



IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 11 of 2006

ANTHONY MWANGANGI NJERU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction (s) and Sentence(s) in Criminal Case No. 7698 of 2003 of the Senior Principal Magistrate's Court at Kibera (Mrs. Wasilwa - PM))

J U D G M E N T

ANTHONY MWANGANGI NJERU faced one principle charge of DEFILEMENT contrary to Section 145(1) of the Penal Code and an alternative count of INDECENT ASSAULT contrary to Section 144(1) of the Penal Code. After a full trial, the Appellant was convicted for the principle count and sentenced to 12 years imprisonment. It is against the conviction and sentence he now appeals to this Court.

When the Appeal came up for hearing before me, Mr. Wandugi acted for the Appellant and raised a point of law. Counsel for the Appellant submitted that the trial of the Appellant before the lower court was rendered irregular for two reasons; one for non-compliance with Section 200 of the Criminal Procedure Code and two, the sentence in the case was passed by a magistrate other than the one who heard the case.

On the first ground, Mr. Wandugi submitted that Mr. Omosa commenced the Appellant's trial on 24th November 2003. That on 19th December 2004, the matter was taken over by one Miss Mwangi while the case was already partly heard by Mr. Omosa. That there was no evidence of compliance with Section 200 of the Criminal Procedure Code and therefore the Appellant was not informed of his rights under that Section.

On the second ground, Mr. Wandugi submitted that without giving any reasons, one Mrs. Wasilwa passed the sentence in the case despite the fact that the learned magistrate was not the trial magistrate of the case.

Mr. Ikol, learned State Counsel conceded to the appeal stating that the proceedings were rendered a nullity.

I have perused the record of the proceedings of the lower court. It is true that Mr. Omosa commenced the Appellant's trial on 24/11/03 and proceeded to hear the first five prosecution witnesses. Then on 31st March 2004, the court record reads thus: -

"31/3/04

Before Ms. Mwangi SPM

Kemboi for prosecution

Court clerk – Kereah in English/ Swa

Accused

Court:

Hearing to proceed under S.200 of Criminal Procedure Code before count 1 on 26/5/04.

Mention on 6/4/04.”

On the said date, the record does not indicate whether the Appellant was present or absent. In the circumstances, it is not clear whether the Appellant was ever informed of the new development of his case under Section 200 of the Criminal Procedure Code as indicated. Section 200 itself has several provisions and the only relevant to this case being Section 200(1) (b) and (3) which provides: -

“Section 200 (1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may –

(b) where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resubmit the witnesses and recommence the trial.

(3) Where a succeeding magistrate commences the hearing of the proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resubmitted and reheard and the succeeding magistrate shall inform the accused person of that right.”

Section 200 (1) (b) is quite clear that where a case is partly heard by one Magistrate a succeeding magistrate may re-summon the witnesses heard by the preceding magistrate and recommence the trial. Under Subsection (3), the court is enjoined to inform the accused person of his right to re-summon witnesses for hearing. The succeeding learned trial magistrate does not seem to have attempted to comply with the provisions of Section 200 of the Penal Code or to have explained the Appellant his rights under that Section. On this ground alone, the conviction was rendered unsafe.

There was another flaw in the trial proceedings in this case. The first two witnesses in the case were children of tender years. The learned trial magistrate then, Mr. Omosa, did not comply with Section 19 of the Oaths and Statutory Declarations Act. That section provides thus: -

“19(1) where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the option of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands, the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code, shall be deemed to be a deposition within the meaning of that section.

(2) If any child whose evidence is received under subsection (1) willfully gives false evidence in such circumstances that he would, if the evidence had been given on oath, have been guilty of perjury, he shall be guilty of an offence and liable to be dealt with as if he had been guilty of an offence punishable in the case of an adult with imprisonment.”

In the case of Njenga vs. Republic [1984] KLR 605, Hancox JA, Chesoni and Nyarangi, Ag. JJA held:

“2. The Criminal Procedure Code (Cap 75) section 200(3) entitles an accused person to demand that any witness be resummoned and enjoins the trial magistrate to inform the accused person of that right.”

The above case underscores the point that it is the duty of succeeding magistrate to inform the accused person of his right to re-summon witnesses and recommence trial.

In the case of JOHNSON MUIRURI vs. REPUBLIC [1983] KLR 445, Madan, Porter JJA and Chesoni Ag. JA held:

*“1. Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a *voire dire* examination, whether the child understands the nature of an oath in which even his sworn evidence may be received. If the court is not so satisfied, his unsworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him.*

2. It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided.

4. When dealing with the taking of an oath by a child of tender years, the inquiry as to the child’s ability to understand the solemnity of the oath and the nature of it must be recorded, so that the cause the court took is clearly understood.

5. A child ought only to be sworn and deemed properly sworn if the child understands and appreciates the solemnity of the occasion and the responsibility to tell the truth involved in the oath apart from the ordinary social duty to tell the truth.

6. The judge is under a duty to record the terms in which he was persuaded and satisfied that the child understood the nature of the oath, the failure to do so is fatal to the conviction.

8. Despite the absence of an express statutory provision, it is the duty of the court not only to ascertain the child is intelligent and competent to justify reception of evidence from the child, but it must also ascertain that the child understands the difference between truth and falsehood.

9. The correct procedure for the court to follow is to record the examination of the child witness as to the sufficiency of her intelligence to justify the reception of evidence and understanding of the duty to tell the truth.”

This authority gives full details of how a trial court should conduct a *voire dire* examination and what to look for during such examination. The decision whether to take the evidence of a child at all, and if so, whether it should be sworn or unsworn are all judicial decision. Not only should the court record questions put to the child but the answers given by the child. The reasons why the court decided on the question whether to take or not take any evidence and if so how taken whether on oath or not on oath must all be recorded. The trial magistrate in the instant case did not conduct any *voire dire* examination of the two children witnesses and I am therefore unable to decide whether this important question of the nature of evidence the court determined he should take from them, was rightly decided. In the circumstances, the proceedings were irregular for this second reason. On the basis of this finding, I set aside both the conviction and sentence in this case.

The next question for determination is whether or not to order a retrial. Mr. Ikol has urged that a retrial be ordered because the seriousness of this case and because the evidence on record strongly pointed to the Appellant’s guilt.

Mr. Wandugi opposed an order for retrial saying that since the Appellant had continuously been serving

sentence since January 2006, the period of slightly over one year was substantive and an order of retrial would cause the Appellant prejudice.

I have on my part considered the principles applicable in determining the question whether to order a retrial or not. The seriousness of the offence, the strength of the evidence and the severity of the sentence are all very relevant issues to consider. The seriousness of the offence cannot be underrated. The evidence adduced by the prosecution was equally strong and may result in a conviction if a retrial were ordered. The maximum sentence for this offence is life imprisonment and in that context one year imprisonment in comparison cannot be termed a substantive part of sentence by any stretch of imagination or definition.

Having considered the appeal, the circumstances and facts of this case I find this a fit case for an order of retrial. I therefore order that a retrial be held in this case.

In the circumstances, I order that the Appellant should be held in custody until 12th February 2007 when he should be produced before Kibera Law Courts for a plea to the self same charges. The case should then be heard by any competent magistrate except Mr. Omosa and Ms. C. Mwangi who both heard this case.

Dated at Nairobi this 7th day of February 2007.

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LESIIT, J.

JUDGE

Read, signed and delivered in the presence of;

Appellant present

Mr. Ikol for the State

Tabitha: CC

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LESIIT, J.

JUDGE