



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 143 OF 2011

JOHN MURIUKI NGATIA.....APELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

FACTS

1. The Appeal arises from the judgment delivered on 5th July, 2011 by the Hon.L. Mbugua PM in CMCr No.745 of 2010. The appellant had been charged on a main charge of defilement of a child under the age of 11 years contrary to Section 8(1) as read with 8(2) of the Sexual Offences Act No.3 of 2006; and an alternate charge of Committing an Indecent Act with a child contrary to Section 11(1) of the same Act.
2. That on the 19/10/2010 in Mathira East District the appellant intentionally and unlawfully did an act of penetration to LW a child aged under the age of eleven (11) years.
3. The appellant was convicted on the main charge and sentenced to life imprisonment.
4. The appellant being aggrieved with the decision preferred this appeal both on conviction and sentence and listed three (3) Grounds of Appeal inter alia;
5. At the hearing of the appeal the appellant was in person while Mr. Njue was present for the State; the appellant had filed written submissions and sought to rely on them whereas Mr. Njue made oral presentations.

ISSUES FOR DETERMINATION

6. Upon hearing the submissions of both sides this court has framed one issue for consideration and determination;
 - i. Whether this is a suitable case to order for a retrial;

ANALYSIS

7. Upon perusal of the court record this court has noted that it does not reflect that the appellant was accorded an opportunity to cross-examine her; this court concurs with Counsel for the State that it was incumbent upon the trial court to have explained to the appellant that he had a right to cross-examine the witness.
8. This court is of the view that this may not have been an oversight on the part of the trial court but more a misconception arising from procedural rules that when accused persons give unsworn testimony they are never subjected to cross-examination and therefore the same rule of procedure

- ought to be applicable where a complainant often a child tender years gives unsworn testimony they likewise should be treated similarly; which is not the case.
9. This court is guided by the Court of Appeal case of **Nicholas Mutula Wambua vs Republic Msa CRA Case No.373 of 2006** where it was held that the right was a peculiar protection given only to accused persons and not accorded to prosecution witnesses irrespective of age.
 10. The State went on to submit that in not being allowed to cross-examine the complainant the appellant was thus not accorded a fair trial and that this was a suitable case in which this court could order for a retrial; that the appellant would not suffer any prejudice were the court to order for a retrial as he had been sentenced to life imprisonment and had only served four (4) years; that there was sufficient evidence to support a conviction; and that the prosecution witnesses were readily available.
 11. Whether to allow a retrial is always dependent on the circumstances of the case; in this instance this court has taken into consideration the defects at the trial in that the appellant was not availed the opportunity to test the evidence of the complainant; it has also been noted that this mistake was entirely of the trial courts making in its failure to give proper guidance on procedure.
 12. Other factors that need to be considered are whether a retrial is in the best interest of justice and whether it will cause any prejudice to the appellant; whether the evidence is sufficient to support a conviction; lastly the availability of the prosecution witnesses who testified at the trial.
 13. By the time of the hearing of this appeal the appellant had been incarcerated for four (4) years which is not deemed to be long period of time considering that the term imposed was for life; this court has noted that indeed one of the grounds of the appellants appeal was that he was not accorded a fair trial he is also amenable to a retrial so that he may have a second chance to prove his ; which therefore puts to rest the issue of prejudice that may have been envisaged.
 14. Having perused the record this court has satisfied itself that there is sufficient evidence that may support a conviction; and Counsel has indicated that the material prosecution witnesses are readily available.
 15. This court is satisfied that it would be in the best interest of justice to order for a re-trial as there are valid and sufficient reasons to support a re-trial.

FINDINGS

16. For the afore-going reasons this court finds that this is a suitable case to order for a re-trial.

DETERMINATION

17. The appeal is found to have merit and is hereby allowed.
18. The conviction entered against the appellant is hereby quashed and the life sentence is hereby set aside; but the appellant shall not be set at liberty.
19. There shall be a retrial before a subordinate court with competent jurisdiction.
20. This court directs that the file be placed before the Chief Magistrate on the 14th day of March, 2016 for Directions.

Dated, Signed and Delivered at Nyeri this 10th day of March, 2016.

HON. A. MSHILA

JUDGE