



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 93 OF 2017

ERICK NGATI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the conviction and sentence by Hon. D. Orimba (S.R.M) delivered on 20th July, 2017 in Kangundo SPM Court Sexual Offences Case No. 4 of 2016)

JUDGEMENT

1. The Appellant was convicted of the offence of defilement contrary to section 8 (1) (3) of the Sexual Offences Act No. 3 of 2006 and sentenced to serve 20 years imprisonment. Aggrieved by the same, he filed this appeal on grounds that:

- i. The trial magistrate erred in law and fact in failing to note that he was not provided with witness statements thus violating his rights under Article 50 (2) (j) of the Constitution.
- ii. The trial magistrate erred in law and fact in convicting him on an illegal sentence.
- iii. The trial magistrate erred in law and in fact by failing to conduct voire dire examination on the complainant.
- iv. The trial magistrate erred in law and fact in convicting him on a defective charge sheet.
- v. The trial magistrate erred in law and fact in convicting him on the prosecution case that was not proved beyond reasonable doubt.

2. This being a first appeal, I am minded of my duty to reconsider and re-evaluate the evidence afresh with a view to arriving at my independent conclusion. I shall address the issues seriatim.

3. It was the Appellant's contention that despite requesting to be issued with witness statements, the said was not issued. Further that the trial court failed to be a neutral arbiter and act on the prosecution's failure to issue statements. He contended that the said failure was a violation of his right under Article 50 (2)(j) of the Constitution. To demonstrate that his right was so violated, the Appellant relied on **Thomas Patrick Gilbert Cholmondley v. Republic (2008) eKLR** and **R. v. Ward (1993) 2 ALL ER 557** where it was observed that the prosecution is under duty to provide an accused person with relevant material such as copies of statements of witnesses who will testify in advance and **Natasha Singh v. CB (2013) 5 SCC 741** where the court was of the view that fair trial which entails the interest of an accused, the victim and society and include grant of fair and proper opportunities to the person concerned must be ensured by the court in criminal proceedings and that under no circumstances should a person's right to fair trial be jeopardized. The prosecution highlighted the provisions of Article 50 (2) (j) of the Constitution and argued that the right to fair trial is a norm of international human rights law designed to protect individuals from unlawful and arbitrary deprivation of basic rights. That right to fair trial include furnishing an accused with statements and conceded that the Appellant's right to fair trial was violated having not been issued with statements despite him so requesting. The prosecution subsequently urged for a retrial.

4. The Court of Appeal in Cholmondeley case (supra) was prior to the promulgation of the new Constitution of the opinion that supplying an accused with relevant material such as copies of statements was an essential element of fair trial. The Court held thus:

"We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under... our Constitution, the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial; all the relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items."

5. The substantive law on right to fair trial is Article 50 (2) (j) of the Constitution. It enunciates that:

(2) Every accused person has the right to a fair trial which includes the right-

... (j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

6. It follows therefore that the prosecution was under duty to supply the statements which the Appellant in fact requested for and the trial court to ensure that the Appellant was issued with the statements in advance to avoid being ambushed by the prosecution case. The failure by the prosecution to issue the Appellant with the witness statements and that of the trial court to intervene violated the Appellant's right to fair trial and consequently rendered the trial substantially defective. I shall in the circumstances not delve into the other grounds of appeal but rather consider whether or not a retrial can be ordered.

7. The court in **Ahmed Sumar v. Republic (1964) EALR 483** had this to say while dealing with the issue of retrial:

“...In general a retrial 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 insufficient evidence or for the purposes 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;...”

8. In **Lolimo Ekimat v. R Criminal Appeal No. 151 of 2004** (unreported), it was held as follows:

“...The principle that has been accepted to courts is that each case must depend on the particular facts and circumstances of that each case but an order for the retrial should only be made where interests of justice require it.”

9. Applying the test, I have considered the admissible evidence and I am of the view that a conviction may result. I shall however not delve into analyzing it lest I pre-empt the outcome. I am further minded that the Appellant was arrested on 7th February, 2016 and arraigned in court on 8th February, 2016. He faced a full trial and judgment was therein delivered on 20th July, 2017. In my view, no prejudice shall be occasioned to the Appellant if a retrial is ordered.

10. In the end, this appeal is allowed. The conviction is quashed and the sentence set aside and I further make orders that:

a) The Appellant be released into police custody and be produced before another court other than Hon. Orimba to try the Appellant.

b) The Appellant be produced before the SPM's Court Kangundo on the 19th September 2018 for purposes of retrial.

Orders accordingly.

Dated signed and delivered at Machakos this 18th day of September 2018.

D. K. KEMEI

JUDGE

In the presence of:-

Erick Ngati - for the Appellant

Machogu - for the Respondent

Josephine - Court Assistant