and the police file are both missing? The Appellant was convicted and sentenced on 15/9/2009. It's not even clear when the Judgment was delivered. He has been in Prison for four (4) years. I can't order for a retrial because of the missing police file, and the unavailability of witnesses. Secondly the age of the complainant though stated as 14 years was never proved by any documentary evidence. The complainant was a friend to the Appellant's daughter and she says the Appellant had sex with her on three different occasions and she never told his daughter or anybody else. It only came to be known when other girls noticed that she was pregnant. That's when she realized there was a problem. It was important that her age be assessed. It wasn't.

Without a copy of the Judgment appealed against I cant proceed further. I hereby quash the conviction and set aside the sentence of twenty (20) years. The complainant is however at liberty to follow up the matter with the relevant authorities on the strength of the DNA results. A certified copy of the DNA results may be obtained from the Court. The Appellant to be released unless otherwise lawfully held under a separate warrant.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 24TH DAY OF SEPTEMBER 2013.

H.I. ONG'UDI

J U D G E

In the presence of;

M/s Ing'ahizu for State

Appellant

Njue – C/c