



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO 202 OF 2016

MAVIN BUSAKA KHAYUMBA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgement (conviction and sentence) of Hon. D.O.Onyango, SPM, delivered on 23/09/2016 in the Senior Principal Magistrate's Court at Kimilili in Criminal Case No. 20 of 2015, R v. Mavin Busaka Khayumba)

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 twenty years' 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. Nyakibia, counsel for the respondent has supported both the conviction and sentence.
3. In this court the appellant has raised four grounds in his petition of appeal.
4. In ground 1 the appellant has stated the unchallengeable fact that he did not plead guilty.
5. The remaining of the 7 grounds are actually mitigating grounds which are in relation to sentence.
6. Furthermore, in his written submissions the appellant has challenged his conviction as well. I will therefore consider the grounds that challenge the conviction.
7. In paragraph 3 of his written submissions, the appellant has submitted that his fair trial rights in terms of article 50 (2) of the 2010 Constitution were violated. The record of the proceedings indicated that the trial of the appellant was conducted by two magistrates. The first magistrate (Hon G.R. Sagero) took the evidence of three prosecution witnesses, and was then transferred. The second succeeding magistrate (Hon. D.O. Onyango) took the evidence of one prosecution witness and that of the appellant, who made an unsworn statement.
8. When the second magistrate took over the case on 8/9/2015, he explained the rights of the appellant under section 200 of the Criminal Procedure Code (Cap 75) Laws of Kenya. In response the appellant informed the court that he wanted the case to proceed from where it had reached. The court then ordered the trial to proceed from where it had stopped. On 24/9/2015, when the case came up for mention, the appellant applied to be given witness statements. As a result, the court ordered the prosecution to supply the appellant with witness statements.
9. The appellant there and then requested that the hearing starts afresh, since he was forced to proceed without statements. The court now presided over by Hon. C. Menya fixed the case for mention for further directions and reallocation in court 1 on 30/9/2015. On 30/10/2015 Hon D.O. Onyango, SPM, fixed the case for trial on 23/10/2015. A number of adjournments were granted at the request of the prosecution until Hon. D.O. Onyango on 5/5/2016 when granting the last adjournment pronounced himself as follows. "***Court: I note that on two previous occasions, I have granted the prosecution last adjournment. In fact, the word "last" is becoming meaningless in the circumstances I have considered the spirited effort by the prosecution to adjourn the case. In the interest of justice prosecution granted the very last chance to get the 2 witnesses. Summons to issue. Hearing on 20/5/2016.***" This last adjournment was in response to the prosecution application for the last adjournment to which the accused responded that he had suffered in remand, since he had not been granted bail.

10. On 20/5/2016 the hearing proceeded before Hon. D.O. Onyango. The hearing proceeded without the change on the part of the appellant that he now wanted the trial to start afresh since earlier on he was forced to proceed without statements was not addressed by the trial court (Hon. D.O. Onyango). He was then put on his defence. In his unsworn evidence, the appellant denied the charge. The appellant further stated that he recalled on 4/4/2015, while at his place of work, three men went there and arrested him, without telling him the reason for the arrest. He finally stated that he was charged in court and that he knew nothing about the charges.

11. It is clear from the foregoing that Hon. D.O. Onyango did not make a decision on the application of the appellant that he now wanted his trial to start afresh. Earlier on he had informed Hon. D. O. Onyango that he wanted the trial to proceed from where it had reached. I find that the court should have allowed the appellant's application for the trial to start afresh in terms of section 200 (3) of the Criminal Procedure Code (Cap 75) Laws of Kenya. Failure to do so infringed his fair trial rights in terms of article 50 () of the 2010 Constitution of Kenya.

12. Furthermore, it seems from his request for witness statements before Hon. C. Menya that prior to that, his trial was conducted without the appellant being supplied with witness statements in advance of the trial as required by article 50 (2)(j) of the Constitution. This is another instance of the infringement of his fair trial rights. Additionally, I find that the court (Hon. D.O. Onyango) granted two adjournments pronouncing each to be a last adjournment. This is not proper as this had the effect of eroding confidence in the administration of justice. Once an order of the court is made it is understood that it is to be complied with and if it is to be departed from sufficient cause has to be shown.

13. In the premises, I find that the appellant did not have a fair trial, since his trial was fatally defective. The appellant's appeal succeeds with the result that his conviction and sentence are hereby quashed.

14. The question that remains is whether I should order for a new trial pursuant to this court's powers under section 354 (3)(a)(i) of the Criminal Procedure Code. The appellant was in remand custody since 7th April 2015 to 9th May 2016. On 9th May 2016, the appellant was released on bail. The remand custody period translates to about one year. He was then sentenced to twenty years' imprisonment on 23rd September 2016, which now translates to about three years. The total custody period is about four years.

15. I have considered all the circumstances of the case including the custody period of about four years. As a result, I find that this is not a fit case in which a new trial is to be ordered. I hereby decline to do so.

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

Judgement signed and dated at Narok this 19th day of December, 2019

J. M. Bwonwong'a

Judge

And

Judgement signed, dated and delivered in open court at Bungoma this 12th of February, 2020.

S. N. Riechi

Judge

12/2/2020