



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KILGORIS

CRIMINAL APPEAL CASE NO. E011 OF 2021

(CORAM: F.M. GIKONYO J.)

(Being an appeal from the judgment of Hon. R.M. Oanda (P.M) in Kilgoris Cr. case No. 715 of 2014 delivered on 30/10/ 2019).

POO.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006. It was alleged that the appellant on 18th May 2014 at Magena Sub- Location, Kenyeny District Kisii County, intentionally and unlawfully caused his penis to penetrate the vagina of **SK** a girl aged 12 years.

2. The appellant was convicted of the charge and sentenced to serve twenty-five (25) years imprisonment.

3. Being dissatisfied with the said judgement the appellant lodged an appeal on the following grounds: -

i. That the trial magistrate erred in both law and fact by convicting the appellant in the present matter defilement without the sufficient evidence that met the standard of any reasonable doubts.

ii. That I pleaded not guilty during the time of trial and still maintain the same.

iii. That the trial magistrate erred in both law and facts by totally presuming justice by not keeping in mind that I the appellant was not furnished with trial copy as required by the law. He made a several applications he be supplied with the same but in vain his lord.

iv. That the trial magistrate erred in both law and fact by convicting him the appellant that he was forced of the hearing proceeded in court and yet he was sick his lord.

Appellant's Submissions

4. The appellant canvassed his appeal through written submissions.

5. He submitted that the evidence adduced by the respondent's witnesses was contradictory hence could not sustain a conviction.

6. He submitted further that his right to fair trial guaranteed under article 50 of the Constitution was violated because he was not supplied with witness statements during trial even after making several requests for them.

7. He continued to submit that the age of PW1 was not proved beyond reasonable doubt. According to him, the complainant was an adult, his wife and they had been in marriage for two years and blessed with two children.

8. He also pointed out that there were inconsistencies in her names in the birth certificate.

9. The appellant was of the view that proper investigations was not done.
10. The appellant concluded that the trial magistrate acted on wrong principles to convict him.

Respondent's Submissions

11. Mr. Ondimu OGW, senior prosecution counsel orally submitted that upon reading the record, he noted fatal errors on their case. That the appellant was placed on his defence on 9/12/2016. At the time, he was on bail. He jumped bail and vanished for three years. From the lower court record at page 32, the prosecution applied to withdraw the case under section 40 of SOA and section 87 (a) of CPC. The matter was withdrawn. The withdrawal was done after the close of the prosecution's case.
12. Later, the appellant was re-arrested on 12/7/2019 and the matter proceeded as if it had not been withdrawn.
13. According to Mr. Ondimu a withdrawal after the close of the prosecution's case leads to an acquittal. He urged the court to consider these matters.

ANALYSIS AND DETERMINATION

14. The DPP- respondent herein has argued that the primary case herein had been withdrawn after the prosecution has closed its case. According to the DPP such withdrawal amounts to acquittal. But in this case, upon being re-arrested, the case continued despite the withdrawal.

15. These arguments by the DPP (Respondent) are matters of the law and the Constitution.

16. Under article 157 of the Constitution, the Director of Public Prosecutions shall exercise State powers of prosecution and may—subject to clauses (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b). Nevertheless, under article 157(7) of the Constitution:

(7) If the discontinuance of any proceedings under clause (6)(c) takes place after the close of the prosecution's case, the defendant shall be acquitted.

17. I have perused the record of the trial court and these facts emerge: -

- i. The prosecution closed its case on 9th December, 2016;
- ii. The trial court found that the accused had a case to answer on 16th December, 2016;
- iii. On 4th June, 2019, the prosecution applied to withdraw the case against the accused under section 87A of the CPC. The trial court allowed the application and the case was withdrawn under section 87a of the CPC.
- iv. The reason given for allowing the withdrawal was that the warrant of arrest issued by the court may never be executed.
- v. The appellant was re-arrested later and the case continued the withdrawal notwithstanding.

18. Section 87A of the Criminal Procedure Code provides:

87. In a trial before a subordinate court a public prosecutor may with the consent of the court or on the instruction or the Attorney General at any time before the judgment is pronounced withdrawn from the prosecution of any person and upon withdrawal:-

(a) if is made before the accused person is called upon to make his defence, he shall be discharged but the discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts,

(b) if is made after the accused person is called upon to make his defence he shall be acquitted.

19. Section 87A of the CPC is in accord with the Constitution. In a withdrawal of a criminal proceeding after the prosecution has closed its case, the accused person is acquitted and he will be entitled to the defence and a Plea of Autrefois Acquit under article 50(2)(o) of the Constitution to subsequent similar charge. Thus, the trial court should be alive to this constitutional reality and categorically so state in its decision. Therefore, the trial court should make a conscientious and judicious decision in giving its permission for withdrawal of charges at that stage. For clarity, under the said article,

A person must not be tried for an offence in respect to an act or omission for which he or she has previously been acquitted or convicted by a competent court....However, a person may subsequently be tried for another offence that he or she could have been charged with in the former trial under section 135 of the CPC (s. 139, CPC). An accused person may also be charged with respect to an act whose consequences had not occurred or were not known at the time of the previous trial (s. 140, CPC). *Judiciary Criminal Procedure Bench book, 2018.*

20. When the record of the trial court is placed on the scale in Section 362 of the Criminal Procedure Code, the criminal proceedings undertaken before the trial court is completely tainted with illegality and irregularity that its null and void.

21. Accordingly, continuation with the criminal proceeding that had been withdrawn after the close of the prosecution's case is inconsistent with the Constitution, and the proceedings thereof are a nullity.

22. It is so declared and the accused shall be set free forthwith unless otherwise lawfully held in custody.

23. Be that as it may, the facts of this case put the court between a rock and a hard place, for, on the one hand is the right of the accused under article 50(2)(o) of the Constitution, and on the other hand, the right of the victim of the offence, the society's objective to stamp out defilement and the need to protect children from sexual debauchery. I should think that before withdrawal of charges instituted under Sexual Offences Act is done, the DPP as well as the court should be careful that the provisions of article 157(6) & (7) of the Constitution are utilized having regard to the public interest in criminal prosecution, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 7TH DAY OF DECEMBER, 2021

F. GIKONYO M.

JUDGE

In the presence of:

1. Appellant

2. Ondimu for DPP0

3.

Kasaso

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