



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. 26 OF 2017

BK.....APPELLANT

VERSUS

REPUBLICRESPONDENT

[Being an Appeal from the Judgement of Hon. L.N. Juma, RM delivered on 29th September, 2017 in Kilifi SPM Court Criminal Case No. 327 of 2016, Republic v Bahati Katana]

JUDGEMENT

1. BK, the Appellant was in the main count charged with attempted defilement contrary to Section 9(1) of the Sexual Offences Act, 2006 (SOA). The particulars of the offence stated that on 11th August, 2016 in Kilifi County the Appellant intentionally and unlawfully attempted to penetrate with his penis the vagina of SK a child aged three years. At the conclusion of the trial the Appellant was found guilty on the main charge and sentenced to serve ten years imprisonment.

2. The Appellant being aggrieved by both the conviction and sentence has filed this appeal seeking to quash the conviction and set aside the sentence on the grounds that:-

“1. That the learned trial magistrate erred in law and fact by convicting and sentencing me while relying on the charge sheet without considering that the same as drafted against me was defective.

2. That the learned trial magistrate erred in law and fact by convicting and sentencing me while relying on the adduced medical evidence without humbly considering that [the] same totally failed to prove this case beyond reasonable doubts.

3. That the learned trial magistrate erred in law and fact by convicting and sentencing me while relying on the prosecution [case] without considering that [the] same was full of contradictions hence not credible.

4. That the learned trial magistrate erred in law and fact by convicting me without considering my reasonable defence statement.”

3. In the course of the appeal I formed an opinion that the Appellant could be suffering from a disease of the mind and I directed the Deputy Registrar to appoint counsel to act for the Appellant.

4. Ms Rutto who was appointed to act for the Appellant pointed out that the Appellant did not comprehend what was going on from the beginning to the end of the trial. She submitted that the trial magistrate ought to have enquired into the Appellant’s mental status before proceeding with the trial. Upon considering the submissions by the Appellant’s counsel and after perusing the record I decided to have a mental assessment report prepared for the Appellant.

5. A report dated 19th February, 2019 prepared by Monica Kamau of Malindi Sub-County Hospital was filed in court. In the report it was observed that during **“the mental assessment patient noted to have low intelligence, poor memory and concentration. Speech, thought perception and content were normal.”**

6. The author of the report concluded that:-

“1. Patient not stable to plead (due to low concentration, intelligence and poor memory caused by epilepsy).

2. To get anticonvulsant medication.”

The medical report therefore confirmed my suspicion that the Appellant may not have been in a position to follow the proceedings during the trial.

7. A perusal of the trial court record shows that the Appellant did not participate in the trial at all. He never cross-examined any of the prosecution witnesses and neither did he utter a word in his defence. It is highly likely that the Appellant was not capable of understanding and following the proceedings due to his mental condition which is said to be related to epilepsy which he has suffered since his childhood.

8. Section 11 of the Penal Code, Cap. 63 provides that every person is presumed to be of sound mind, and to have been of sound mind at any time which comes into question, until the contrary is proved.

9. However, Section 12 of the same Penal Code provides for the defence of insanity in the following words:-

“A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission; but a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission.”

10. Whereas it is upon an accused person to demonstrate his unsoundness of mind where he intends to rely on insanity as a defence, a trial court is nevertheless under a duty to ensure that the accused persons it tries are of sound mind. Section 161(1) of the Criminal Procedure Code, Cap. 75 places an obligation on the trial court to inquire into the soundness of the mind of an accused person where the court has reason to believe that the accused is of unsound mind and consequently incapable of making his defence.

11. The fact that the Appellant did not participate in the trial ought to have raised the antenna of the trial magistrate. It is clear that the Appellant may not have understood the proceedings. May be it is a high time that the recommendation of S. N. Mutuku, J, in **Mohamed Sonar Noor v Republic [2013] eKLR** should be adopted. In that case the learned Judge opined that:-

“It is unfortunate that other than the practice in murder trials, the accused persons are not automatically examined to determine their mental status before the plea is taken. It is my view that every accused person, especially those facing serious offences, must as of right be subjected to medical check-up in regard to their mental status before a plea is taken. That would not be asking for too much given the guarantees, inter alia, to rights to a fair trial in our Constitution.”

12. In view of what I have stated above, I think it would only be fair and just that the Appellant be tried afresh and in conformity with the provisions of the law applicable to a person of unsound mind.

13. The trial commenced in 2016 and I am of the view that the prosecution can still secure witnesses once the Appellant is fit to stand trial. The appeal is therefore allowed. The conviction is quashed and the sentence set aside. The matter is remitted to Kilifi SPM's Court for retrial by any magistrate with jurisdiction to try the matter other than L.N. Juma, RM.

14. The Appellant shall be placed in remand awaiting appearance before Kilifi SPM's Court not later than 14 days from the date of the delivery of this judgment.

Dated and Signed at Nairobi this 30th day of April, 2019

W. Korir,

Judge of the High Court

Dated, Countersigned and Delivered at Malindi this 13th day of June, 2019

R. Nyakundi,

Judge of the High Court