REPUBLIC OF KENYA

High Court at Meru

Criminal Appeal 225 of 2010

SILAS KINOTI MWITHALIE ……...…….. APPELLANT

VERSUS

REPUBLIC …….. RESPONDENT

An appeal from the judgment of the Hon. Mr. J. N. Nyaga SPM in the Senior Principal Magistrate's Court at Maua in Criminal Case No. 223 of 2010

delivered on 19th January 2010

J U D G M E N T

The appellant had earlier been charged with the offence of defilement contrary to section 8 (3) (1) as read with section 8 (3) of the Sexual Offences Act 2006.

The particulars of the offence as stated in the charge sheet are as follows:-

"On the 31st day of December 2009 at Kangeta Location in Igembe District within the Eastern Province, intentionally caused his penis to penetrate the vagina of L.M, a child aged 14 years."

When the accused was arraigned in court on 19th January 2010 he pleaded guilty to the above offence and hence the learned magistrate convicted him and later sentenced him to 20 years imprisonment. Being aggrieved by the decision and sentence of the trial magistrate, the appellant filed this appeal. In his memorandum of appeal, the appellant listed the following grounds:-

1. ***VIOLATION OF SECTION 48 OF EVIDENCE ACT***

My Lord, it is my humble submission hat although I pleaded guilty, the law was to be keenly observed by the trial court whether it was complied with. It is now clear that the law was not complied with and the trial court noticed at the time the court was delivering the judgment only to keep silence to that effect. My Lord, it is my humble argument that the P3 form was authorized by clinical officer and produced it as exhibit knowing very well that he was not registered clinical officer nor a registered practitioner as the law requires, thus failing to comply with the above provision of law. My Lord, similarly I submit that despite of pleaded guilty, the law guaranteed my fundamental right. It is therefore lawfully I was prejudiced. It is also my humble submission that I pleaded guilty, putting

into account that I did not waste the precious time of the court.

1. ***MITIGATION***

My Lord, it is my humble submission that being so young of tender age, and again being the first time to stand before a court of law, also being not informed in the field of law in any way and worst of all being unpresented by any advocates due to poverty as I hail from a poor family, the prosecution took advantage. Thus I pray this honourable court to decimal the section or give me non custodial sentence and I am so remorseful because I did this act out of my ignorance without having any knowledge of the repercussion or its consequences.

It is my further prayer to this Hon. Court that having now understood the repercussion and the consequences of the evil deed that I did against the complainant for the period I am in jail, I swear and promise this court, touching my right ear, if given a second chance, or not, I shall never repeat again this kind of deed or any other kind of offence that would land me to prison again and I am very very sorry for what I did, thus it is my prayer this Hon. Court will consider my cry, sympathetically and I am ready to adhere with laws of the Republic in nation building. My Lord, it is my further submission that I was sentenced twenty years in jail at the age of 19 years on this earth and it is now the time I am in jail understanding the repercussion and the consequences id did out of ignorance, and it is the time the same has destroyed the entire of my life as a youth and again it is my prayer for the court leniency and I repeat again calling for the leniency of the court for the interest of my freedom.

<u>REASONS WHEREFORE</u>

I the appellant pray that may this appeal of seeking leniency be allowed, conviction quashed and sentence of 20 years imposed upon me be set aside and be set at liberty.

During the hearing of the appeal, the appellant opted to rely on the above petition of appeal.

On the other hand, the appeal was opposed by Mr. Motende who appeared for the State. According to the learned State Counsel, when the appellant was arraigned in court, he pleaded guilty during the plea taking. Consequently, the facts were read out and the appellant confirmed that the same were true. Besides the above, he also submitted that the complainant was 14 years old and that after the defilement, she reported the incident to her father. Subsequently they went to report the matter to the nearest police station where she was issued with a P3 form and thereafter taken to Nyambene District Hospital. On arrival, the complainant was examined by a clinical officer who observed that she had a broken hymen. The examination was done about 5 hours after the incident. The complainant was later treated and a P3 form was filled which was produced as exhibit 1. The accused was later arrested before being arraigned in court. As far as the issue of the qualifications of the Clinical officer is concerned, the learned State Counsel stated that the same was an afterthought. In addition to the above, he also submitted that the appellant never raised any objections when the facts were read out to him. He also reminded the court that the complainant was treated in a government hospital. As far as the age of the appellant is concerned, the learned State Counsel submitted that during the commission of the offence, he was 19 years old and hence he was not of tender age. On the issue of sentence, he submitted that the learned trial magistrate was in order to sentence the appellant to 20 years imprisonment. He contended that the above is the only sentence provided by the law under the Sexual Offences Act. He also explained that the complainant was about 14 years old. On the basis of the above, he has urged this court to uphold the sentence since the law does not provide a non custodial sentence. He concluded that this appeal has no merits at all and hence urged this court to dismiss the same.

This court has carefully considered the grounds of appeal and the submissions by the learned State Counsel. From the grounds of appeal, it is apparent that the appellant's submissions have dealt at length on mitigation. Little did the appellant realize that despite the moving mitigating factors, the hands of the trial magistrate were tied because he imposed a minimum sentence of 20 years imprisonment. That can be explained by the fact that the appellant is not trained in law and may not be aware that certain offences can attract a minimum sentence. Secondly it is apparent that the appellant has also relied heavily on the

fact that the Clinical officer who examined the appellant was not qualified in his profession. Unfortunately, the learned State Counsel was not helpful in informing the court whether the said Clinical officer is qualified and registered. That means that this court cannot make an informed decision given the materials which are before it. In the case of **Mutonyi vs. Republic**, KLR 1982, 2003, the court described an expert witness as follows:-

"Expert evidence is given by a person skilled and experienced in some profession or special sphere of knowledge from facts reported to him or discovered by him by tests, measurements and the like."

The above facts creates some doubt as to whether the expert evidence was actually factual and proper. This court wishes to resolve that doubt in favour of the appellant. Given the fact that the appellant had been charged of a serious offence, the scale of justice would dictate that a fresh trial be conducted before another competent magistrate other than the original trial magistrate. The principles relating to a retrial was stated very succinctly in the case of **Fatehali Manji vs. Republic E.A. [1966] 342** where the Court stated as follows:-

"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 purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is initiated by 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 own facts and circumstances and an order for retrial should only be made where the interest of justice require it."

Given the total circumstances of this case, I hereby quash the conviction, set aside the sentence and order for a retrial. In that regard, I hereby direct that the appellant appears before the Chief Magistrate Meru no 25th October 2012 so that fresh plea may be taken. In the event that the appellant opts to plead not guilty to the fresh charge, then the trial magistrate may fix the matter for hearing. It is only to that extent that this appeal succeeds.

Those are the orders of this court.

MUGA APONDI
JUDGE

Judgment read, signed and delivered in open court in the presence of:-

……. APPELLANT

MR. MOTENDE - STATE COUNSEL

MUGA APONDI
JUDGE

18TH OCTOBER 2012