REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT EMBU

Criminal Appeal 128 of 2009

REPUBLIC ……. PROSECUTOR

V E R S U S

MOSES GACHOVI NJIRU …… APPELLANT

J U D G M E N T

The Appellant herein was charged before the subordinate court Embu with defilement of a girl under the age of 16 years c/s 145(1) of the Penal Code.

He was charged with a second count of indecent assault of a female c/s 144(1) of the penal code. He denied both counts and the matter went to full trial. He was acquitted on the 1st count but convicted on count 2.

According to counsel for the appellant, this rendered the charge sheet to be defective and it forms a ground of Appeal. I can state at this early stage however, that it is correct to say that count 2 ought not to have been a distinctive offence on its own as it arose from the same transaction as count 1. It should have been framed as an alternative count.

I nonetheless note that the Appellant was convicted on only one count which is what was disclosed by the evidence adduced before the trial court. He was therefore not prejudiced in any way and the defect in the charge sheet was curable Under Section 382 of the Criminal Procedure Code.

The Appellant was convicted and sentenced to 10 years imprisonment as provided for Under Section 11(1) of the Sexual offences Act.

At page 38 of the proceedings the magistrate in justifying her application of the sexual offences Act to this case made the following observation,

> ***"The offences that the accused person is charged with crime committed before the sexual offences Act came into operation (sic). I shall therefore apply section 48, first schedule of the sexual offences Act which directs that the proceedings commenced under any law represented by***

the Acts shall be conform (sic) under the said sexual offences Act."

Section 48 of the sexual offences Act is the transition clause. It applies the provisions of the 1st Schedule which clearly state that provisions of the sexual offences Act ***"shall supersede"*** any existing provisions of any other law with respect to sexual offences. With respect to the learned trial Magistrate however, she appears to have read the first schedule selectively. I say so because section 3 of the 1st schedule provides:-

"Any proceedings commenced under any written law or part

thereof repealed by this Act shall continue to their logical

conclusion under those written laws".

The trial against the Appellant should therefore have proceeded with the offences as charged. She had no power therefore to convert the offences the Appellant was charged with from those under the penal code to the new ones under the sexual offences Act.

I agree with counsel for the Appellant on that point that this was in contravention of the rights of the Appellant under Section 77 of the constitution. Section 48 of the sexual offences Act read together with Section 3 of the First Schedule are in tandem with the Accused's rights under the constitution and also under section 23(3)(e) of the interpretation and general Provisions Act as amended.

The substitution of the charges to those under the sexual offences Act and imposing a sentence under that Act was therefore unlawful. The sentence imposed on the Appellant was therefore unlawful and need to be quashed. I therefore quash the same.

On the rest of the evidence however, I have considered the evidence adduced before the trial court along with the grounds of Appeal and the submissions by both counsel. Although as an Appeliate court I am required to re-analyse and re-evaluate the same and make my own inference as to whether the same supports a conviction or not, I find this an unnecessary exercise and it might be prejudicial to the Appellant herein. I say so because, my finding is that the circumstances of this case calls for a retrial. All I can state is that in my considered view were it not for the illegality of the conviction and the sentence, the evidence on record would most certainly have supported a conviction. I may however point out that section 19 of Cap 15 deals with the evidence of ***"children of tender years"*** Under the Children's Act, a child of tender years is defined as a child under the age of 10 years. The sexual offences Act adopts that meaning for purposes of that Act. This therefore means that the evidence of PWI and PW2 was properly taken and the same did not need to be subjected to a "***voive dire"*** inquiry.

I note that the Appellant has only served about 1 year of his sentence and a retrial will not therefore be prejudicial to him.

In sum I allow this Appeal and quash the conviction therein and set aside the sentence. I nonetheless order that a retrial be conducted before any Magistrate with jurisdiction at the Embu Law Courts except Miss E. K. NYUTU.

The Appellant will be released from prison and be escorted to Manyatta Police Station where the same charges will be preferred against him before he is taken to court for plea and subsequent hearing and determination of the case.

W. KARANJA

JUDGE

Delivered, dated and signed at Embu this 3rd day of June 2010.