



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 103 OF 2017

RICHARD KIBET BUSIENEI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from against both the conviction and the sentence of Hon. Y. I. Khatambi (Senior Resident Magistrate) delivered on 24TH November 2017 in NAKURU Court Criminal Case No. 46 OF 2016.)

JUDGMENT

1. Section 214 of the Criminal Procedure Code is entitled “Variance between charge and evidence, and amendment of charge” and states as follows::

Where, at any stage of a trial before the close of the case for 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 accused person to plead to the altered charge;

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

iii. Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.

iv. Where an alteration of a charge is made under subsection (1) and there is a variance between the charge and the evidence as described in subsection (2), the court shall, if it is of the opinion that the accused has been thereby misled or deceived, adjourn the trial for such period as may be reasonably necessary.

2. In **David Abdalla Osman V Republic [2010] eKLR**, Lesiit J. interpreted this section as follows:

*The proviso to Section 214 makes it mandatory for the court to require an accused 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 accused. 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 might have caused the trial magistrate to form a different view of the witness’ evidence”

I have considered this appeal. I have also perused the record of the proceedings. It is not in dispute that an error occurred at the trial of the case in that the learned trial magistrate allowed the substitution of the charge at the end of the prosecution case. The learned trial magistrate complied with the provision of S. 214 CPC only in part. She read over the new charge to the appellant who denied it. She however failed to comply with the rest of the proviso. Trial learned magistrate omitted to accord the appellant his right to recall witnesses for further cross-examination if he so wished.

3. In the present case, the Appellant, Richard Kibet Busienei, was arraigned before the Nakuru Chief Magistrate's Court with two counts as follows:

4. The first count was that of defilement contrary to Section 8(1) as read with Section 8 (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge as contained in the charge sheet were as follows:

On the 25th day of February 2016 at (Particulars Withheld) Village in Nakuru West Division within Nakuru County Intentionally and unlawfully committed an act by inserting a male genital Organ Namely Penis to a female genital organ namely vagina of SC child aged 8 years which caused penetration.

5. An alternative charge of indecent act contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge as contained in the charge sheet were as follows:

On the 25th day of February 2016 at (Particulars Withheld) village in Nakuru West Division within Nakuru County Intentionally and unlawfully committed an indecent act by touching private parts namely vagina of SC child aged 8 years which caused penetration.

6. The second count was one of attempted defilement contrary to Section 9 (1) as read together with Section 9 (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge as contained in the charge sheet were as follows:

On the 25th day of February 2016 at (Particulars Withheld) village in Nakuru West Division within Nakuru County Intentionally and unlawfully committed an act by inserting a male genital Organ Namely Penis to a female genital organ namely vagina of SC child aged 8 years which could cause penetration.

7. This count also had an alternative charge of committing an indecent act contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge as contained in the charge sheet were as follows:

On the 25th day of February 2016 at (Particulars Withheld) in Nakuru West Division within Nakuru County Intentionally and unlawfully committed an indecent act by touching private parts namely vagina of SC child aged 8 years which caused penetration.

8. The Appellant pleaded not guilty and the trial commenced. Four Prosecution witnesses testified and were cross-examined on various dates. Then, the matter came up for further hearing on 06/07/2017. The Prosecutor applied to amend the charge sheet. The application was granted by the Learned Trial Magistrate. The proceedings record that the charge was read over to the Accused Person in Kiswahili, a language he understood and every element thereof explained to him. The Learned Magistrate, then, asked the Appellant to respond. He responded to both substantive counts as well as alternative counts by stating "si kweli". The Learned Trial Magistrate proceeded to enter a plea of not guilty. She then recorded: "Hearing to proceed." The fifth Prosecution witness, a doctor, was then put on the witness stand.

9. At the conclusion of the trial, the Learned Trial Magistrate returned a guilty verdict on the first count and imposed a life imprisonment sentence on the Appellant. The Learned Magistrate acquitted the Appellant on the 2nd Count.

10. The Appellant is aggrieved and has filed the present Appeal. The Appellant raised several grounds of appeal. One of the grounds was that the Learned Trial Magistrate erred in law when she failed to inform the Appellant that he had a right to recall any witnesses after the amendment of the charges after four witnesses had already testified as required under section 214 of the Criminal Procedure Code reproduced above.

11. During the hearing of the appeal, Mr. Chigiti, the Prosecutor, conceded to the appeal on this ground. He urged the Court to find that there was a mistrial in view of this error but to order a re-trial since there was sufficient evidence to convict.

12. Mr. Chigiti was right to concede the appeal. As Lesiit J. explained in *David Abdalla Osman V Republic [2010] eKLR* upon the amendment of the charge sheet after some witnesses have testified, the Court has a duty to, first, take plea afresh and, second, inform the Accused Person that he has a choice whether to recall the witnesses who had already testified. This is a fundamental right to fair trial which, if not adhered to, fatally taints the entire trial. Hence, the conviction in this case cannot stand. It is hereby set aside. By dint of that, the sentence imposed also falls by the way side.

13. The only question that remains is whether to order a retrial or not.

14. *Having perused the record of the trial Court with the keenness and evaluative eye demanded of an appellate Court, I have come to the conclusion that a retrial would be appropriate here. In Makupe v Republic Criminal Appeal No 98 of 1983, the Court of Appeal at Mombasa on July 18, 1984 (Kneller JA, Chesoni & Nyarangi Ag. JJ A) set out the general test to be utilised in determining whether a retrial should be ordered or not: In general a retrial will be ordered when the original trial was illegal or defective. Conversely, a retrial will not be ordered where the conviction is set aside because of insufficient evidence. The court must in ordering a retrial take the view that had the case been properly prosecuted and admissible evidence adduced, a conviction might fairly result.*

15. In this case, I am persuaded, from my view of the case that properly prosecuted there might be sufficient admissible evidence to result in a conviction. The less I say about this, the better.

16. In the end, therefore, the orders and directions of the Court are as follows:

a) **The conviction entered in Nakuru Chief Magistrate's Court Criminal Case No. A.46 of 2016 is hereby set aside.**

b) **The sentenced imposed on the Appellant is hereby consequently set aside.**

c) **The Appellant shall be released from Prison forthwith and shall, instead, be placed on remand pending their presentation before the Magistrates' Court to take plea.**

d) **The Appellants shall be presented before the Chief Magistrate's Court, Nakuru on Monday, 10th March, 2020 to take plea. The case shall be allocated to a magistrate other than the Learned Honourables Y. Khatambi and J. Nthuku.**

e) **The Deputy Registrar is directed to send back the Trial Court file and a copy of this ruling to the Chief Magistrate's Court for compliance.**

17. Orders accordingly.

Dated and delivered at Nakuru this 5th day of March, 2020.

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JOEL NGUGI

JUDGE