



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 590 OF 2009

ISSACK RASHIDAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 1223 of 2008 in the Chief Magistrate's Court

at Kibera – Mr. Karanja (RM) on 23rd December 2009)

JUDGMENT

1. **Issack Rashid**, the appellant herein was convicted for the offence of defilement contrary to **Section 8 (1)** as read with **Section 8(3)** of the **Sexual Offences Act No. 3 of 2006**, in **Kibera Chief Magistrate Cr. 1223 of 2008**. Particulars of the offence were that on 11th day of May 2008 at Kawangware within Nairobi, he unlawfully committed an act by causing his genital organ (penis), to penetrate into the genital organ (vagina) of J.N. (identity concealed on account of her being a minor) a girl aged 13 years.
2. In the alternative the applicant had been charged with engaging in an indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. The particulars were that on the date stated above the appellant committed the offence by touching the complainant's genital organ (vagina).
3. Upon conviction the appellant was sentenced to twenty (20) years imprisonment. Being aggrieved, the appellant lodged an appeal against conviction and sentence on grounds that the provisions of **Section 200(3)** of the **Criminal Procedure Code** were not duly complied with; that the evidence was incredible; that **Section 77** of the **Evidence Act Cap 80 laws of Kenya**, was contravened and that his defence was dismissed without consideration.
4. Miss Ndombi, learned state counsel conceded the appeal and stated that indeed, there was a procedural technicality because **Section 200(3)** of the **Penal Code** was not complied with. That the appellant was sentenced to 20 years imprisonment for the offence of defilement. She therefore

- urged the court to order for a retrial since the two main witnesses, the doctor and the complainant can be traced.
5. After a careful re-evaluation of the evidence on record I agree that this appeal must succeed on two grounds. First, the record shows that the appellant was tried by three magistrates. Hon Wanjala began the trial and took the evidence of **PW1** on 22nd September 2008.
 6. Hon. Odero, Chief Magistrate (as she then was), took over the case on 18th December 2008 for reasons that are not apparent in the record. She however, did not record the evidence of any of the witnesses. Hon Karanja, Senior Resident Magistrate took over the case on 7th July 2009, when Hon Odero was elevated to the High Court and heard it to completion.
 7. It is not evident in the record that any of the two subsequent magistrates explained the appellant's rights under **Section 200(3) Criminal Procedure Code** to him. This alone is fatal to the prosecution case and Miss Ndombi was wise to concede the appeal.
 8. The interests of justice however, require that an accused person should be given a fair hearing. If found to be innocent they should be released and if found to be guilty they should receive the punishment prescribed by law. I therefore re-evaluated the evidence to determine whether the evidence adduced before the trial court was sufficient and cogent enough to warrant an order for retrial as submitted by Miss Ndombi.
 9. The case before me rested on the evidence of a single identifying witness who was a minor. It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness. See the decision of the Court of Appeal in **Ogeto v Republic [2004] 2KLR pg. 14.**
 10. I am alive to the fact that the evidence of a victim alone would be sufficient to found a conviction in a case arising out of a sexual offence. The proviso to **Section 124** of the **Evidence Act** provides as follows:

....“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.”
 11. It would therefore have been quite proper for the court to convict on the evidence of the minor alone if her evidence was creditworthy. In her evidence however, I note that she was quite reluctant to explain what happened to her. Her entire testimony in chief did not mention anything that might have happened to her while in the appellant's house. In fact, she did state that the appellant did not do anything wrong when she was in his house.
 12. Second, the medical evidence showed that the minor was three weeks pregnant at the time of the appellant's arrest some two days after the alleged defilement. The testimony of **PW2**, the minor's mother was that she refused to state who made her pregnant. There is a real possibility that there is a different person who had been defiling the minor to the extent of impregnating her, and who is not the appellant.
 13. The issue for determination by this Court is whether a retrial of the appellant should be ordered. The principles governing whether or not a retrial should be ordered were enunciated in **Fatehali Manji -versus- Republic [1966] EA 343**, wherein Sir Clement De Lestang, the then acting President of the Court of Appeal stated at page 344 that:

“In general, a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill up gaps in its 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 its particular facts and circumstances and an order for retrial 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.”

Applying the above principles to this case, I am satisfied that the evidence is insufficient to warrant this court to order the re-trial of the appellant.

14. In view of the foregoing reasons, I find that this appeal has merit and is allowed. I quash the conviction, set aside sentence and order that the appellant be set at liberty forthwith unless otherwise lawfully held.

SIGNED DATED and DELIVERED in open court this **18th** day of **December 2013**.

.....

L. A. ACHODE

JUDGE