REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 995 of 2003

BENSON KANG'ETHE NJOROGE ..…….....…...……...……..APPELLANT

VERSUS

REPUBLIC……..…….....…….…RESPONDENT

JUDGMENT

The Appellant, ***BENSON KANG'ETHE NJOROGE*** was charged before the Senior Resident Magistrate's Court, Kikuyu with one count of defilement of a girl contrary to Section 145 (i) of the Penal Code. The Particulars given in the charge sheet were that on the 23rd day of January, 2003 at [*particulars witheld*] in Kiambu District within Central Province, ***BENSON KANG'ETHE NJOROGE*** had carnal knowledge of ***AM***, a girl under the age of 14 years. He was duly convicted of the offence following a full trial. Upon conviction he was sentenced to seven (7) years imprisonment. The Appellant was aggrieved by the conviction and sentence. Consequently through Messrs E. N. Mugu & Company Advocates he lodged the instant Appeal.

In his Petition of Appeal, the Appellant faulted his conviction by the trial Magistrate on the following grounds:-

1. **THAT** the Learned Magistrate erred in law in permitting a police constable to prosecute the case before her contrary to the provisions of the Law.

2. **THAT** the Learned Magistrate erred in law in applying the provisions of the amended law to a matter which was filed before the law came into effect, and that this was infact unconstitutional.

3. **THAT** the Learned Magistrate totally misdirected herself on the law on corroboration, medical evidence, and the standard of proof needed to sustain a conviction.

4. **THAT** the evidence of PW1, apart from being mostly hearsay, did not support the finding of defilement and the only medical evidence was inclusive (sic).

When the Appeal came up for hearing, Mrs Kagiri, Learned Counsel conceded to the Appeal. She submitted that she was conceding to the Appeal purely on a technicality. On 11th March, 2003 the case in the Lower Court was prosecuted by one P. C. Tom. He led the evidence of PW1 and PW2. Counsel submitted that this was in contravention of the express provisions of Section 85 (2) of the Criminal Procedure Code. The proceedings were thereby rendered a nullity. For this reason the Learned State Counsel invited me to annul the proceedings and set aside the conviction and sentence. Mr. Mugu, learned Counsel for the Appellant did not object to the course taken by the state.

I have on my on part perused the record of the Lower Court and confirmed that indeed one P.C. Tom led the entire prosecution case and not just PW1 and PW2 as had been submitted by the Learned State Counsel. The said P. C. Tom was unqualified to undertake the duties of a public Prosecutor in the subordinate Court since he was a police officer below the rank of Assistant Inspector of police as required by the provisions of section 85 (2) as read together with Section 88 of the Criminal Procedure Code. It has been held that in cases in which an unqualified police officer acts as a Court Prosecutor, in anything other than mentions, the proceedings are a nullity – see for instance the case of ***ELIREMA & ANOR VS REPUBLIC (2003) 1 KLR 537***. Accordingly and as invited by the Learned State Counsel I annul the

proceedings of the subordinate Court with the consequence that the conviction and sentence imposed are set side.

Mrs. Kagiri sought for an order of retrial. In support thereof, the Learned State Counsel submitted that the evidence on record against the Appellant was strong. That the offence committed by the Appellant was serious as the Complaints private parts were injured. That in the event of a retrial being ordered the State would readily avail the witness. That the Appellant would not be prejudiced at all if an order of retrial was to be made and finally, the State Counsel submitted that it would be in the interest of justice if a retrial was ordered.

Mr. Mugu, opposed the request for retrial. He submitted that the evidence tendered was insufficient to sustain a conviction as most of it was hearsay. That medical evidence was not tendered for reasons that are not clear. That the police surgeon who testified could not confirm if the Complainant was defiled as he found the hymen of the Complainant intact. That the Complainant could have been scared into wrongly Implicating the Appellant. Counsel further submitted that there was evidence of bad blood between the Complaint's mother and the Appellant and consequently the possibility of the Appellant being framed could not be ruled out. Finally, Learned Counsel submitted that if a retrial was to be ordered, it will accord the prosecution a chance to fill up the gaps in their case to the detriment of the Appellant.

The principles applicable in determining whether or not to order a retrial are well settled. The order for retrial should not made unless the interest of justice require it and it will only be made if it does not occasion an injustice to an accused person. The order for retrial similarly should not be made if it will afford the prosecution an opportunity to fill in the gaps in the evidence previously tendered. That each case must be determined on its own facts and circumstances. further an order for retrial should only be made if the initial trial was illegal , a nullity or defective. Finally the Appellate court must be satisfied that on proper consideration of the admissible or potentially admissible evidence that may be tendered at the retrial, a conviction is likely of result. (See generally ***SUMAR VS REPUBLIC (1964) EA 481, FATEHALI MANJI VS REPUBLIC KLR 522.***

I have already held that the trial in the Court below was a nullity by virtue of the participation of P. C. Tom therein as a Prosecutor. The offence committed was morally repugnant. It involved a girl of tender years. The effect of her experience will remain with her for life. I think that in the circumstances it will be in the interest of justice that the matter be heard a fresh. The Appellant was sentenced to a prison term of seven years. He has only served about $2_{1/2}$ years of the term. In the circumstances, I do not think that the Appellant will be prejudiced by an order of retrial. The Appellant is of the view that if a retrial is ordered, then the prosecution would have been accorded an opportunity to fill in the gaps of the evidence already tendered. I do not think so. The evidence on record does not require such filing if any. The medical evidence was adduced by the Police surgeon. It is speculative to imagine that this time around the prosecution will go around fetching further evidence from Kenyatta National Hospital where the girl was first admitted following the incident. The evidence already on record is sufficient to return a conviction in my view. It is direct and corroborated. The Complainant knew the Appellant very well as they were related and stayed in the same compound. I do not think that much of the evidence tendered was hearsay as submitted by the Learned State Counsel.

All in all I think that the interest of justice will be best served by an order of retrial. Accordingly, I order that there be a retrial in this case. Towards this end the Appellant shall be produced before the Senior resident magistrate's Court, Kikuyu on 5th April, 2006 for purposes of retrial. The retrial shall be presided over by any other Magistrate of competent jurisdiction other than J. M. Wakahora who heard the initial case. Until then the Appellant shall continue to be held imprison custody.

Dated at Nairobi this 29th day of March 2006.

……..

MAKHANDIA

JUDGE