



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
CRIMINAL APPEAL NO. 5 OF 2013

VINCENT CHERUIYOT LANGAT.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence made by the learned Principal magistrate at Kericho court (Hon. J. Ndururi) in Kericho Chief Magistrate's court criminal (S.O) case No.9 of 2012 on 15/02/2013)

JUDGMENT

VINCENT CHERUIYOT LANG'AT, the Appellant herein was tried and convicted for the offence of defilement contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act No.3 of 2006**. He was thereafter sentenced to life imprisonment. Through the law firm of W.K.Ngenoh Lessan & Co. Advocates the appellant filed this appeal in which he put forward the following grounds:

- 1.That the learned trial Magistrate erred in law and fact by convicting the Appellant herein on a charge whose particulars were fatally defective.**
- 2.That the learned trial Magistrate erred in law and fact by convicting the Appellant on defective proceedings.**
- 3.That the learned trial Magistrate erred in law and fact by convicting the Appellant on a language he could not understand.**
- 4.That the learned trial Magistrate misdirected himself in law and fact by convicting the appellant in analyzing the evidence on record hence arriving at a wrong decision in law.**
- 5.That the learned trial Magistrate erred in law and fact by failing to reconcile material discrepancies contradictions in the prosecution case hence causing injustice to the appellant.**
- 6.That the learned trial Magistrate erred in law and fact by failing to taking into consideration the time of the alleged offence and the age of the Appellant in arriving at sentencing.**

When the appeal came up for hearing, Miss. Muthee, learned State counsel opposed the appeal.

The case that was before the trial court was short and straightforward. The prosecution's case is that the appellant, a neighbour to the victim's home, is said to have visited that home on the material day whereupon he defiled the victim who was alone. It is alleged the appellant defiled the child inside her home and then disappeared to an unknown place until he was arrested on 27th January, 2012. When placed on his defence, the appellant denied the offence and relied on the defence of alibi. He claimed he had gone to visit his grandfather's home in Kuresoi. The victim, D C told the trial court that on 16th September 2011, she was at home playing with other children. Later, the appellant appeared when she was alone, her mother having left home. She stated that the appellant got hold of her and dragged her into her home where he defiled her. The child screamed but the appellant used his hand to cover her mouth. When her mother arrived, the complainant told her what happened to her. She reported the incident to the area Assistant Chief and then to Kipkelion Police Station. The child was taken to Kipkelion hospital where she was examined and treated.

When the appeal came up for hearing, Mr. Ngenoh learned advocate for the appellant abandoned grounds 1,2, and 6 of the Petition of Appeal. The main ground argued on appeal is to the effect that the trial court shifted the burden of proof. Miss. Muthee, concurred with the appellant on this ground. She urged this court to order for a retrial. I have considered the rival submissions and I think this ground alone is sufficient to dispose of this appeal. In page 7 of his Judgment, Hon. Ndururi, learned Principal Magistrate stated as follows:

“The accused person did not bear a duty to prove his alibi. However, in view of the overwhelming evidence against him, he ought to have called some other witnesses to corroborate the alibi.”

It is clear that the learned Principal Magistrate erred in making the above assertion. He basically shifted the burden of proof to the appellant. The appellant was only required to set up the defence of alibi and the prosecution is enjoined to displace or disprove the same. The appellant's defence was therefore improperly rejected. The appeal must succeed on this ground alone. Miss. Muthee, has urged this court to make an order for retrial. Mr. Ngenoh, was not opposed to such an order being made. One of the cardinal principles which must manifest itself first before making the order is that the court must be satisfied that the evidence on a proper consideration *prima facie* should sustain a conviction. I am convinced *prima facie* that there is sufficient evidence capable of sustaining a conviction hence the order for retrial should be made.

In the end, this appeal is allowed. The conviction is quashed and the sentence ordered is set aside. The appellant to be held in custody pending his retrial. The file should be placed before the Chief Magistrate's Court presided over by another Magistrate of competent jurisdiction other than Hon. Ndururi on 26th November, 2013 for mention for further orders and directions on re-trial which should in any case be given priority.

Dated, Signed and delivered this 22nd day of November, 2013

J.K.SERGON

JUDGE