



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
(CORAM: OJWANG, J.)
CRIMINAL APPEAL NO. 58 OF 2007

-BETWEEN-

DALMAR MUSA ALI.....APPELLANT

-AND-

REPUBLICRESPONDENT

(An appeal from the Judgement of Ag. Senior Principal Magistrate S.M. Kibunja dated 16th November, 2006 in Criminal Case No. 650A of 2006 at Garissa Law Courts)

JUDGEMENT

The original charge brought against the appellant herein was abduction contrary to s.142 of the Penal Code (Cap.63, Laws of Kenya); and the particulars were that he, on 16th June, 2006 at about 10.30 a.m., at Dogahaley Refugee Camp in Garissa District, within North Eastern Province, with intent to marry, took away **Faisa Abdirisack Ali**, against her will from Eles Primary School to the Refuge Camp.

It is on that basis the learned magistrate heard the case; but as he *was in the course of writing his judgement*, it apparently occurred to him that the charge had not been formulated as it should have been; and the following modification to the charge forms part of the judgment:

“I therefore order that the charge be amended to read as defilement c/s. 8(4) of [the] Sexual Offences Act (Act No. 3 of 2006), in that between 16th June, 2006 and 2nd July, 2006 the accused had carnal knowledge of PW1, a girl below [the age of] 18 years...He knew PW1 was below the [age of] 18 years, as he said he knew she was born in 1990, and I [find] the accused guilty of the offence of defilement...”

The learned Magistrate arrived at the sentence as follows:

“The offence [which the] accused has been convicted of carries a minimum sentence [under the Sexual Offences Act] and though he is a first offender, a deterrent sentence is necessary as [offences] of this nature are [on] the increase in this area. [The accused shall] serve fifteen years’ imprisonment.”

In his grounds of appeal, the appellant stated that he had not been accorded a *fair and impartial trial*; that

proof-beyond-reasonable doubt had not been attained by the prosecution; and that the sentence imposed had been harsh and excessive.

The foregoing points were taken up in written submissions which the appellant placed before the Court at the time of hearing, and he chose not to supplement this with oral submissions.

Learned respondent's counsel, **Mrs. Gakobo** in her response, while being of the view that the charge-amendment had been done in good faith by the trial Magistrate, submitted that such action, all the same, could have prejudiced the appellant. Since the amendment was effected at judgment stage, the appellant had not been accorded an *opportunity to defend on the new charges*. During the hearing it had been perfectly clear that the appellant was defending himself against a charge of *abduction*; but he had no opportunity to defend himself against a charge of *defilement*; and moreover, the conditions set out in s.214 of the Criminal Procedure Code (Cap.75) which relate to *amendment of charges*, had not been complied with.

While urging that the evidence adduced had suggested strongly that the offence of defilement had been committed, learned counsel conceded to the appeal: on the main ground of principle that the trial had not been conducted in a fair manner. **Mrs. Gakobo** asked that a retrial be ordered, under the Sexual Offences Act, to "ensure that justice is done for [both] the complainant and the appellant."

Since the appellant had remained in prison for just one year and four months, since the sentence of the trial Court was pronounced, counsel submitted that he would not in any way be prejudiced if a fresh trial of the matter was ordered – for he had not yet served a substantial portion of the sentence. Counsel urged that witnesses would be available if a retrial was ordered.

It is clear to me that the trial Court had not complied with the terms of s.214 of the Criminal Procedure Code, which regulates amendments to charges in the course of trial. That section stipulates:

"(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:

Provided that –

I. Where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge...."

Not only is there apparently no legal provision to support alteration of a charge during the final stage of writing judgment, but such action would clearly undermine the procedural safeguard accorded the accused, to *plead to the new formulation of the charge*, or to *recall witnesses*. The trial in the instant case, therefore, had not been conducted in accordance with the law, quite apart from its having been intrinsically unfair to the appellant herein. The proceedings and judgement of the trial Court will hereby be quashed.

The only remaining question is whether this is a suitable case for a retrial. Retrials are governed by principles now well established in case law: see **Ahmedali Ali Dharamsi Sumar v. Republic** [1964] E.A. 481; **Braganza v. Reg.** [1957] E.A. 152. These principles are well summarised in **Momanyi Bwouonga's** learned work, *Procedures in Criminal Law in Kenya* (Nairobi: EAPH, 1994), at p.251:

"There are instances in the course of an appeal hearing when it comes to light that the trial of the appellant was either illegal or unsatisfactory for one reason or [another]. In cases of [this] nature the appellate court, depending on the nature of the defect, may either acquit or order a retrial. In general, a retrial should only be ordered when the original trial was illegal or defective.

“[H]owever, a retrial will not be ordered unless it can be shown from the record that, on a proper consideration of the potentially admissible evidence, a conviction might result.”

The evidence before the trial Court is clear from the record, and has led learned counsel ***Mrs. Gakobo***, not at all without cause, to submit that it could lead to a prosecution ending up in a conviction. In the circumstances, and taking into account public policy factors which require effective application of the criminal law, this Court ought to order a retrial of the case, under the *Sexual Offences Act, 2006* (Act No.3 of 2006).

I will make orders as follows:

- 1. The proceedings before the trial Court in Criminal Case No. 650A of 2006 at Garissa Law Courts, and the resulting Judgement of 16th November, 2006 are hereby quashed and vacated.**
- 2. A retrial shall take place, on the basis of the Sexual Offences Act, 2006 (Act No.3 of 2006), before a Magistrate other than the Magistrate who first heard the case.**
- 3. The appellant shall remain in custody pending the directions of the retrial Court.**
- 4. This matter shall be listed for mention before the Duty Magistrate at Garissa Law Courts on Wednesday, 3rd December, 2008.**

Orders accordingly.

DATED and DELIVERED at Nairobi this 27th day of October, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Respondent: Mrs. Gakobo

Appellant in person