



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 62 OF 2011

ALFRED JUMA SHEM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgement (conviction and sentence) of Hon. R.O.

Oigara, SRM, delivered on 18/11/2010 in the Senior Resident Magistrate's

Court at Kimilili, Criminal Case No. 594 of 2008, R v. Alfred Juma Shem)

JUDGEMENT

[Pursuant to section 201 (2) as read with section 200(1) (a) CPC]

1. The appellant has appealed against his conviction and sentence of life imprisonment in respect of the offence of defilement contrary to section 8 (1) as read with section 8 (4) of the Sexual Offences Act No. 3 of 2006.
2. Ms. Koech, counsel for the respondent has supported both the conviction and sentence.
3. In this court, the appellant has raised four grounds of appeal in his petition of appeal.
4. In ground 1 the appellant has faulted the trial court for convicting him on fabricated evidence, which fell short of the standard of proof beyond reasonable doubt. In ground 2 the appellant has faulted the trial court for failing to consider his defence. In ground 3 the appellant has faulted the trial court for failing to call the school teacher as a witness. In ground 4 the appellant has faulted the trial court for failing to allow him to mitigate.
5. In his oral submissions in this court, the appellant has submitted that he had applied to the learned magistrate to recuse himself; since the same learned magistrate had convicted him in two previous cases of defilement and sentenced him to life imprisonment. He further submitted that one such case was criminal case No. 595 of 2009 in Kimilili Senior Resident Magistrate's Court. In this regard, the prosecutor during the pre-sentencing hearing stated that the appellant had one previous conviction for defilement. He was convicted for that defilement on 4/5/10.
6. It is clear therefore that the learned magistrate should not have tried the appellant because he had previously convicted him of a similar defilement offence. In view of this the learned magistrate should have disqualified himself from trying the appellant. He was not impartial as required by article 50 (1) of the 2010 Constitution of Kenya; which reads as follows:

7. "Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."
8. In the circumstances, I find that the appellant did not have a fair and impartial trial. This breach of the appellant's constitutionally guaranteed right was breached. It therefore follows that the trial of the appellant was fundamentally defective.
9. In the premises, the appellant's appeal succeeds with the result that his conviction and sentence are hereby quashed.
10. In the light of the foregoing, it is moot or academic to consider the grounds of appeal.
11. The only issue left for me to consider is whether I should order the re-trial of the appellant pursuant to this court's powers in terms of

section 354 (3) (a) (i) of the Criminal Procedure Code (Cap 75) Laws of Kenya. In doing so, I have taken into account that the appellant has been in prison custody for about ten years; following his conviction and sentence on 18th November 2010.

12. Since the appellant has been in custody for about ten years, I find that it is in the interest of justice not to order for the re-trial of the appellant.

13. The appellant is hereby ordered to be set free unless otherwise held on other lawful warrants.

Judgment signed, dated at Narok this 19th day December 2019.

J. M. Bwonwong'a.

Judge

19/12/2019.

AND

Judgment signed, dated and delivered court open at Bungoma this 13th day of February, 2020.

S. N. Riechi

Judge

13/2/2020