



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 117 OF 2019

EDWIN KIPKASI KIPKEMBOI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the decision of Hon. P.W Wasike (SRM) delivered on the 11th day of July 2019 in Criminal Case Number 1347 of 2019 at Kapsabet Law Courts)

JUDGMENT

1. The appellant was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act.
2. The particulars of the offence are that on the 2nd day of June 2017 in Nandi County intentionally and unlawfully caused his penis to come into contact with the anus of BK (name withheld) a child aged 10 years.
3. He was charged with an alternative charge of attempted defilement contrary to section 9(1)(2) of the Sexual offences act. On the 2nd day of June 2017 in Nandi County, intentionally attempted to cause his penis to penetrate the anus of BK, a child of 10 years.
4. In her judgement the learned trial magistrate considered both the evidence for the prosecution and the defence and concluded that the ingredients of the offence had been proved beyond reasonable doubt. He was found guilty and convicted of the main charge and sentenced to life imprisonment.
5. The appellant, aggrieved with the conviction and the sentence filed the present appeal. He submitted that his right to a fair trial was infringed upon when the trial court denied him a single adjournment while granting the prosecution 39 adjournments.
6. The appellant was unwell and therefore in no condition to prepare for his defence. during the trial, he was not heard and his representation in respect to his being sick was not considered.
7. The prosecution submitted that they were in agreement that the appellant's requests were not regarded especially considering that the appellant was on record stating that he was unwell.
8. Section 283 of the Criminal Procedure Code allows the court to adjourn a case for sufficient reasons. Indisposition was a good reason to grant the request for adjournment.
9. The record shows that there was overwhelming evidence from the prosecution. The prosecution prays that the case be returned to the trial court so that the appellant and the complainant can get justice. The appellant was in agreement that the submissions of the prosecution that the case be tried afresh.
10. The appellant was sentenced on 11th July 2019 and the prosecution contends that they can still get the witnesses to testify.
11. The Court of Appeal had the following to say in the case of Samuel Wahini Ngugi v. R (2012) eKLR: -

“The law as regards what the Court should consider on whether or not to order retrial is now well settled. In the case of Ahmed Sumar vs. R (1964) EALR 483, the predecessor to this Court stated as concerns the issue of retrial in criminal cases as follows:

‘It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered.....In this judgment the court accepted that a retrial should not be ordered unless the Court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person’

12. Applying the principles to this appeal and considering the nature of the evidence on record, the charge, the possibilities of the availability of the witnesses I am of the considered finding that this is a case for retrial.

13. The retrial of the case is in the interest of justice and both the appellant and the prosecution agree that the same should be conducted.

14. Consequently, the appeal is hereby allowed, the sentence quashed. The appellant shall be released into police custody and be produced before any other Court competent to try him except Honourable P.W Wasike.

DATED, SIGNED and DELIVERED at ELDORET this 10th day of SEPT. 2020

L. A. ACHODE

JUDGE