REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 8 OF 2012

J G M .... APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(APPEAL ARISING FROM THE JUDGMENT OF THE PRINCIPAL MAGISTRATE'S COURT AT BARICHO (E.H. KEAGO – P.M) IN CRIMINAL CASE NO. 326 OF 2012 DELIVERED ON 15TH

OCTOBER, 2012)

JUDGMENT

The appellant herein was convicted for the offence of attempted incest contrary to ***Section 20 (2) of the Sexual Offences Act*** and sentenced to ten (10) years imprisonment by the Principal Magistrate at Baricho Court (E.H. KEAGO) on 15th October 2012.

He has now filed this appeal against both sentence and conviction raising seven (7) grounds as per his appeal. He also submitted written submissions when he appeared before me to argue the appeal on 18th October 2013.

Mr. Omayo for the State opposes the appeal arguing that the appeal was on good evidence.

Being a first appellate Court, I have considered the evidence afresh in order to draw my own conclusion while bearing in mind that the trial Court had the advantage of seeing and hearing the witnesses testify.

The first ground of appeal is that the appellant was not issued with witnesses statements so he was not prepared for trial. ***Article 50 (1) (J) of the Constitution*** stipulates that an accused should be provided with the evidence that the prosecution seeks to rely upon. It is equally the responsibility of an accused to inform the trial Court that he has not been supplied with such statements by the prosecution so that the magistrate can make appropriate orders. The record does not show that the appellant made any such request to the trial Court and that the same was refused. That ground of appeal lacks merit and I reject it.

The other ground is that he was convicted on the evidence of a single witness. It is true that the only eye witness to the crime was the complainant. However, ***Section 124 of the Evidence Act*** has the following provisal:-

"***Provided that where in a Criminal Case involving a sexual offence the only evidence is that of the alleged victim of the offence, the Court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the Court is satisfied that the alleged victim is telling the truth"***

The above provisal to ***Section 124 of the Evidence Act*** was introduced by ***Legal Notice No. 5 of 2003*** which was in itself a reaction to the case of ***MUKUNGU VS REPUBLIC 2002 2 K.L.R 482*** where it was held, inter alia, that the requirement for corroboration in sexual offences affecting women and girls was unconstitutional to the extent that that requirement was against them as women or girls and was therefore an infringement of ***Section 82 of the then Constitution of Kenya.*** It is now settled that Courts will no longer be humstrung by requirements of corroboration in sexual offences even in the case of children so long as the Court is satisfied that the victim is truthful. In this case now before me, the trial magistrate was satisfied that the complainant gave "***strong evidence***". It is not clear to me whether "***strong evidence"*** amounts to the same thing as a Court being satisfied that the victim was "***telling the truth".*** To my mind, ***Section 124 of the Evidence Act*** can only be complied with if the "***reasons***" are "***recorded in the proceedings"*** indicating that the "***Court is satisfied that the alleged victim is telling the truth"***. I am of the view that there was no compliance with ***Section 124 of the Evidence Act*** which vitiated the trial.

The other ground is that the trial magistrate erred in law and in fact by failing to advise the appellant on the procedure of the case. There is merit in this ground of appeal. From the record, the proceedings of 13th August 2012 indicate that after the prosecution had closed it's case, the trial magistrate stated as follows:-

"***COURT: Section 211 of the Criminal Procedure Code explained to the accused who opts to give un-sworn testimony no witness to call***"

Clearly, there was no compliance with the provisions of ***Section 211 of the Criminal Procedure Code*** in the circumstances of this case. Even though the magistrate recorded that the provisions had been "***explained to the accused***", there is no record of what the accused said in response. The magistrate himself recorded that the accused opted to give un-sworn testimony and call no witness. The proper procedure is that once the Court has explained to the accused his rights under ***Section 211 Criminal Procedure Code***, the trial magistrate should then go further and record what the accused himself stated as to whether he will give sworn or un-sworn evidence or whether he will be calling any witness or if he will require summons for the witness etc. Indeed all that the accused wishes to state in the preparation of his defence must be recorded at the stage and it is clear from ***Section 211 (2) of the Criminal Procedure Code*** that it is the accused, not even his advocate, who shall address the Court. In this case, the accused was not represented by counsel and thus the main reason why his rights under ***Section 211 Criminal Procedure Code*** ought to have been explained to him and his responses recorded. His complaint therefore that:-

"The learned trial magistrate erred in law and in fact by failing to advise me on the procedure of this case"

appears to be well merited and borne out of the record.

The other ground of appeal is as follows:-

"The learned trial magistrate erred in law and in fact by forcing me to proceed with the hearing of the case in a language am not conversant with. I am illiterate and I can only speak my mother tongue"

I have perused the record herein and apart from the proceedings of 2nd April 2012 when the record shows that an interpreter by the name John was present and the interpretation was in English/Kikuyu, the subsequent proceedings do not indicate what language was being interpreted. For instance, the trial commenced on 16th July 2012 and the record for that day reads as follows:-

"***16/07/2012***

Before Hon. E.H. Keago P.M.

Prosecutor C.I. Rose

C.C Naomi

Accused present

Court: Matter to proceed for hearing with 3 witnesses present"

There is no mention of what language, if any Naomi was interpreting. All the three witnesses testified on that day and when the case came up for further hearing on 13th August 2012, the prosecution closed it's case. ***Article 50 (2) (m) of the Constitution*** provides as follows:-

"***Every accused person has the right to a fair trial which includes the right – to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial"***

And ***Section 198 (1) of the Criminal Procedure Code*** provides as follows:-

"***Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open Court in a language which he understands"***

There was no compliance with either of the two Statutory provisions.The magistrate made no note of the language into which the evidence of the witnesses was being interpreted. The record shows that apart from the complainant who spoke in Kikuyu, there is no indication of what language CHRISTOPHER WAHOME (PW2) or CORPORAL CATHERINE MIGWI (PW3) spoke and whether it was infact interpreted to the appellant. The practice of recording the name of the interpreter and the languages of the interpretation have been standard procedures in our Courts for a long time bearing in mind that many litigants particularly in rural Courts are not conversant with either Swahili or English languages. In the circumstances of this case where the language used by the Court was not recorded, this Court is entitled to make a finding that the appellant was unable to follow the proceedings.

The up-shot of the above is that clearly, this conviction is unsafe and must be interfered with and I accordingly allow the appeal and quash the conviction.

I have considered whether or not to order a retrial in this case. The principles governing whether or not a retrial should be ordered were ennunciated in ***FATEHALI MANJI VS REPUBLIC 1966 E.A 343*** where at ***page 344*** Sir Clement De Lestang the then acting President of the Court of Appeal stated the following:-

"***In general, a retrial will be ordered only when the original retrial was illegal or defective: it will not be ordered where the conviction is set aside because of insufficiency of evidence or for purposes of enabling the prosecution to fill up gaps in it's evidence at the first trial; even where a conviction is vitiated by a mistake of the trial Court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on it's particular facts and circumstances and an order for re-trial should only be made where the interests of justice require it and should not be ordered where it is likely to cause injustice to the accused person"***

Further, in ***MWANGI VS REPUBLIC 1983 K.L.R 522 at page 538***, the Court of Appeal held that:-

"We are aware that a retrial should not be ordered unless the appellate Court is of the opinion that on a proper consideration of the admissible or potentially admissible evidence, a conviction might result"

In the circumstances of this case, the charge facing the appellant is quite serious and the events giving rise to it occurred in March 2012 which is not long ago and he was only convicted on 15th October 2012. Memories are still fresh and the prosecution should have no difficulties in mounting a retrial within a reasonable time. The appellant will not be prejudiced as this is not an old case and he will now have the benefit of an interpreter to assist him during the trial. Considering all the above, I am persuaded that the best course to take in this case is to order a retrial.

I accordingly order that the appellant be produced before the Principal Magistrate's Court at Baricho on 2nd December 2013 where his re-retrial will be conducted by any other magistrate other than E.H. Keago.

B.N. OLAO

JUDGE

28TH NOVEMBER, 2013

28/11/2013

Coram

B.N. Olao – Judge

CC – Muriithi

Appellant – present

Mr. Sitati State Counsel – present

Language – English/Kiswahili

COURT: Judgment delivered this 28th day of November 2013 in open Court.

Mr. Sitati State Counsel present

Mr. Muriithi Court clerk present

Appellant in person present

Right of appeal explained.

B.N. OLAO

JUDGE

28TH NOVEMBER, 2013