



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 173 of 2004

FRANCIS WAWERU NDEGWA APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal from original Conviction and Sentence in the Chief Magistrate's Court at Nyeri in Criminal Case No. 325 of 2004 dated 25th May 2004 by M. R. Gitonga – P.M.)

J U D G M E N T

The appellant was charged with the offence of Rape contrary to section 140 of the Penal Code. He also faced another count of malicious damage to property contrary to section 339 of the Penal Code and an alternative count to the 1st count of indecent assault on female contrary to section 144(1) of the Penal Code. He pleaded not guilty to both charges and his trial commenced in earnest. In the end the learned magistrate found for the prosecution in respect of the alternative count as well as the 2nd count. She proceeded to sentence the appellant to 2 years imprisonment in respect of the alternative count and a fine of Kshs.5,000/= in default 60 days imprisonment in respect of count 2.

The appellant was aggrieved by the conviction and sentence and accordingly preferred this appeal through **Messrs Kagondu & Mukunya Advocates**. In the Petition of appeal, the appellant faults the learned magistrate for convicting him on 4 grounds to wit; No evidence of indecent assault, No medical evidence adduced to support the charge, lack of corroboration of the complainant's evidence and finally that the conclusions of the learned magistrate were wholly unsupported by any evidence.

When the appeal came up for hearing before me, **Mr. Orinda**, learned Principal State Counsel conceded to the appeal on the technical grounds that throughout the proceedings in the subordinate court, the language of the court was not shown. The ranks of the prosecutors who undertook the prosecution of the case before the trial court were not indicate and finally that there was no conclusive evidence of indecent assault.

Mr. Mukunya, learned counsel for the appellant in response stated that he had nothing to add to what Mr. Orinda had said save to state that in the event that the appeal is successful, the cash bail of Kshs.50,000/= paid by the appellant should be released to him for onward transmission to the appellant.

I have carefully perused and considered the record of the trial court as required of me in terms of the principles set out in the celebrated case of **Okeno v/s Republic (1972) E.A. 32**. There is no doubt that the issues raised by Mr. Orinda are clearly discernable from the record. The rank of the prosecutor who

undertook the entire prosecution is not indicated. Throughout the proceedings he is merely referred to as “**Yusuf Prosecutor.**” This being the case it is difficult to tell whether the said Yusuf was a police officer and if so was of the rank above acting inspector of police so as to qualify to undertake the prosecution of the case on behalf of the state in terms of section 85(2) as read together with section 88 of the criminal procedure code.

Secondly, the record is silent as to the language used in court as well as the language used by the witnesses and the appellant to communicate with the court. This state of affairs would appear to be in violation of section 198(1) of the Criminal Procedure Code as well as section 77 of the constitution of Kenya

The law is now well settled that only an advocate of the High Court of Kenya or a police officer not below the rank of an acting inspector of police may be appointed to be a public prosecutor. In the well known case of *Elirema & another v/s Republic* [2003] KLR 537, the court of appeal stated:

“For one to be appointed as a public prosecutor by the Attorney General, one must be either an advocate of the High Court of Kenya or a person (sic) a police officer not below the rank of an Assistant Inspector of Police. We suspect the rank of Assistant Inspector must have been replaced by that of an Acting Inspector but the Code has not been amended to conform to the Police Act. Kamotho and Gitau were not qualified to act as prosecutors and the trial of the appellants in which they purported to act as public prosecutors must be declared a nullity. We now do so with the result that all the convictions recorded **against the two appellants must be and are hereby quashed and the sentences are set aside.**”

In that case, Kamotho and Gitau were both corporals. They took active part in the prosecution of the appellants and the court as is indicated above nullified their trials. In this case the record shows that throughout the hearing of the case before the learned Principal Magistrate, the prosecutor was “**Yusuf**” I am unable to tell whether the said Yusuf was a police officer and or an advocate. If so either whether he was in compliance with the provision of the law referred to in the aforesaid case. As there is a doubt created as to the competence of Yusuf as a public prosecutor, that doubt must as in every criminal case be resolved in favour of the appellant. That means and it is therefore my holding that the said Yusuf was an incompetent public prosecutor.

I would observe that in the **Elirema’s case (supra)**, the court of appeal set out what it viewed as the role of a prosecutor and stated thus:

“In Kenya, we think, and we must hold that for a criminal trial to be validly conducted within the provision of the Constitution and the Code, there must a prosecutor (sic) either public or private, who must play the role of deciding what witnesses to call, the order in which these witnesses are to be called and whether to continue or discontinue the prosecution. These roles cannot be played by the trial court, for if it does so, there could be a serious risk of the court losing its impartiality and that would violate the provisions of section 77(1) of the Constitution.”

In this case, a nonqualified prosecutor had played the roles that the prosecution needs to play as stated in the *Elirema’s case* (part of which I have reproduced above). It amounted to unqualified prosecutor taking part in the prosecution of the case and I would therefore declare the trial a nullity on that score.

The appellant was first taken to court on 3rd February 2004 when the charge was read over to him and he pleaded not guilty to the charge. The record on that day is silent as to the language in which the charge was read and explained to the appellant. Hearing was fixed to commence on 3rd March, 2004 in court 2. On 17th February 2004 the case came up for mention. On this date again there is no record as to which language the court and the appellant communicated. On 3rd March, 2004 2000, the case came up for hearing. The appellant was represented by a counsel. Three witnesses testified on that occasion. However the record is again silent regarding the language of communication in court. Thereafter, the case came up for hearing on 29th March, 2004 when the remaining prosecution witnesses testified and the prosecution closed their case and the learned magistrate adjourned the ruling on no case to answer to 21st

April 2004. On that occasion, the learned magistrate found that the appellant had a case to answer and put him on his defence. He gave a sworn statement of defence and called no witnesses. On all these occasions there is no indication that an interpreter was ever availed and no evidence is available that the appellant was at any time given an opportunity to present his case in a language he was conversant with.

Back to the law. Section 77 of the Constitution deals with provisions to secure protection of law. The pertinent provision is section 77(1) (b) and it states as follows:

“(2) Every person who is charged with a criminal offence –

(a)

(b) Shall be informed as soon as reasonably practicable, in language that he understands and in detail, of the nature of the offence with which he is charged”

(c).....

(d).....

(e).....

(f) Shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge”

And section 198(2) of the Criminal Procedure Code states:

“198(1) Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language which he understands.”

Thus, in law, at the trial of an accused person, the court must ensure not only that the charge is explained to the accused in a language the accused understands but the court is further enjoined to ensure that the evidence given during the trial is interpreted to the accused in a language the accused understands. These are legal requirements. They are constitutional rights of an accused person and cannot, in my view be waived or abrogated on the believe that the accused must have understood the proceedings merely because he was represented by counsel. The protection afforded is for the accused person not his counsel. **Jackson Leskei v/s Republic – Criminal Appeal No. 313 of 2005** the court of appeal stated:

“It is the Court’s duty to ensure that the accused’s right to interpretation is safeguarded and to demonstratively show its protection.”

Mr. Orinda, the learned Principal State Counsel, conceded the appeal on that ground as well. To my mind, he took the correct approach in conceding the appeal and for what I have stated above, I do agree with him and of course with **Mr. Mukunya**, the learned counsel for the appellant. I would for the second time therefore allow the appeal, quash the conviction and set aside the sentences imposed upon the appellant on this ground as well.

The next matter I need to consider is whether to order a retrial in this case. **Mr. Orinda** did not seek a retrial and rightly so in my view. The court of appeal has in the past considered similar cases and in the case of **Richard Omolo Ajuoga v/s Republic – Criminal Appeal No. 223 of 2003**, it considered and analysed several cases decided on the issue of under what circumstances a retrial should be ordered such as the cases of **Pascal Ouma Ogolo v/s Republic – Criminal Appeal No. 114 of 2006**, **Henry Odhiambo Otieno v/s Republic – Criminal Appeal No. 83 of 2005**, **Ahmed Sumar v/s Republic (1964) E.A. 481 at page 483** and ended up with the case of **Benard Lolimo Ekimat v/s Republic – Criminal Appeal No. 151 of 2004** (unreported) where it stated:-

“There are many decisions on the question of what appropriate case would attract an order of retrial but on the main, the principle that has been acceptable to courts is that each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where interests of justice require it.”

The principle acceptable and which emerges in all these authorities is that each case will depend on its own circumstances. In this case, although the charges were serious, none of them were proved to the required standard. The appellant was convicted for malicious damage to property to wit, the complainant’s pant as well as the alternative count of indecent assault on a female. He is alleged to have committed the later offence by touching her private parts. With regard to the 2nd count, there was no evidence that the appellant damaged the complainant’s pant and if so with malice. If indeed the appellant tore the complainant’s pant as he struggled to rape her, malice cannot be inferred from such circumstances. Further magistrate found that no rape had been committed on he complainant. That being so how could she then find that the appellant damaged the complainant’s pant. It is also important to note that the alleged pant was recovered in a latrine much later after the alleged incident. It was recovered in the absence of the appellant. Could the damage alleged not have been caused by its continued stay in the latrine? That possibility cannot be ruled out absolutely. How about indecent assault. Again once the learned magistrate found as a fact that rape had not been proved there was no basis upon which she could have found that the appellant indecently assaulted the complainant. The charge was specific and it was that the appellant indecently assaulted the complainant by touching her private parts. Throughout the evidence of the complainant she did not mention at all that the appellant ever touched her private parts. For a charge of indecent assault to stick, the complainant must by evidence demonstrate that the accused touched her private parts with his hands. See **Isaac Omambia v/s Republic, Criminal appeal No. 47 of 1995** in which the court of appeal stated thus:

“..... These particulars that the appellant touched the private parts of the complainant mean and can mean nothing else than that the appellant touched with his hand the “private parts” of the complainant which, to give the well known and ordinary meaning of that phrase, means the genitalia of the complainant and to no other part of her body, or as defined in the shorter oxford English dictionary, the “pupenda” or “External genital organs.....”

In the absence of any evidence that he appellant ever touched the complainant’s private parts with his hand, the offence was not committed.

Finally, the mistake ending in this appeal being allowed was not a prosecution’s mistake but a court’s mistake. I feel that considering all the circumstances of this case, it would not be in the interest of justice to order a retrial.

The upshot of the foregoing is that the appellant is set free forthwith unless he is otherwise lawfully held. These are the orders of this court.

Dated and delivered at Nyeri this 29th day of October 2007

M. S. A. MAKHANDIA

JUDGE