



REPUBLIC OF KENYA

High Court at Meru

Criminal Appeal 111 of 2004

THOMAS LOKAVE..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Criminal Appeal against both conviction and sentence by Hon. W.K. Korir SRM at Meru CM.
Criminal Case No. 1099 of 2003 delivered on 31.8.2004)*

J U D G M E N T

The Appellant **THOMAS LOKAVE** was charged with one count of rape contrary to section 140 of the Penal Code. The particulars are that on the 30th day of September, 2003 at about 1.00 pm at Maili Tatu area, in Isiolo District within Eastern Province, had carnal knowledge of Josephine Akuone without her consent. He was convicted of the offence and sentenced serve (20) years imprisonment on the charge. Being aggrieved by the conviction and sentence he filed this appeal.

The Appellant relied on 5 grounds of appeal.

1. **That the trial magistrate erred in law by failing to observe that section 48 of the evidence act was not complied with**
2. **That the learned trial magistrate further erred in law by failing to observe that section 197 and 198 were not complied with.**
3. **That the learned trial magistrate erred in law to convict I the appellant without observing that section 137(c) of criminal procedure code was violated.**
4. **That the learned trial magistrate still erred in both law and fact by failing to resolve material contradictory riddle with the prosecution case in favour of the appellant.**
5. **That the learned trial magistrate erred in both law and fact by failing to give due consideration to my un-sworn defense.**

The appellant relied on his written submissions for this appeal. He urged that on the date he entered his plea the language used by the court is not recorded and neither is there any record of the language of the court throughout the proceedings. He urges therefore it cannot be known whether there was any interpretation. He urged that the court violated section 197 and 198 of the Criminal Procedure Code. The second point is that the clinical officer who filled the P3 form was not qualified. He drew the court attention to the learned trial magistrate's judgment at page 2 where the trial magistrate stated:-

It is clear from the evidence of the complainant and the police officer that the complainant was treated and examined on 30.9.2003 the day of the incident. It appears that the Clinical Officer (PW1) filled the P3 form a week later using treatment notes. He appears not to have carefully gone through the treatment notes so that he could see that the complainant was seen on the day of the alleged rape. His claim that spermatozoa could not be seen because the complainant went to hospital eight days after the incident is therefore not true. The reason why spermatozoa was not seen will emerge later in this judgment.

The appellant has also raised the issue that the learned trial magistrate disregarded his defence yet it was strong enough to dislodge the prosecution case.

The state was represented by Moses Mungai learned State Counsel. In his submissions the learned state counsel urged that the appellant was properly recognized at the scene and that the evidence adduced against him including that of the medical document was strong.

The facts of the case are that the complainant was walking home in the company of a friend when she was grabbed by the appellant, violently thrown to the ground and raped. Her friend ran away from the scene. She was not called as a witness.

I have looked at the proceedings of the lower court and I have confirmed that the learned trial magistrate did not record the language of the court or whether there was any interpretation. The appellant has stated that he only knows Kiswahili. Some of the witnesses testified in English and others in the Turkana language. It is clear that the trial was defective as it was not demonstrated that the accused persons rights to have interpretation in a language he understands was ever satisfied. We cannot be sure that he understood the proceedings as required both under the Constitution Article 49 and also under the Criminal Procedure Code sections 197 and 198. Since the proceedings were defective I hereby quash the conviction and set aside the sentence.

Regarding on whether to order a retrial or not the law is settled as to what the court should consider before making an order for retrial. There are various decisions of the Court of Appeal relating to the principles the court should apply when ordering for a retrial which the Court of Appeal made mention of in **Richard Omollo Ajuoga Vs. Republic H.C. Criminal Appeal No. 223 of 2003**. They are as follows:-

“In the case of Ahmend Sumar Vs. Republic (1964) E.A. 481, at page 483, the predecessor to this court stated as follows:-

“It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not, in our view, follow that a retrial should be ordered.

The Court continued at the same page at paragraph II and stated further:-

“We are also referred to the judgment in Pascal Clement Braganza Vs. R. [1957] EA 152. In this judgment the Court accepted the principle that a retrial should not be ordered unless the court was of the opinion that on a consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interest of justice require it and should not be ordered where it is likely to cause an injustice to an accused person.

Taking the queue from that decision, this Court in the case of Bernard Lolimo Ekimat Vs. Republic Criminal Appeal No. 151 of 2004 (unreported) had the following to say:-

“There are many decisions on the question of what appropriate case would attract an order of retrial but on the main, the principle that has been acceptable to courts is that each case must depend on the particular facts and circumstances of that case but an order for retrial should only

be made where interests of justice require it.”

I have considered all the circumstances of this case. The appellant was sentenced to 20 years imprisonment. He has served more than 8 which is a substantive part of the sentence. If I were to order a retrial there is no guarantee that 8 years down the line the prosecution would be able to avail its witnesses. Furthermore it is my view that making an order for retrial will cause the appellant difficulty having served a substantial part of the sentence and also for the fact that in the trial court his case was heard twice after the initial trial magistrate was transferred.

I decline to order a retrial. I order rather that the appellant should be set at liberty unless he is otherwise lawfully held.

DATED AT MERU THIS 8th DAY OF NOVEMBER, 2012.

**LESIIT, J
JUDGE.**