REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 112 of 2006

SIMON NGETHE NYAMBURU …….APPLICANT

VERSUS

REPUBLIC……RESPONDENTS

***(From original conviction and sentence in Criminal Case No. 1079 of 2005 of the Senior Resident Magistrate's Court at Gatundu – MRS. M. MBURU SRM*).**

JUDGMENT

SIMON NGETHE NYAMBURA, the appellant, was charged before the subordinate court with the offence of attempted defilement of a girl contrary to section 145(2) of the Penal Code. The particulars of the offence were that on 23rd July 2005 in Thika District within Central Province attempted to have carnal knowledge of N. N. M a girl under the age of four teen years. He was charged with a second count of indecent assault contrary to section 144(1) of the Penal Code, which I take to be an alternative charge as the particulars relate to the same incident. The particulars of this second count are that on the 23rd July 2003 , in Thika district within Central Province, unlawfully and indecently assaulted N.N. M by touching her private parts while armed with a knife.

After a full trial, he was convicted on the main count of defilement. He was years imprisonment. Being aggrieved by the decision of the trial magistrate, he has appealed to this court against both the conviction and sentence. His amended grounds of appeal are as follows –

1. That the magistrate erred both in law and fact in failing to notice that the identification by PW1 and PW2 could not amount to positive identification to make a conviction.

2. The trial magistrate erred both in law and fact in failing to notice that the language used to interview PW1 the complainant and also the language used while the appellant was giving his defence statement was not indicated in the record, considering that PW1 was a minor.

3. The learned trial magistrate erred in both in law and fact in failing to consider that the time given by both PW1 and PW2 did not corroborate (each other).

4. The learned trial magistrate erred both in law and fact in failing to consider that the case was not properly investigated and the sentence imposed was too harsh and excessive.

5. The trial magistrate failed to notice that the case was testified by only one family a daughter and

her father who were once the appellant's employer.

6. The trial magistrate failed to consider the contradictions between the two witnesses PW1 and PW2 and the chance which made PW2 be at the area at the time of the incident.

7. The learned trial magistrate failed to notice that the leso (won by PW1) was not produced as exhibit.

8. The learned magistrate failed to consider his defence, which although unsworn had narrated what had happened on that day.

The appellant also filed written submission.

The learned State Counsel, Mrs. Gakobo, opposed the appeal and supported both conviction and sentence. Counsel contended that PW1's evidence was that the appellant pulled her and touched her private parts and said that he would have sex with her. Counsel contended that attempted rape was not proved as there was no evidence of an attempt to penetrate. In counsel's view, mere words of an intention could not amount to the offence of attempted rape. Counsel urged this court to evaluate the evidence and find the appellant guilty of the offence of indecent assault. Counsel contended that identification was positive and safe as both PW1 and PW2 knew the appellant well before the incident as he used to work for them before. Counsel contended that the defence of the appellant was considered by the trial magistrate but was dismissed because it did not shake the prosecution evidence.

In a short reply, the appellant submitted that though the witnesses (PW1 and PW2) claim to have known him before they did not appear to know his name. He contended that there was also a contradiction in the evidence of PW1 AND pw2 AS PW2 stated that the incident occurred at 6 pm, whiled PW1 stated that it was at 12 noon.

This being a first appeal, I have to remind myself that I am duty bound to re-evaluate the evidence on record afresh to come to my own conclusions and inferences, taking into account that I neither saw nor heard the witnesses testify to determine their demeanour and give allowance for that - see OKENO –vs- REPUBLIC [1972] EA 32.

The facts in brief are as follows. On 23//7/2005 the complainant (PW1) who is aged about 11 years was at home alone. The appellant, who had worked for the complainant's father (PW2) before come to the house. According to PW1 the appellant came and grabbed her while she was putting water in a dish using a pipe. The appellant pulled the complainant towards a bed, touched her private parts and said that he would have sex with her. She hit him with a cooking stick and the appellant took a knife which was in the utensil nearby and threatened her. Her father (PW2) heard the commotion and came to the scene. They overpowered the appellant and tied him, put him in PW2's pick up and took him to the police.

According to PW3 PC JOSEPH KAMUYU – the appellant was sent to Kagongo police patrol base by PW2 and the complainant on the 23/7/2005, with a report that PW2 had found the appellant at home armed with a knife and wanted to rape his daughter (PW1). PW2 also brought a knife to the police patrol base. Thika appellant was therefore re-arrested.

In his defence the appellant gave unsworn testimony. It was his defence that he was a vegetable seller at the market. On the material day, a customer came and told him that he wanted him (appellant) to cut for him vegetables. He then went to borrow a knife from the complainant's house and found the complainant who gave him a knife and then he met with the father of the complainant who then started beating him.

Faced with these facts, the learned magistrate found that the prosecution proved its case, and stated thus in the judgment –

"**the evidence against the accused in this case is overwhelming. The complainant through a minor**

gave very clear evidence of how the accused grabbed her and even threatened her with a knife while telling her he wanted to have sex with her. It is also noted that the PW2 was attracted by the commotion and when he entered the house he found the accused armed with a knife and the complainant on the floor. I have no doubt that the accused had intentions of defiling the complainant had he not been interrupted by PW3".

The first complaint of the appellant is that his identification by PW1 and PW2 was not positive. That ground of appeal cannot succeed. The evidence on record from both PW1 and PW2 was that they knew the appellant before, and that he had even worked for PW2. The appellant also stated in his own defence that he went to the house where he met PW1 and was found by PW2 in the same house and beaten. I find no basis for the assertion that he was not positively identified by the witnesses. There was no possibility of mistaken identity at all.

The second complaint of the complainant is on the language used in court. He contends that the language used when the PW1 testified and when he (the appellant) gave his defence was not recorded. With regard to the evidence of PW1. The record clearly shows that she testified in Swahili language. With regard to the appellant his defence testimony was taken on 28/10/2005. The proceedings on that day were in Swahili translated to English. It is apparent from the record that the language used by the accused himself in his defence was not specifically indicated in the proceedings.

With regard to the defence of the appellant it is merely stated by the learned magistrate – "**ACCUSED's UNSWORN STATEMENT".** No indication was given by the language was used by the appellant in his defence. In SWAHIBU SIMBAUNI SIMIYU & ANOTHER –vs- REPUBLIC Criminal Appeal No. 243 of 2005 Omollo, Bosire and Waki JJA held.

"**Once again each appellant asked very few questions and when they were finally put on their defence, each appellant is shown to have addressed the court, it being recorded :-**

ACCUSED1 SWORN STATES ……

ACCUSED 2 UNSWORN STATES

Once again, it is not shown what language each appellant used so that from the record of the magistrate it is not possible to say each spoke in English or in Swahili and whether each of them understood whatever language was being used.

……..

On that basis alone, the appeals must be allowed"

The above decision of the Court of Appeal is binding on one. I will have to allow the appeal on that ground. I do not find it necessary to go to the other grounds of appeal.

Do I order a retrial? The principles to be considered by the court in deciding whether or not to order a retrial are well settled. In AHMED SUMAR –vs- REPUBLIC [1964] EA 481, at page 483, the Court of Appeal for East Africa held –

"…….**a retrial should not be ordered unless the court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the peculiar 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 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 perused the evidence on record. In my view, if the same self evidence is retendered in a retrial, a conviction might result. In addition, the offence is a serious offence and the appellant was sentenced to

serve fifteen (15) years imprisonment in December 2005, which is less than two years now. In my view, there will be no undue delay in the hearing of the case de novo. I am also of the view that witnesses and exhibits will be readily available. It is my view that an order for a retrial will in no way be prejudicial to the appellant. The interests of justice in the circumstances of the case do justify an order for retrial, as the interests of justice have to be considered both on the side of the appellant, as well as on the side of the public interest.

For the above reasons, I allow the appeal, quash the conviction and set aside the sentence. I however order retrial. Towards this end, the appellant shall appear before the Chief Magistrate's Court Thika on 14th December 2007 for a retrial on the same charges before any magistrate of competent jurisdiction other than MRS. M. MBURU SRM who presided over the initial trial. Until then the appellant shall remain in prison custody.

Dated and delivered at Nairobi this 10th day of December 2007.

George Dulu

Judge

In the presence of –

Appellant

Mrs. Gakobo

Eric - court clerk