



**THE REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**CRIMINAL APPEAL NUMBER 215 OF 2009**

**MWANGI NDEREVA..... APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

**(Being an appeal against conviction and sentence in Cr. Case No.1162 of 2009 by the Hon. Kimemia Resident Magistrate, in Kitui delivered on 4<sup>th</sup> December, 2009)**

**JUDGMENT**

The appellant, was on 14<sup>th</sup> October, 2009 arraigned before the Principal Magistrate's court in Kitui on one count of defilement contrary to section 8(1) (3) of the Sexual offences Act. It was alleged that on 7<sup>th</sup> September, 2009 at about 8 p.m. in Kitui District of the Eastern Province, he intentionally and unlawfully penetrated T.W a girl aged 13 years.

In the alternative, the appellant was charged with Indecent Act contrary to Section 11(1) of the Sexual Offences Act in that on the same day and place, he willingly and unlawfully had an act of indecency of T.W, a girl aged 13 years by touching her private parts namely vagina.

The appellant pleaded guilty on the main count. Accordingly, a plea of guilty was entered against him. The facts were subsequently led by the prosecutor and on being asked whether the facts were correct, he replied in the affirmative whereupon he was convicted on his own plea of guilty. The appellant

was then allowed to mitigate. In the course of his mitigation he stated that he was drunk when he committed the crime. On that basis, the learned magistrate changed the plea to one of not guilty and rightly so in my view.

The case was then set down for hearing. On 1<sup>st</sup> December, 2009 when the case came up for hearing and the appellant was reminded of the charges, he again admitted the offence. Facts were once more led and he admitted the same. Once again, he was convicted on his own plea of guilty. In mitigation the appellant again raised the issue of being drunk when he allegedly committed the act. Unlike the previous magistrate who entered a plea of not guilty, the magistrate who handled the plea this time around did not see it that way. She promptly sentenced the appellant to twenty (20) years imprisonment.

Aggrieved by the conviction and sentence, the appellant lodged the instant appeal, limited to sentence only. In the grounds of appeal, the appellant claims that he pleaded guilty to the charge, he was remorseful and prayed for court's leniency, that he was under intoxication and influence of alcohol when he committed the crime. He had otherwise reformed, was remorseful and ready to live a moral life after acquiring theological studies, guiding and counseling and peer education.

When the appeal came up for hearing before me on 15<sup>th</sup> February, 2012 the appellant elected to canvass the same by way of written submissions. I have carefully read and considered them.

On her part, **Mrs. Gakobo**, learned Senior State counsel opposed the appeal stating that the plea was equivocal. The plea was properly taken. Accordingly, the conviction should be upheld. The sentence of 20 years was the minimum provided for under the Act. The sentence should therefore be upheld.

Having gone through the record of the trial court, I cannot agree with the learned State counsel that the appellant's guilty plea was properly taken. It was not unequivocal. Accused person reserves the right to change his plea after conviction and before sentence is passed or imposed on him. In this case, when mitigating, the appellant stated that he was under influence of alcohol when he committed the offence. That aspect of mitigation should have put the trial court on red alert. Clearly the appellant was raising a defence of intoxication. The trial court should have stopped there and then entered a plea of not guilty so that the case could proceed to hearing in the normal manner. In refusing to take that route as the previous magistrate had, the trial court gravely erred. The conviction of the appellant in those circumstances cannot be allowed to stand.

Even though the appellant had only appealed on sentence, this court as the first appellate court has jurisdiction to examine the trial court's record so as to be satisfied that the conviction and sentence was proper and in accordance with law. Since the conviction was not entered in accordance with the guidelines set out in the celebrated case of **Adan Vs. Republic (1973) EA. 443**, it follows automatically that the sentence imposed cannot be sustained.

Should I then order a retrial? The discretion of the appellate court to order one, ought or should be exercised with great care. The exercise is not done randomly but is grounded on well formulated

principles. In general, a retrial will not be ordered when the original trial was illegal or defective. Each case must however, depend on its own facts and circumstances and the order for retrial should only be made where the interests of justice require it. It will not be given for purposes of enabling the prosecution to fill up the gaps in its evidence at the first trial. It may also be ordered where the evidence on record if presented at the retrial may lead to the conviction of the appellant see **Fatehali Manji Vs. Republic (1969) E.A. 433** and on **M'Kanake Vs. Republic (1973) E.A. 67**.

In this case, I note that the appellant was allegedly convicted on his plea of guilty. That was on 4<sup>th</sup> December, 2009. He was thereafter sentenced to 20 years imprisonment. So far he has only served 3 years of the term. If an order of retrial is made, I do not think that the appellant would be prejudiced at all since he has not served substantial portion of the sentence. The omission leading to quashing of the proceedings before the trial court was occasioned by the court itself as opposed to the prosecution. To my mind, justice will be better served for both the appellant and the complainant if a retrial is ordered. This is a case involving relatives. So getting witnesses to testify at the retrial will not be a problem.

In the premises, I allow the appeal, quash the conviction and set aside the sentence imposed. However, the appellant shall undergo a retrial on the self-same charges in the same court but before another magistrate of competent jurisdiction other than **B. M. Kimemia**, Resident Magistrate, who presided over the initial trial. For the retrial to commence, the appellant shall appear before the said court on 9<sup>th</sup> March, 2012. Pending such appearance, the appellant shall remain in custody.

**Ruling dated signed and delivered in Machakos this 29<sup>th</sup> day of February, 2012.**

**ASIKE-MAKHANDIA**

**JUDGE**