REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 179 OF 2007

SIMON KIATHE MUREITHI.....APPLICANT

VS

REPUBLIC.....RESPONDENT

JUDGMENT

INTRODUCTION

The Charge

[1] The Appellant was charged with attempted defilement contrary to section 9(1) and (2) of the Sexual Offences Act. He was also charged with the offence of committing an indecent act with a child contrary to section 1(1) of the sexual Offences Act. On 23/1/2006 at [particulars withheld] in Meru Central District within Eastern Province he attempted to defile J K child aged 16 years. The charge for which he was convicted was a substitution for the earlier charge of attempted defilement under section 146 of the Penal Code.

[2] The Appellant was tried and the court convicted him for attempted rape under Section 4 of the Sexual Offences Act. Consequently, he was sentenced to 15 years imprisonment. The conviction and sentence aggrieved the Appellant and he filed this appeal.

THE APPEAL

Arguments by the Appellant

[3] The Appellant through his counsel Mr. Riungu filed a Supplementary Petition of Appeal and withdrew the earlier Petition of appeal filed by the Appellant. He argued the grounds in the Supplementary Petition of Appeal which carries three significant grounds. Ground 1 and 2 are related to and impugn the judgment of the trial court for convicting and sentencing the Appellant on an illegal charge. The argument put forward is that, at the time of the commission of the offence herein (i.e. 31/3/2006), the Sexual Offences Act had not come into force. Sexual offences Act come into force on 21/7/2006. That is why the Appellant had been charged under is Section 146 of the Penal Code which was the law applicable then. The prosecution committed fatal errors substituting the Penal Code provision and offences for those in the Sexual Offences Act. On that ground alone, the counsel argued, the court should quash the conviction and set aside the sentence.

Prosecution Concede Appeal

[4] M/S Mwangi, counsel for the Respondent conceded the appeal for the reasons advanced by

the Appellant's counsel. She gave a further reason of her conceding the appeal; that the age of the complainant was not ascertained at all as required by law. She concluded that the charge was defective, thus, the conviction should be quashed and the sentence set aside.

COURT'S RENDITION

[5] PW1 and PW4 clearly identified the Appellant as the person who attempted to defile the victim herein. The victim was mentally challenged since birth and is not able to speak intelligibly or understand anything she does or is taking place around her. She was examined on 5/4/2006 by the Doctor K.S Njuguna, a Consultant Psychiatrist, and found her to have mental retardation. This is the person the Appellant abused.

[6] The evidence of PW1 and PW4 was clear on the circumstance of the offence, for they witnessed the unlawful act on the victim PW2. They told the trial court that they found the Appellant on his knees and had already pushed the victims dress and petticoat up towards the chest in readiness to commit unlawful sexual assault on the victim. PW1 hit the Appellant on his back. The complainant fled only to be arrested later. PW1 chased after the complainant up to the market where he hid.

[7] PW4 also witnessed the unlawful act by the Appellant on the victim. She is one of the persons who were in the company of the victim when the Appellant went to their home. She positively identified the Appellant as she knew him.

[8] The evidence was overwhelming and there is no doubt that the Appellant attempted unlawful sexual act on the victim. But a sad lapse in this case changed everything; took justice away from the victim and society as a whole. The sad lapse is in the charging of the Appellant under a new law that did not apply to the offence. The prosecution had initially charged the Appellant under the correct law- the Penal Code. But in unexplained turn of things, the charge under the Penal Code was substituted for offences under the Sexual Offences Act. The sexual offences Act had not come into force at the time of the commission of the offence and, therefore, did not apply. There is no expectation whatsoever that a person should be charged under a law which was not in force at the time of the commission of the offence unless there is a sort of saving of the offences in the repealed law. This emanates from the principle of legality that all laws should be prospective-forward looking. But it must be understood that the laws does not prohibit prosecution or continuation with prosecution of acts which were offences which were offences under the repealed law or constituted liability that had already attached in law before the passage of the new law. The saving could be done under a general provision or by a specific provision in the superseding law. In Kenya, Section 23 of the Interpretation and General Provisions Act provides that the repealing law does not affect liability that had accrued under the repealed law or legal proceedings that had been instituted or prevent institution of proceedings on such liability or obligation that had accrued under the repealed law. What is more comforting is that Section 48 of the Sexual Offences Act clearly incorporated application of the transitional provisions in the FIRST SCHEDULE to the Act. Regulation 3 of the FIRST SCHEDULE provides;

> *3.* ***Any proceedings commenced under any written law or part thereof repealed by this act shall continue to their logical conclusion under those written laws.***

[9] There was sufficient legal guide and direction when the trial court was confronted with this scenario and I do not understand why the prosecution substituted the original charge sheet which was properly before court. The trial court should also have discerned the law on the matter before allowing substitution of charges. The legality of the substituted charge sheet should have been questioned by the trial court as that is its work.

[10] In the entire Judgment by the trial Court, it is quite visible that there were legal difficulties in justifying the position the trial court took in convicting the Appellant for attempted rape.

[11] Another lapse; the trial court did not enforce or follow through its own orders of 3/3/06 that;

> *"**The complainant to be taken for [an] age assessment as she looks older than 16 years of age. A medical report on her mental capacity to be presented before further directions are given"***

The medical report on the mental status was prepared and filed but that on age assessment was never filed or followed through by the trial court. Full enforcement of that order was necessary to establish the age or the victim by the trial court as age was already in doubt. All the difficulties the trial court found itself in its attempt to settle on a lesser of appropriate offence of attempted rape would have been cured long, if, it had been keen on the law. These lapses obscured the charge and vitiated the conviction that ensued.

FINDINGS AND ORDERS

[12] This would have been a perfect case for a retrial to be ordered. Except, the question that lingers is; on what charge shall the retrial be ordered? The charges as framed were illegal. The charge sheet was defective. In the circumstances, this court is unable to order a retrial. With great trepidation, I note the victim is a vulnerable person who would need protection by State Organs including the court. But with a heavy heart, I reluctantly find only one action line; quash the conviction and set aside the sentence. Accordingly, I quash the conviction and set aside the sentence meted out herein. The Appellant shall be set to liberty forthwith unless lawfully held in custody.

Dated, signed and delivered in open court at Meru this 22nd day of October, 2013

F. GIKONYO

JUDGE