



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

Criminal Revision 14 of 2005

ABUBAKAR KIBWANAAPPLICANT

VERSUS

REPUBLIC..... RESPONDENT

RULING

Abubakar Kibwana hereinafter referred to as the accused was tried by the Senior Resident magistrate Nyeri on two counts as follows:

Count 1: Defilement of a girl under the age of 16 years contrary to section 145(1) of the Penal Code. Particulars being that on the 23rd day of January year 2001 at Ruringu in Nyeri District within Central Province, he had carnal knowledge of [*name withheld pursuant to section 76(5) of the Children Act, 2001*] a girl under the age of 14 years.

Count 2: Indecent Assault on a Female contrary to section 144(1) of the Penal Code the particulars being that on the 23rd day of January in the year 2001 at Ruringu in Nyeri District within Central Province, he unlawfully and indecently assaulted [*name withheld pursuant to section 76(5) of the Children Act, 2001*] a girl under the age of fourteen years by touching her private parts.

The case was initially heard before a Resident Magistrate. Ms J. B. A. Olukoye who reserved the case for judgment on 11th March 2004 but unfortunately left the judiciary before delivering the judgment.

On the 3rd June 2004, the case was mentioned before Mrs. M. R. Gitonga Principal Magistrate who at the request of the advocate for the Accused ordered for the case to be heard de novo. Thereafter hearing proceeded de-novo before Mrs. Osoro Senior Resident Magistrate. Mrs. Osoro finalized the hearing and delivered a judgment on 17th February 2005 in which she acquitted the Accused of the offence of defilement but convicted the Accused of the offence of Indecent Assault of a female contrary to section 144(1) of the Penal Code. She thereafter sentenced the Accused to pay a fine of Kshs.100,000/= in default to serve 5 years imprisonment.

The matter was subsequently referred to me by the Chief Magistrate Nyeri under section 363 of the Criminal Procedure Code. The Chief Magistrate was concerned about the legality of the sentence imposed upon the Accused.

Since it was apparent that there was a possibility of an order being made on revision to the prejudice of the Accused, the Accused was served through his advocate with a notice under section 364(2) of the Criminal Procedure Code.

The Accused and his advocate appeared before me on 31st January 2006.

It was the submission of the advocate that the Chief Magistrate had no powers to initiate a revision as the state had a right of appeal which it did not pursue. He relied on ***Criminal Appeal No. 20 of 1999 Gachoki Ndegwa v/s Republic [unreported]***. He submitted further that there was no illegality or impropriety in the sentence.

The counsel further urged the court to exercise its discretion and examine the record with a view to satisfying itself as to whether the conviction was proper. In this regard the advocate submitted that there was no corroboration of the evidence of the minor Plaintiff as the law then required and that section 19 of the Oaths and statutory declarations Act was not complied with. He relied on the case of ***Kinyua v/s Republic [2002] 1 KLR 256***. He further maintained that the provisions of section 200 of the Criminal Procedure Code was not complied with. He therefore urged the court to acquit the Accused and find that there was no impropriety on the sentencing.

I have perused section 364(1) of the Criminal Procedure Code, and in my understanding it empowers the High Court to examine any record of proceedings of a subordinate court for purposes of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order or the regularity of any proceedings. Section 364(1) describes the manner in which the proceedings get to the High Court as follows: ***“the record of which has been called for or which has been reported for orders or which otherwise comes to its knowledge.”***

This implies that there is no limitation as to how the proceedings for revision find its way to the High Court except as provided in Section 364 (5) of the Criminal Procedure Code which provides that “no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.

It was submitted by Mr. Wandugi that the Chief Magistrate was barred by this section from initiating a revision with due respect to Mr. Wandugi, the case of ***Justine Gachoki Ndegwa & Another v Republic Criminal Appeal Number 20 of 1999*** which He relied upon does not support his proposition. In the cited case, the revision was initiated by the Director of Public Prosecution who is clear a party in a criminal suit who would have a right of appeal and is therefore barred by section 364(5) of the criminal procedure code from initiating a revision. A chief magistrate is not a party to any suit. His position is to that of a subordinate court of the first class described in section 363(1) of the criminal procedure code ought to be amended to include the Chief Magistrate particularly in a situation where the chief magistrate is in charge of several other courts of a lower rank. Be that as it may the information regarding this matter was properly before the court under section 364 (1) of the Criminal Procedure Code and this court is obliged to examine the record.

Section 144(1) of the Penal Code under which the Accused was convicted provides as follows:

“144(1) Any person who unlawfully and indecently assaults any woman or girl is guilty of a felony and is liable to imprisonment with hard labour for twenty one years.”

In this case the Accused person was sentenced to a fine of 100,000/= in default to serve 5 years imprisonment.

Although section 144(1) does not provide for a sentence of a fine section 26(3) of the Penal Code provides that a person liable to imprisonment for an offence under the Penal Code may be sentenced to pay a fine in addition to or in substitution for imprisonment. The sentence of the trial magistrate providing for a fine was therefore to that extent in accordance with the law.

Nevertheless section 28(2) of the Penal Code provides the scale for the prison terms that may be imposed in default of a fine. That section as amended by Act No. 5 of 2003 provides for the maximum period of 12 months in respect of any fine exceeding 50,000/=. This means that having fined the Accused person Kshs.100,000/= the trial magistrate could not impose a default sentence of more than 12 months. The default sentence of 5 years was therefore a contravention of section 28(2) of the Penal Code. To this

extent therefore I find that the sentence imposed upon the Accused person was illegal.

Regarding the propriety of the Appellant's conviction Mr. Wandugi submitted that section 19 of the Oaths and Statutory Declarations act was not complied with and that the evidence of the minor Plaintiff was not corroborated and that Section 200 of the Criminal Procedure Code was also not complied with.

I have examined the record and do find that the trial magistrate appears to have examined the minor Plaintiff but did not make any specific finding as to whether she understood the nature of an oath and if not whether she understood the importance of speaking the truth. Section 19 of the Oaths and Statutory Provisions Act makes it mandatory for such a determination to be carried out before the evidence of a minor is received.

As regards corroboration, under section 124 of the Evidence Act as amended by Act 5 of 2003, the court is entitled to base its conviction on the uncorroborated evidence of the minor Plaintiff provided it records its reasons for believing that the minor Complainant is telling the truth. In this case no such reasons were recorded as required. Of greater concern is the fact that there were glaring inconsistency in the evidence regarding the date of the commission of the offence.

Although the minor Complainant alleged in her evidence that the offence was committed on the 23rd January 2001, she was not taken to hospital until two years later on 21st May 2003 when she was diagnosed to be having a venereal disease. The evidence of the Doctor (P.W.3) was also inconsistent with that of the minor complainant as He testified that the incubation period for venereal disease is not one year but between 5 days to a week. The infection spotted on 21st May 2003 could not therefore have been the result of the alleged assault. The trial magistrate appeared to have appreciated the difficulty posed by these inconsistencies and therefore acquitted the Accused person of the charge of defilement. However she proceeded to convict the Accused person for the charge of indecent assault on the very same evidence. I find that there was no evidence upon which such a charge of indecent assault could be supported.

Finally there was a defect in the charge-sheet as the Accused was charged with the offences of defilement and indecent assault both offences being alleged to have been committed on the same day at the same time. The charge of indecent assault ought to have been brought as an alternative count and not as a second count.

The upshot of the above is that the record reveals glaring improprieties and irregularities both in the conviction and sentence. In exercise of powers under section 364(1) of the Criminal Procedure Code, I set aside the judgment of the trial magistrate, quash the conviction of the Accused and set aside the sentence imposed upon him. The fine of Kshs.100,000/= paid should be refunded to the Accused.

Those shall be the orders of this court.

Dated, signed and delivered this 5th day of June 2006.

H. M. OKWENGU

JUDGE