



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HC. CR. MISC APPL. NO.13 OF 2018

FORMERLY NO. 5 OF 2018 AT KILUNGU LAW COURT

JOHN MAUNDU MUTETI APPELLANT

-VERSUS-

REPUBLIC RESPONDENT

JUDGMENT

INTRODUCTION

1. The Appellant was charged with offence of Rape of a person with mental disability contrary to Section 7 of sexual offences Act No. 3 of 2006.
2. Particulars being that on 16th day of January 2018, in Makueni County, John Maundu Muteti intentionally caused his penis to penetrate the vagina of FK without her consent, a person with mental disability.
3. Alternative charge was Indecent Act with an adult contrary to Section 11 (A) of the Sexual Offences Act No. 3 of 2006.
4. On the 16th day of January 2018 in Makueni County, John Maundu Muteti intentionally touched the vagina of FK with his penis against her will.
5. The Appellant pleaded guilty to the charge and a plea of guilty was entered.
6. The facts were read and the Appellant answered that “*ni kweli*” it is true.
7. The Appellant was unrepresented. The court later recorded before sentence. “*Accused warned of the heinous penalty as per the law. In mitigation he told court that he was drunk but was sorry.*”
8. The court proceeded to sentence him and awarded him 30 years imprisonment.
9. The Appellant lodged an appeal and set out the following grounds:-
 - 1) **That**, he pleaded not guilty to the charges.
 - 2) **That**, the trial court erred in points of law and fact by not realizing there was a grudge between him and some of the witnesses.
 - 3) **That**, the trial court further erred in points of law and facts when rejecting his defence statement by not giving any cogent reason for so doing as is stipulated under Section 169(1) of the Penal Code.
 - 4) **That**, since he cannot retail all that had transpired at the subordinate court, he humbly pray to the Hon. Court to furnish him the trial records so as to enable prepare some more tangible grounds during the hearing of the same of which he would also wish to be present.
10. The matter came for hearing and he submitted that he did not know what was happening in court and police had cheated and forced him to admit the charge.

11. In his 4th ground of appeal he states that ***“he cannot (recall) all that transpired at subordinate court”***
12. The prosecution concedes appeal and prays for the court to order re-trial.
13. The court has gone through the record and notes that the Appellant was arrested on 17/01/2018 and was taken to court on 22/01/2018.
14. The span of five (5) days of detention before being taken to court contrary to Article 49 of the Constitution is not explained.
15. Thus would make the court to infer that the Appellant was being harassed to concede to the charge before being taken to court.
16. The warning also made by the court after conviction should have been preceded by enquiring as to the five days pre-charge detention period.
17. The court finds that the prosecution is justified in conceding appeal. The court thus agrees the matter being of recent times.
18. The prosecution witness and exhibits will be available for retrial. The principles upon which a Court can order a retrial were set out in the case of **Ahmed Ali Dharmasi Sumar –Vs- Republic 1964 E.A 481** and restated in **Fatehali Manji –Vs- The Republic 1966 E.A. 343** as follows:-

“In general a re-trial will be ordered only when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the Prosecution to fill up gaps in its evidence at the first trial. Even where a conviction is vitiated by a mistake of the trial Court for which the Prosecution is not to blame, it does not necessarily follow that a retrial should be ordered. Each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interest of justice require it and should not be ordered where it is likely to cause an injustice to the accused person.”

19. In the instant case there is no prejudice shown that would be occasioned to the appellant. In any case he conceded to retrial.
20. Thus the court makes the following orders:-

1) The appeal is allowed, conviction quashed and sentence set aside.

2) The matter is to be retried by another magistrate save C.A Mayamba – Senior Resident Magistrate at Kilungu Law Courts.

SIGNED, DATED AND DELIVERED THIS 10TH DAY OF JULY 2018, IN OPEN COURT.

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C. KARIUKI

JUDGE