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

Criminal Appeal 258 of 2005

(From Original Conviction and Sentence in Criminal Case No .J24 of 2003 of the Chief Magistrate's Court at Makadara – Mrs. Nzioka - PM).

JOSEPH MUTUA KASIVA ……..…..…..……..…..APPELLANT

VERSUS

REPUBLIC…….....…….……..….RESPONDENT

JUDGMENT

The Appellant, ***JOSEPH MUTUA KASIVA*** was charged with the offence of Defilement of a girl contrary to Section 145 (1) of the Penal Code. The particulars of the offence were that on 27th September, 2003 at ***[Particulars withheld]*** Village in Ruai within Embakasi Division of the Nairobi Province, the Appellant had carnal knowledge of B M a girl aged 3 1/2 years. The Prosecution called a total of 6 witnesses in a bid to prove its case.

The brief facts of the case were that the Complainant (PW2), a girl aged 4 years was left in the company of the Appellant, a casual employee by PW3. PW3 was proceeding to see a friend. whilst alone with PW2, the Appellant according to PW2 showed her his penis, removed her trouser and defiled her on the sofa set. When PW3 came back PW2 informed her of what had had transpired. PW3 then checked her private parts and noted some discharge. With the assistance of the neighbours, PW3 caused the Appellant to be arrested. Following further investigations, the Appellant was then charged with the instant offence.

Put on his defence, the Appellant elected to give an unsworn statement of defence. In his defence, the Appellant stated that he was framed in the case by PW3 who had wanted him to have sexual relationship with her but he had refused.

Having carefully considered the evidence and in a well thought out Judgment, Mrs. Mbugua, Learned senior resident magistrate found in favour of the Prosecution and convicted the Appellant accordingly.

Upon conviction, the Appellant was sentenced to life imprisonment with had labour. The Appellant was aggrieved by both the conviction and sentence, and hence lodged this Appeal.

In his Petition of Appeal, the Appellant faults the Learned Magistrate for convicting him on inconclusive evidence, failing to consider his defence and finally that the sentence imposed was harsh and excessive considering that he was a first offender. In support of these grounds of Appeal, the Appellant with the permission of the Court tendered written submissions that I have carefully considered.

The State through Mrs. Kagiri Learned State Counsel opposed the Appeal. Counsel submitted that the evidence linking the Appellant to the offence was clear and consistent. That the Prosecution evidence was well corroborated compared to the defence offered by the Appellant. It was the submission of the Learned State Counsel that the Prosecution evidence was overwhelming. That the Appellant's defence was a mere denial. On sentence, Counsel maintained that the same was legal and within the law as the maximum sentence that the offence carries is life imprisonment.

In the course of writing this judgment i noted that there was an issue that goes to jurisdiction of the court which neither the Appellant nor the Learned State Counsel addressed in their submissions. The issue is one of whether on certain occasions the trial court was properly constituted. From the record it does appear that from 23rd February, 2005 onwards the Coram of the Court was not reflected at all. All we have on record is Coram as before. The last proper coram to be recorded was on 23rd February, 2005 when it was recorded thus:-

" ***……. 23. 2. 2005***

Before Mrs. Mbugua RM

Prosecutor I. P. Muriuki

Court Clerk Esther

Accused in custody present

Prosecutor: I have 2 witnesses in Court….."

When the case came up for a ruling on no case to answer it is not possible tell whether there was Coram and or whether the Court was properly constituted. On that day the Court record merely reflects:-

"….. I have considered evidence of Prosecution witnesses and I find accused has case to answer……"

From the foregoing, it is not possible to tell whether the Appellant was present or even the Prosecutor and if the Prosecutor was present whether he met mandatory requirements set out in Section 85(2) as read together with section 88 of the Criminal Procedure Code and as restated by the Court of Appeal in ***ELIREMA & OTHERS VS REPUBLIC (2003) KLR 505.***

Again when the case came up for defence hearing on 23rd March, 2005, the same situation obtained. Once again the coram of the Court on that day merely read:- "***Coram s before"***

The Court of Appeal held in the case of ***LOLIMO EKIMAT VS REPUBLIC CA NO 151 of 20004*** (unreported) that the words "***Coram as before"*** meant nothing. That whether there was a Prosecutor in those circumstances and such Prosecutor was qualified was to a matter that could be assumed or inferred. For that reason the Court of Appeal proceeded to allow the Appeal, quash the conviction and set aside the sentence. The Court of Appeal decision is binding on me. Accordingly and for the aforesaid reasons I would annul the proceedings, set aside the conviction and sentence.

This Court however is not oblivious to the fact that it has raised and dealt with the issue *suo moto*. Ideally parties should have been called upon to address the Court over the issue. However, the matter being straightforward and clear-cut and considering the binding authority of the Court of Appeal decisions on this Court, it became clear and apparent to me that perhaps it was not absolutely necessary that I should invite the Appellant and the Learned State Counsel to address me on the same.

The next issue which I have to decide in the light of the decision I have came to is whether I should order a retrial.

The principles upon which the Courts act in determining whether or not to order a retrial are well settled. A retrial should only be ordered:-

(i). If it is in the interest of Justice.

(ii). If it will not occasion injustice to the Appellant.

(iii). If upon consideration of the admissible or potentially admissible evidence, a conviction may result in the event of a retrial.

(iv). If it will not accord the Prosecution opportunity to fill in the gaps in their case.

See generally, ***FATEHALI MANJI VS REPUBLIC (1966) EA 343***, ***SUMAR VS REPUBLIC (1964) EA 481*** and ***MWANGI VS REPUBLIC (1983) KLR 522.***

Applying the above principles to the circumstances of this case, and having evaluated and reanalyzed the evidence in terms of ***OKENO VS REPUBLIC (1972) EA 32*** I have come to the conclusion that this is a proper and fit case for an order of retrial.

The offence committed was serious. It involved a girl of about 4 years. The experience must have traumatized her and may have a lasting effect on her. The Appellant was convicted and sentenced on 12th May, 2005. He has thus been in jail for hardly 1 1/4 years. The Appellant had initially been sentenced to life imprisonment with hard labour. Having so far served only 1 1/4 of the sentence, the Appellant cannot be heard to say that if a retrial is ordered, he will be prejudiced or that he will suffer injustice. Having perused the evidence on record I am satisfied that if the self same evidence was to be re-tendered at the retrial a conviction is likely to result.

Having taken into account all the foregoing, I do order and direct that the Appellant undergoes a retrial. Towards this end the Appellant shall be produced before the Senior principal Magistrate's Court, Makadara on 18th October, 2005 for his retrial to commence. Until then the Appellant shall continue to be held in custody.

Dated at Nairobi this 11th day of October, 2006.

……

MAKHANDIA

JUDGE