



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL APPEAL NO. 145 OF 2008

THOMAS MENYA OLUM.....APPELLANT
-VERSUS-
REPUBLICRESPONDENT

JUDGMENT

(Being an appeal from the Judgment of the Senior Resident Magistrate's court at Homabay in Criminal Case No. 1022 of 2007 delivered on 29th July, 2008 by E. K Mwaita (Ag S.R.M))

The appellant, **Thomas Menya Olum** was charged before the Senior Resident Magistrate's court at Homabay with defilement contrary to section 8 (1) as with sub section 2 of the Sexual Offences Act. The particulars of the offence were that on 4th August, 2007 in Suba District within Nyanza Province he had unlawful carnal knowledge of **M.A.A** a girl under the age of 11 years.

Alternatively he was charged with indecent act with a child contrary to section 11(1) of the **Sexual Offences Act**. The particulars thereof were that on the same day and place, he willfully and unlawfully indecently assaulted **M.A.A** by touching her private parts namely vagina of a girl aged under 11 years.

The appellant denied the charges and was accordingly tried. The prosecution's case was that on 4th August, 2007 PW1, **M.A** was in her house at about 1.00p.m. Her children including the 3 year old, **M.A.A**, the complainant were playing. One, **Babu**, a 5 year old boy came and told her that someone had taken away the complainant. He showed her direction towards the bush where he claimed the complainant had been taken to. She immediately raised an alarm and members of the public accompanied her as they went looking for the complainant. As they neared a bush, she heard the complainant about 50 metres away. She rushed towards her and found the complainant lying on the ground whilst the appellant who was naked was kneeling over her with his penis out. She grabbed the appellant and pulled him off the complainant. Members of the public got hold of him and started beating him up. She noticed sperms all over the thighs of the complainant. The appellant was taken to Mbita Police Station as she took the complainant to K Health centre for treatment. There after she went to Mbita Police Station and reported the incident. She was issued with a P3 at Magunga Police Post which was filled on the same date at Mbita sub district hospital. The vagina of the complainant according to PW4, the clinical officer was swollen and her private parts had turned reddish. There was blood coming out of the vagina. He confirmed that the complainant had been defiled. After investigations were completed the appellant was charged with the offence by PW3, PC **Ibrahim Bashir Ibrahim**.

In his unsworn defence, the appellant said that he did not know the charge herein nor the complainant. That some people came and beat him up claiming that he had defiled a young girl. He was then arrested by the police and charged.

The learned magistrate having evaluated the evidence very carefully was satisfied that the main charge laid had been proved by prosecution as required. Accordingly he convicted the appellant. Since however he did not have jurisdiction to impose the sentence contemplated he transferred the case to the Senior Resident Magistrate's court at Rongo for that purpose. Upon receipt of the file, **C.A.S Mutai**, the Senior Resident Magistrate at Rongo Law courts imposed a sentence of life imprisonment.

The appellant was aggrieved by the conviction and sentence aforesaid. He accordingly lodged the instant appeal. In his ground of appeal, he complained that he had been denied the right of interpretation and that the evidence was insufficient to find a conviction.

When the appeal came up for hearing, the state through **Mr. Mutai**, learned senior state counsel readily conceded the same on the ground that the sign language interpreter was not available when the plea was taken as well as when PW1 and PW2 testified respectively. The proceedings were thus a nullity. The learned Senior state counsel further submitted that if this court agreed with him and allowed the appeal on

that basis, he was seeking an order for retrial as the offence was serious, the evidence tendered overwhelming and that the appellant would suffer no prejudice.

In response, the appellant stated that he was not averse to an order of retrial.

Having carefully perused both original and typed record of the trial court, I am satisfied that the sign language translator was not availed at the time the appellant was presented before court for plea as well as when PW1 and PW2 testified. The sign language translator was only availed at the stage when PW3 and the remaining witnesses testified. There is no doubt at all that the appellant is deaf and dumb. The fact was self-evident at the hearing of this appeal and was also appreciated by the trial court when it adjourned further hearing of the case pending the availability of the sign language interpreter. Indeed during the hearing of this appeal, it had to be adjourned severally to await the availability of sign language translator from the chief magistrate's court at Kisumu. The non-availability of the sign language translator in the trial court on those occasions rendered the entire trial a nullity and or a mistrial. It matters not that subsequently and for the remainder of the trial, such sign language translator was availed. The damage to the prosecution case had already been done. In a nutshell the appellant did not at all follow the proceedings on those occasions which was prejudicial.

The record also shows that this case was presided over by two magistrates at different times. Initially **S.M. Mwendwa R.M** handled the case. Infact, he took the evidence of PW1, PW2 and PW3. Later and in unclear circumstances the case was taken over by **E.K Mwaita, Ag SRM** who heard the defence case, wrote and delivered the judgment. In taking over the case as aforesaid. **E.K Mwaita** did not comply with the mandatory provisions of section 200 of the Criminal Procedure Code thereby rendering the entire trial a nullity again.

Finally, the record does not show that the complainant ever testified. This was a fatal omission on the part of the prosecution. For all the foregoing reasons I would allow the appeal, quash the conviction and set aside the sentence of life imprisonment imposed.

With regard to retrial, much as the appellant welcomed it, I am however not inclined to make such an order. A retrial should not be ordered where it will accord the prosecution an opportunity to correct their mistakes. In the circumstances of this case if a retrial is ordered then the prosecution will have the opportunity to put the complainant in the witness stand thereby correcting their previous omission to the detriment of the appellant. Much as the offence is serious, I doubt whether the evidence tendered by the prosecution was overwhelming as suggested in the absence of the evidence from the complainant.

The end result of the foregoing is that I decline to order a retrial. Instead I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Judgment dated, signed and delivered at Kisii this 16th September, 2010.

ASIKE-MAKHANDIA

JUDGE