**Sammy v Republic (Criminal Appeal 66 of 2019)**
**[2023] KEHC 3452 (KLR) (21 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3452 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MALINDI**

**CRIMINAL APPEAL 66 OF 2019**

**SM GITHINJI, J**

**APRIL 21, 2023**

**BETWEEN**

**SHADRACK KAZUNGU SAMMY ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Appeal from Original Conviction and Sentence in Criminal Case No. 294 of 2015 of the Senior Resident Magistrate's Court at Kilifi - Hon. L.N Wasige, RM dated 14th December 2016)***

## JUDGMENT

1. The Appellant was convicted of, and sentenced to serve ten years imprisonment for the offence of sexual assault contrary to Section 5(1) (a) (i) (2) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence are that on 16th June 2015 within Kilifi County, the Appellant intentionally and unlawfully used his fingers to penetrate the Vagina of AK, a child aged 6 years.

2. The Appellant was also charged with an alternative count of indecent Act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars hereof being that on 16th June 2015 within Kilifi County, the Appellant intentionally and unlawfully used his fingers to penetrate the Vagina of AK, a child aged 6 years.

3. Aggrieved by the sentence and the conviction of the trial court, the Appellant lodged an appeal on the following grounds: -

    1. That the evidence availed in court was not sufficient to link him to the crime.

    2. That there was no p3 form to corroborate the prosecution case.

    3. That the sentence of 10 years is harsh, severe and excessive.

**Evidence**

4. PW1 EK the complainant's mother testified that on 17th June 2015 at around 3p.m, she met two men at her home, namely Sifa Kazungu and Davis Katana, who informed her that the Appellant had attempted to defile the minor. The Appellant was their neighbour. She immediately interrogated the minor who narrated to her that while she was playing, the Appellant called her to a nearby incomplete house where he removed her pant and inserted his fingers inside her vagina.

5. She took the minor to Matsangoni A.P Post and later to Matsangoni dispensary where the minor was examined. She reported the incidence at Kilifi Police Station where they were referred to Kilifi District Hospital where a p3 and post rape care forms were filled.

6. Upon being cross examined, she told the court that there was no grudge between the Appellant and herself and neither did she know of any grudge between the Appellant and the said Sifa.

7. PW2 AK testified through an intermediary, her mother [PW1]. She identified the Appellant as Sammy Kazungu, who is their neighbor. She narrated that on the material day she was playing alone outside when the Appellant called her. The Appellant removed her panties and inserted his fingers in her buttocks and her vagina. She felt pain and cried. It was at that point when one Davis rescued her.

8. The minor maintained in cross examination that the Appellant hurt her and made her feel pain.

9. PW3 Davis Katana equally identified the Appellant. He testified that on the material day, at around 12 noon he was headed to a shed to relax when he saw one Sifa laughing. Sifa asked him to go to a nearby deserted house to see what the Appellant was doing. He narrated that he found the Appellant kneeling on top of the minor inserting fingers in her vagina. The minor was crying asking to be let go. He [PW3] called out the minor and the Appellant let her go.

10. PW4 Dr. Zena Jeizan a doctor at Kilifi County Hospital produced a P3 form-PEXH1 filled by Dr. Hashim in favour of the complainant. As per the p3, the outer genitalia and vagina was normal, hymen intact. No discharge or blood. The approximate age of injury was days and the type of weapon used was blunt. No treatment was given and the degree of injury was harm.

11. PW4 also produced the post rape care form-PEXH2 filled by Dr. Lucas Mwero a clinician at Matsangoni Health Centre. The minor had normal external genitalia, no visible injuries, normal vagina, normal anus and hymen was intact.

12. PW5 CPL Clara Bingo of Kilifi Police Station confirmed that PW2 reported the incident and the case was investigated by CPL Dzombo. She produced as PExh 3 the minor's clinic card indicating that she was born on 31/8/2009.

13. After the close of the prosecution case, the Appellant was found with a case to answer. He opted to give unsworn evidence.

14. The Appellant denied all the charges. He stated that he met PW1 and PW2 for the first time in court. According to him, he was arrested on 18th June 2015 at around 5. 30am for reasons that he had impregnated a girl. The Appellant added that he had been arrested before on allegations that he had impregnated PW2's older sister named Kabibi, but released when the said Kabibi confirmed that he was not responsible for the pregnancy. This incident, according to the Appellant caused PW1 to develop a grudge against him.

**Analysis and Determination**

15. This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, re-evaluate and re-analyse it and come to its own conclusion bearing in mind that unlike the trial court, it did not have the benefit of seeing the demeanor of the witnesses during the trial and can therefore only make an allowance for that. [See *Okeno v R* [1972] EA 32, *Eric Onyango Odeng' v R* [2014] eKLR.

16. I have considered the grounds of appeal and the submissions made thereon by the Appellant. I note that the Appellant raised a legal issue which I find prudent to first address:

    1. Whether failure to give the Appellant the right to elect whether to re- call witness after prosecution has amended its charge renders the trial defective.

17. Section 214 of the *Criminal Procedure Code* provides as follows:

    (1) Where, at any stage of a trial before the close of the case by the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:

    Provided that-

    i. where a charge is so altered, the court shall thereupon call upon the Appellant person to plead to the altered charge;

    ii. where a charge is altered under this subsection the Appellant may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross – examined by the Appellant or his advocate, and, in the last- mentioned event, the prosecution shall have the right to re- examine the witnesses on matters arising out of further cross – examination.

18. In *David Abdalla Osman v Republic* [2010] eKLR Lesit J observed as follows:

> " The proviso to Section 214 makes it mandatory for the court to require an Appellant person to make an election whether or not to recall witnesses who may have testified in the case once the charge is amended and or substituted. This is a mandatory requirement and therefore a right of the Appellant. The court of appeal in the case cited by Mr. Mwanzia for the appellant, Yongo v Republic, Supra, put it this way:
>
> "It is mandatory requirement that the court must not only comply with the above conditions, but it shall record that it has so complied. The trial magistrate failed in not recording whether there had been compliance with the provision to section 214 of the *Criminal Procedure Code* (Cap 75).
>
> The appellant should have been given the opportunity to further questioning which might have caused the trial magistrate to form a different view of the witness' evidence"

19. I have perused the proceedings before the trial court. It is undisputed that the Prosecution successfully made an application to amend the charge. The initial main count was of defilement contrary to section 8 [1] as read with section 8[2] of the *Sexual Offences Act*.

20. The learned trial magistrate partly complied with the provision of Section 214 above. She read over the new charge to the appellant who denied it. She however failed to comply with the rest of the proviso.

She failed to accord the appellant his right to recall witnesses for further cross- examination if he so wished. Failure to do so renders a trial defective.

21. In the circumstances, and as was observed by Lesit J in the David Abdalla case[supra], this court has no discretion to take a different course exercise but to quash the conviction and set aside the sentence. Having found that the trial was defective, it then behooves the court to determine whether a retrial should be ordered. In the renown case of *Opicho v Republic* [2009] KLR 369, the Court of Appeal held as follows:

> " In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a re-trial should be ordered. Each case must depend on its own facts and circumstances and an order for retrial should only be made where the interest of justice require it."

22. The principles for granting a retrial were also laid out by the court of appeal in *Bob Ayub v Republic* [2010] eKLR as follows:

> " We have anxiously considered whether or not to order a retrial. The relevant principles to consider when faced with such a matter have been stated severally by this Court. In the case of *Muiruri v Republic* [2003] KLR 552 this Court held inter alia as follows: -
>
> 3. Generally, whether a retrial should be ordered or not must depend on the circumstances of the case.
>
> 4. It will only be made where the interest of justice requires it and if it is unlikely to cause injustice to the appellant. Other factors include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely the prosecution making or not."

23. Given the foregoing, I am of the considered view that a retrial would prejudice the Appellant who has been in custody from the time of his arrest on 18th June 2015, that is approximately 7 years ago.

24. I therefore do allow the Appeal, quash the conviction and the sentence imposed. The Appellant is set free unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 21st DAY OF APRIL, 2022.**

**.....**

**S.M.GITHINJI**

**JUDGE**

In the presence of; -

1. Mr Mwangi for the State

2. The Appellant in person