



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL REVISION NO. 352 OF 2018

MOHAMED AHMEDAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING ON REVISION

1. The applicant MOHAMED AHMED was on the 21/7/2016, by a charge sheet dated the same day charged and arraigned in court to face two counts as follows:-

Count I: Being in possession of obscene photographs for the purpose of distribution contrary to Section 181(1) (a) of the penal code.

Particulars of the offences:

MOHAMED AHMED: On diverse dates between 8th February 2016 and 25th February 2016 at unknown place within Mombasa County for the purpose of distribution produced obscene naked photographs of A D T tending to corrupt morals.

Count II: Conveying obscene photographs contrary to Section 181(1)(b) of the penal code.

Particulars of the offences

MOHAMED AHMED: On diverse dates between 8th February 2016 and 25th February 2016 at unknown place within Mombasa County for the purpose of distribution conveyed obscene publication of abusive text messages to A D T tending to corrupt morals”.

2. He denied the charges and a trial then ensued during which the prosecution called four witnesses before the Applicant was put on his defense consequent to which he offered to give sworn evidence and called one witness to support his defense.

3. In his judgment dated 6/7/2018, the trial court acquitted the Applicant on count one, but convicted him in count two and sentenced him to a jail term of 9 months without the option of fine.

4. Now this file has been placed before me for perusal pursuant to Section 362 of the Criminal Procedure Code as read with Section 364 of the same statute.

5. The court’s mandate on revision is to peruse the record with a view to satisfying itself as to the correctness, legality or propriety of the findings, sentence or order recorded and as to the regularity of the proceedings.

6. Being so obligated and mandated, I have perused the court file and I have taken note that the law under which the Applicant was charged and convicted creates an offence of conveying the prohibited material to the public with the prospects of corrupting morals. The provision reads:

Section 181(1) Any person who-

(a) For the purpose of or by way of trade or for the purpose of distribution or public exhibition, makes, produces or has in his possession any one or more obscene writings, drawings, prints, paintings, printed matter, pictures, posters, emblems,

photographs, cinematograph films or any other obscene objects, or any other object tending to corrupt morals; or

(b) For any of the purposes above mentioned imports, conveys or exports, or causes to be imported, conveyed or exported, any such matters or things, or in any manner whatsoever puts any of them in circulation”.

7. As reproduced before, the offence for which the Applicant was convicted was that he conveyed obscene publication of abusive text messages to A D T tending to corrupt morals. It is to be noted that the law cited does not criminalize abusive text messages, rather the forbidden act is conveying any obscene writings, drawings, prints, painting, printed matter, pictures, posters, emblem photographs, cinema photographs films or any other obscene object tending to corrupt morals. The evidence adduced was to effect that the photographs sent were those of the complainant.

8. The first issue to consider is the propriety of the charge. The statement of the charge discloses what was sent as obscene photographs while the particulars of the charge talked of conveying obscene publication of abusive text messages. It begs the question, whether the accused convey an already published obscene and abusing text messages or he conveyed obscene text messages. In both either of the situations even if evidence had been led to prove the particulars, the charge would not be in congruence with the offence charged of conveying obscene photographs.

9. To this court, the charge and particulars were at variance and were not congruent on the charge facing the Applicant. It was framed contrary to Section 134 & 137 Criminal Procedure Code. It was a duplex charge on which the court ought to have invoked its powers under section 135(3) to have the charge sheet amended. That the court did not do and it cannot be said that the charge could not have embarrassed the Applicant in his defense at trial. The approach of a court when faced with a duplex charge is that to establish if the accused was able to know the case he was to meet. Where there exist a risk of confusion in the accused's mind as to charge frame the charge is bad.

10. The other reason the charge was duplex is that the evidence led and adduced showed that there were several messages sent on different dates. Each of those messages conveyed differently created different offences and out to have been charged each on different count. In Paul Katana Njuguna vs Republic [2016] eKLR, the Court of Appeal said:

“As we have already noted the rule against duplicity is to enable the accused know the case he has to meet. We accept as the correct position of law that the uncertainty in the mind of an accused is the vice at which the rule against duplicity is aimed”

11. The second point goes to the correctness of the finding that the Applicant was proved by the prosecution, beyond reasonable doubt, to have committed the offence.

12. I hold the view that the prosecution was duly bound to prove the following facts:-

(i) That the Applicant as the accused did convey the material.

(ii) That the material was obscene.

(iii) That the material was capable of corrupting the morals of the person it was conveyed to.

13. Now on conveyance, there was need on the prosecution to lead evidence on proof that it was the accused and nobody else who conveyed the material to the complainant.

14. In her evidence in chief the complainant said the Accused sent her a nude photograph of herself. In cross examination however, the question of who sent the nude photograph was raised and it is of interest how the complainant answered the question.

15. The record reveal that the photograph was sent from a number registered in the complainant's name and allegedly stolen by the Accused. When the investigating officer was called to give evidence he made no attempt to shed light on who sent the photographs. It having come from the complainant herself that the number used was registered in her name, I hold the view that there was need to associate the number with the accused or the telephone handset known to belong to the Accused. That was totally not done. That was enough doubt as to who sent or conveyed the photographs. Every time there is a doubt in a criminal proceeding, the doubt must be resolved in favour of the accused. Here the trial court failed to do so and thereby erred.

16. If that was not enough the photographs to constitute an offence ought to have been produced and proved to have been obscene and capable of corrupting the morals of the person conveyed to. In this case no photographs were produced and the conveyance charged was to the complainant herself. Can it be said that the complainant could view her own photographs, even if nude, to be obscene and capable of corrupting own morals? I doubt if that was possible.

17. There was no evidence led by that the complainant or indeed the investigating office that the photographs were obscene or morally disturbing. The evidence led was hollow and one gets the impression that the charges were not wholly bereft of emotional disagreement between the complainant and the accused as former spouses. When the trial court found and held the accused person as a jilted lover he should have posed to find out if the complainant herself did not feel jilted with prospects of revenge. This was particularly relevant after the complainant in her evidence said that she made attempt at reconciliation and failed to have the accused back.

18. The third and last matter is the sentence metted out. The law gives the court the liberty to impose an imprisonment sentence or a fine of upto Kshs.7,000/=. Having convicted the accused and without the previous record of the accused being availed to court, the court went for a custodial sentence without the option of a fine and assigned no reason for failure to give the option of a fine.

19. Looking at the record availed on the proceeding before the trial court, it is not apparent what influenced the trial court to settle for a custodial sentence without the option of a fine provided by the statute. Deterrence is not the only object of criminal justice. Other forms of sentencing ought to be considered and a reason advanced. I do therefore find that in the circumstances revealed a custodial as the only sentence was not appropriate just as much as it was advisable and necessary for the court to invite the records of Accused regarding previous convictions prior to passing the sentence.

20. The foregoing findings bring me to the conclusion that the charge was dublex and could not find a proper trial leading to a lawful conviction. Equally the prosecution failed to discharge the burden of proving the charge and its ingredient beyond reasonable doubt against the accused person

21. Additionally, In the absence of a previous conviction the accused ought to have been treated as a first offender and he ought to have been given the option of a fine.

22. In *Riyadh Abdul Hafedh vs Republic [2006] eKLR* the High Court, Muchelule J said of a custodial sentence without an option of a fine:-

“Looking at the court proceedings, no reasons were given why the court imposed a prison term and why a fine was thought to be inappropriate. While exercising its discretion in sentence, it is advisable that reasons be given on record to show what the trial court considered to determine the kind of sentence awarded. In this case having considered that the accused person had pleaded guilty, was a first offender and his mitigation to the effect he was misled by a friend to use the passport in question, these circumstances weighed more in favour of the award of a fine than of imprisonment unless reasons were given to indicate otherwise. None were given. In the circumstances the sentence of imprisonment without the option of a fine was harsh”.

23. For the above reason and this being a review, the conviction of the trial court is set aside and in its place substituted an decision acquitting the accused person.

24. Let him be set free forthwith unless otherwise lawfully held.

25. Let this decision be certified to the trial court in terms of Section 367 Criminal Procedure Code.

Dated and delivered at Mombasa this 11th day of July 2018.

P.J.O. OTIENO

JUDGE