REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 364 of 2005

DANIEL NDUNGU KIMUHU…… APPELLANT

VERSUS

REPUBLIC……. RESPONDENT

(From Original Conviction(s) and Sentence(s) in Criminal Case No. 884 of 2003 of the Principal Magistrate's Court at Kikuyu (M.W Murage – PM)

JUDGMENT

The appellant **DANIEL NDUNGU KIMUHU** was charged and convicted of the offence of defilement of a girl contrary to Section 145(1) of the Penal Code. He was sentenced to serve life imprisonment with hard labour. Being dissatisfied with the decision of the learned trial magistrate, he filed this appeal to this court, through his counsel M/s Muhuhu & Company Advocates, challenging both the conviction and sentence.

At the hearing of the appeal, learned counsel for the appellant, Mrs. Muhuhu, made submissions in support of the appeal. Learned State Counsel Mr. Makura conceded to the appeal on two technical grounds. The first ground on which learned State Counsel conceded to the appeal was that the learned trial Magistrate failed to conduct a preliminary examination of the complainant, PW1, who was a juvenile. He submitted that the omission by the trial Magistrate was fatal to the prosecution case. The second ground on which learned State Counsel conceded to the appeal, was that during the proceedings for the defence case, the learned trial Magistrate did not indicate the rank of the prosecutor.

I have carefully considered the submissions of both counsel. I have also perused the proceedings. Indeed, the complainant, PW1, was a child of about 4 years. She was therefore a child of tender years. The learned trial Magistrate did not enquire as to whether the witness understood the nature of an oath and whether she possessed sufficient intelligence to justify the reception of her evidence.

In the case of **ONSERIO – vs – REPUBLIC (1985) KLR 618**, the Court of Appeal had this to say at page 620, on the reception of such evidence –

"Before receiving Samuel's evidence, who, because of his age, appears a child of tender years, the Magistrate did not inquire whether he did not understand the nature of an oath, and whether he was possessed of sufficient intelligence to justify the reception of his evidence though not given an oath (Section 19(1) Oaths and Statutory Declaration Act (Cap. 15)). The appellant could only be convicted on Samuel's evidence if corroborated by the material evidence in support thereof implicating him (Section 124, Evidence Act).

Clearly, the learned trial Magistrate should have inquired as to whether PW1 who was a child of tender

years, understood the nature of oath, and whether she possessed sufficient intelligence to justify the reception of her evidence even if the same was not given on oath. The failure of the learned trial Magistrate to enquire before receiving the evidence of PW1, who was a child of tender years as well as the complainant in the case, was fatal to the prosecution case. I agree with the submissions of both learned counsel that the appeal should be allowed on that ground.

The second technical ground upon which learned State Counsel conceded to the appeal, is that, during the defence case, the learned trial Magistrate did not indicate the rank of the prosecutor. I have perused the proceedings, including the original record. The defence evidence was tendered on 9.9.2004. On that date the quorum was not indicated by the learned trial Magistrate. Therefore, it is not clear whether a prosecutor was present, nor is it clear whether the prosecutor, if one was present, was a qualified prosecutor under Section 85(2) of the Criminal Procedure Code (Cap. 75), which provides-

"**85(2) The Attorney General, by writing under his hand, may appoint any advocate of the High court or person employed in the public service, not being a police officer below the rank of Assistant Inspector of Police, to be a public prosecutor for the purposes of any case".**

The omission by the learned trial Magistrate to indicate who was a prosecutor during the defence case proceedings, and the rank or designation of that prosecutor, rendered the whole trial a nullity, (see **ROY RICHARD ELIREMA & ANOTHER – vs – REPUBLIC (KSM) CRIMINAL APPEAL NO. 67 OF 2002).**

Learned State Counsel Mr. Makura has asked me to order a retrial. His grounds for asking for a retrial are that there is overwhelming evidence against the appellant, and that a conviction was likely. He contended that there was the evidence of PW4, and PW3 as well as the evidence of the doctor and the Government Analyst. Also that the appellant had been in custody for only 2 years and 4 months, while the sentence he was to serve was life imprisonment. He also contended that no prejudice would be suffered by the appellant if an order for retrial was made.

Counsel for the appellant, on the other hand, opposed a retrial. She submitted that there was no overwhelming evidence against the appellant. The complainant PW1 merely said that she met somebody. The only evidence against the appellant was the evidence of PW6 the Government Analyst, which was based on inconclusive blood test evidence. She was of the view that subjecting the appellant to a retrial would prejudice him, as the evidence on record was not conclusive.

The principles to be considered by a court in deciding whether to order a retrial are well settled. In the case o**f AHMED SUMAR – vs – REPUBLIC [1964] EA 481**, at page 483, the Court of Appeal for East Africa had this to say –

"**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 went further to state on the same page –

"**We were also referred to the judgment in Pascal Clement Braganza – VS – Republic [1957] EA 152. In this judgment the court accepted the principle that a retrial should not be ordered unless 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 interests of justice require it and should not be ordered where it is likely to cause an injustice to an accused person".**

I have carefully considered the evidence on record. The offence under which the appellant was charged with, convicted and sentenced, was a serious offence.

The offence is one of defilement of a child. The key witness was the complainant PW1. The complainant was a child of 4 years. All she said in evidence was –

"**I am S W. I do not go to school. I used to go to school. I cannot remember something was done to me. I met somebody. He is the one in court. I am afraid of him. He is in court. I am four years old".**

In cross examination she stated –

"**I was alone. I carried the bag".**

The mother of the complainant, who was **N W K** PW 2, testified that the complainant initially merely said to her that the act was done by "***somebody***". It was later that the complainant stated that it was a person who works at Wamgui's place. It is notwithstanding that, the appellant was a person who was employed by Wangui's father. In cross examination, PW2 stated that Wangui also had one worker, but they did not go to Wangui's place.

This evidence of PW1 and PW2, in my view, cannot possibly sustain a conviction. In the first place, through PW2 stated that she was given information on the appellant by PW1, PW1 did not state in evidence that she informed PW2 about the person who defiled her. Therefore, the evidence of PW2 on the identity of the appellant cannot be admissible as having emanated from PW1. Secondly, even the description of the offender given by PW2 does not necessarily point to the appellant, as PW2 admitted in cross examination that Wangui also had a worker, and they did not bother to look for that employee of Wangui.

The other evidence against the appellant was the evidence of the Government Analyst, PW6, who found the blood of the appellant to be group B and also that there was sexual interaction between the complainant and a person of blood group B. The said witness stated, in cross examination, that in Kenya about 22% of the people are of blood group B, and that one needed DNA analysis to be specific on whose blood it was.

Apparently, no DNA analysis was conducted. In my view, the evidence that the complainant had sexual interaction with a person of blood group B, and the fact that the appellant was found to be of blood group B, cannot possibly found a conviction as there are many people in Kenya with the blood group B.

Having considered all the evidence on record, I am of the humble view that, even if the same evidence was tendered in court, a conviction might not result. On that ground therefore I am of the view that a retrial should not be ordered. It will not be in the interests of justice and it is likely to cause injustice to the appellant. I will not order a retrial.

For the above reasons I allow the appeal, quash the conviction and set aside the sentence. I decline to order a retrial. Instead, I order that the appellant be released forthwith unless otherwise lawfully held.

Dated and Delivered at Nairobi this 23rd day of April 2007.

George Dulu

Judge

Read and Delivered in the presence of-

Appellant

Mrs. Muhuhu for appellant

Mr. Makura for State

Eric – Court Clerk

George Dulu

Judge