



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CRIMINAL APPEAL NO. 193 OF 2011

JOSEPH KATHINI KIVUVA APPELLANT

VERSUS

REPUBLIC RESPONDENT

[An Appeal from the original conviction and sentence on 25th November 2008 in Criminal Case No. 12 of 2008 by the Chief Magistrate’s Court at Machakos (Hon. S. Gacheru, RM.)]

JUDGMENT

INTRODUCTION

1. The appellant was convicted on his own plea of guilty of the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act, 2006 and sentenced to life imprisonment on the 25th November 2008 in Criminal Case No. 12 of 2008 by the Chief Magistrate’s Court at Machakos (Hon. S. Gacheru, RM).
2. The Charge and Particulars of the Offence were as follows:

Charge

Defilement contrary to Section 8(1) as read with Section 8 (2) of the Sexual Offences Act, 2006

Particulars

Joseph Kathini Kivuva: On the 17th day of September, 2008 at Mitamboni Sub Location in Machakos District within Eastern province, unlawfully and intentionally committed an act which causes penetration with E. N. W. [initialization mine] a girl aged 9 years.

3. The appellant also faced a second (really alternative charge) count of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act with particulars that –

“Joseph Kathini Kivuva: On the 17th day of September 2008 at Mitamboni Machakos District within Eastern Province, unlawfully and intentionally committed an indecent act with a child namely E. N. W. [initialization mine] a girl aged 9 years by touching her

private parts.”

4. The full text of the proceedings before the trial Court is set out below as follows:

“REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT OF MACHAKOS

CRIMINAL SEXUAL OFFENCE NO. 12 OF 2008

REPUBLICPROSECUTION

VERSUS

JOSEPH KATHINI KIVUVA.....ACCUSED

22/9/2008

Name of Magistrate S.M Mungai-PM

Name of Prosecutor I.P Kinaro

Court Clerk- Mutinda

Language in Kiswahili

Not guilty alternative: Not guilty

Court: Plea of not guilty entered.

Accused to be released on a personal bond of Sh 100,000 with surety of like amount.

Hearing -31/10/2008 court 3.

Mention- 6/1/2008 .

Remanded in custody.

S.M MUNGAI

PRINCIPAL MAGISTRATE

3/10/2008

Before: S Gacheru-RM

C.P -I.P Mwangi

Court Clerk- Esther

Accused

Hearing on 31/10/2008.

Further mention on 17/10/2008.

S GACHERU

RESIDENT MAGISTRATE

6/10/2008

Before: S Mungai-PM

Prosecutor: I.P Kinaro

Court Clerk- Collins

Accused-present

Court: *Hearing- 31/10/2008.*

Mention- 17/10/2008.

S MUNGAI

PRINCIPAL MAGISTRATE

17/10/2008

Before: M Okuche-RM

Court Clerk- Mueni

Prosecutor- P.C Muye

Accused -present

Hearing -31/10/2008

M OKUCHE

RESIDENT MAGISTRATE

17/10/2008

31/10/2008

Before: Okuche-RM

Chief Prosecutor- P.C Muye

Court Clerk- Kausya

Accused- Present

Prosecutor: *I have three witnesses. I am ready to proceed.*

Court: *It is now 11.51 am. This court is proceeding for mention at Machakos Prison, this matter cannot be reached.*

Adjourned and referred to Court 1 for reallocation.

M OKUCHE

RESIDENT MAGISTRATE

31/10/2008

Later at 15.15 pm

Coram as before

Court: *Hearing on 12/11/2008*

M OKUCHE

RESIDENT MAGISTRATE

12/11/2008

Before: S Gacheru-RM

C.P- I.P Rasigu

Court Clerk- Esther

Accused-present

Prosecutor- *I am ready to proceed with 2 witnesses.*

PW1-R M M

Female Adult Sworn and States

I come from Mitaboni Sub location in Machakos. I am a farmer.

On 17/9/2008, at about 4.00pm I was returning home from a funeral at my neighborhood at home. When I was at about 40 meters away from my home I heard accused held me on my right hand and he told me that he had been told by his mother that he had defiled my daughter.

I told accused that we go to my home so that we could discuss about the issue. At my home accused told me that it was alleged that he had defiled my daughter namely E. N. W. [initializing mine]. My said daughter was at home outside the house. Upon asking the complainant she told me that accused had defiled her after she came from school.

When it was about 5.00pm I went and removed all the clothes of the

complainant and upon checking on her vagina I found that the same had been injured. I also saw sperms on the complainant's vagina and decided to go and report the matter to the area chief but before I could go, someone called Simon Mutuku came and told me that I was required to go to the accused's home where the Assistant Chief was calling me. I put back the complainant clothes that she had on her. I and the complainant we went to accused's home where I found the Assistant Chief and a Police Officer.

Accused had already left my home to his home after my daughter (complainant) said that the accused had defiled her. The Assistant Chief and the Police Officer then checked the vagina of the complainant. They arrested the accused and escorted him to Machakos A.P Post. Accused's home was about 150 meters away from my home. I reported the matter at about 10.00 am on 18/9/2008 at Machakos Police Station and then took the complainant to Machakos General Hospital for treatment while accompanied by another female police officer. The complainant was issued with treatment card at the hospital which I wish to produce (copy) as exhibit 1.

I recorded my statement with the police. I knew accused prior to that incident but I have no grudge against him. The complainant told me that accused defiled her in the house on 17/9/2008. The complainant also told me that accused held her as she was going home from school and took her to his house where he defiled her.

S GACHERU

RESIDENT MAGISTRATE

Cross examination by accused:

Nil

S GACHERU

RESIDENT MAGISTRATE

Re-examination:

Accused: *I wish to change my plea.*

Court: *Charge read over and explained to the accused in Kikamba who replies.*

Prosecutor: *Before the accused takes a plea I pray to be allowed to amend the charge sheet.*

Accused: *No objection.*

Court: *Mention of the matter at 2.30 pm when the prosecutor should avail an amended charge sheet.*

S GACHERU

RESIDENT MAGISTRATE

12/11/2008

Later:

Coram as before

C.I Kosgey for state

Accused-present

Court: *Charge read over and explained to the accused in Kikamba who replies.*

Main charge.

Its true.

Court: *Plea of guilty entered.*

Prosecutor: *I have the facts ready.*

Facts: *The offence was committed on 17/9/2008 at Mitaboni Sub-Location in Machakos. The complainant was returning back from school at about 4.00pm on the material date. The accused lured the complainant into his house when he grabbed the complainant and placed her in his bed and threatened to beat her in the event that she raised an alarm. The accused then removed the complainant's pants and went ahead to defile her. A neighbour who saw the accused lock himself inside his house with the complainant became suspicious.*

The neighbour went and informed the grandmother of the complainant. The said grandmother and accused's brother went to the accused house where they found accused leaving the house and they found the complainant there on the bed with the legs spread apart and the inner pant down on the floor. The grandmother then called the Area Assistant Chief who came and after finding what happened arrested the accused.

The complainant was later taken to Machakos Hospital for treatment and later accused was charged with the present offence. After the complainant was examined a P3 Form was filled whereby her age was estimated as 10 years old. I have the P3 Form which was filled on 23/9/2008 which I wish to produce as exhibit 1. The complainant had been treated on 18/9/2008 at Machakos General Hospital and issued with a treatment card No.42240 which I wish to produce as exhibit 2 in these proceedings.

That's all.

S GACHERU

RESIDENT MAGISTRATE

Accused: *facts are correct.*

Court : *Accused convicted on his own plea of guilty.*

Prosecutor: *Accused may be treated as a first offender and I don't have his past record.*

Accused: *I have been sick that's why I committed the offence herein.*

Court: *Before I pass a sentence to the accused, I find it necessary to refer accused to Machakos Gen Hospital for an assessment report on his mental capability which I hereby order.*

Mention 19/11/2008 for the report to be availed to court

S GACHERU

RESIDENT MAGISTRATE

12/11/2008

19/11/2008

S Gacheru-RM

Prosecutor- I.P Rasugu

Court Clerk- Josphine

Accused-present

Court Case for medical report.

Prosecutor- Am yet to receive the report of the accused but he was examined yesterday. I pray for mention on 25/11/2008.

Court: Mention 25/11/2008 to avail the medical report.

S GACHERU

RESIDENT MAGISTRATE

19/11/2008

25/11/2008

Before: S Gacheru-RM

C.P -I.P Rasugu

Court Clerk- Esther

Accused-present

Court: I have seen the medical assessment report of the accused dated 20/11/2008. I have noted from the said report that there is nothing to establish that accused had mental problem on 17/9/2008 when he committed the offence herein. I will therefore find accused guilty as charged and sentence him accordingly.

Sentence: Accused is sentenced to serve life imprisonment for the main count.

Right of appeal 14 days.

S GACHERU

RESIDENT MAGISTRATE

25/11/2008”

THE APPEAL

5. The appellant filed a petition and grounds of appeal as follows:
 1. *“That the pundit magistrate erred in both law and fact while convicting me on plea of guilty without inquiring into my mental status to meet the interest of justice.*
 2. *That the pundit magistrate erred in both law and fact while upholding and convicting me on a plea of guilty without giving nor administering to me any caution before arriving at a point of conviction and sentence.*
 3. *That the pundit magistrate erred in both law and fact while convicting and sentence me to life imprisonment which contravene Section 74(1) of the inter-alia constitution.*
 4. *That since I can’t recall all that transpired during the delivering of the judgment I kindly request this Hon. Court to serve me with the certified copy of the proceedings and its judgment to sentence me erect more firm grounds and to be present during the trial of this appeal in person.”*
6. The appellant subsequently filed amended grounds of appeal as follows:
 1. *That, the learned trial magistrate erred in law and facts to admit the plea of own guilty, which was given by a mentally challenged person, and not disapproved to the contrary.*
 2. *That, the learned trial magistrate erred in law and facts, by simply admitting the medical assessment report findings:*
 - i. *Not documented and produced in court as an exhibit.*
 - ii. *Without its Author testifying and be cross-examined thereon; therefore un-justified in the magnitude of this case.*
 3. *That, the mitigating factors advanced escaped any due considerations by the learned magistrate as envisage in Article 50(2) (P) of the Constitution, hence by unfairly sentenced for life imprisonment.”*
7. At the hearing of the appeal, the appellant filed written submissions to which counsel for the DPP, Mrs Saoli, made replying submissions orally with the appellant responding thereto, as follows:

“Mrs. Saoli for DPP:

Appellant charged with defilement contrary to section 8(1) as read with section (2) of the Sexual Offence Act 2006. The Respondent urges the court to dismiss the appeal on the grounds that:

1. *Appellant pleaded guilty in Kikamba a language he understands very well. Plea was unequivocal. Facts were read and confirmed them as correct. Sentence is the only one prescribed by the law.*
2. *Trial Court was prudent in taking time to issue an order that the appellant be taken for mental assessment before sentence was passed. A report was produced on 21st November 2008, which established that appellant had no mental problem when committing the offence. We pray that the Court dismisses the appeal.*

Appellant:

I was unwell. I had had an accident in Nairobi. I was taken to Hospital and was admitted in Machakos Hospital. My father passed on. I was injected and I lost consciousness and I also do not recall anything that I had done. I do not even remember the act that I was charged as having been involved in. I was advised to accept the charge. I was sentenced to life imprisonment. I was not warned that I would be sentenced to life. I was misadvised to accept eh charge.”

ISSUES FOR DETERMINATION

8. The questions for determination by the appellate court -
 - a. Whether the plea of guilty was competent and unequivocal.
 - b. Whether an order for retrial should be made, if the court finds the plea of guilty not to have

been competent or unequivocal.

9. The Court must in accordance with its duty as first appellate court, as set out in ***Okeno v. R*** (1972) EA 32, to consider the evidence before the trial court and to evaluate it and reach its own conclusion before considering whether the trial court's conclusion may be supported. Before considering the merits in the evidence, the court must first determine whether the appeal is competent or whether it is barred by the appellant's plea of guilty.

DETERMINATION

Whether plea of guilty unequivocal

10. Under section 348 of the Criminal Procedure Code -

“348. No appeal shall be allowed in the case of an accused person who has **pleaded guilty and has been convicted on that plea by a subordinate court**, except as to the extent or legality of the sentence.”

11. From the record of the proceedings in the trial court it is clear that the accused sought to explain his conduct and this was not a plea of guilty. The accused is recorded as having explained his plea prompting the magistrate to order for psychiatrist's report, as follows:

“Accused: facts are correct.

Court : Accused convicted on his own plea of guilty.

Prosecutor: Accused may be treated as a first offender and I don't have his past record.

Accused: I have been sick that's why I committed the offence herein.

Court: Before I pass a sentence to the accused, I find it necessary to refer accused to Machakos Gen Hospital for an assessment report on his mental capability which I hereby order.

Mention 19/11/2008 for the report to be availed to court

S GACHERU

RESIDENT MAGISTRATE

12/11/2008”

12. The trial court was itself aware that the circumstances of the case raised a doubt as to the accused's mental status and that is why the court ordered 'for an assessment report on his mental capacity'. The report dated 20th November 2008 and addressed to the Chief Magistrate was in terms as follows:

“Re: Joseph Kathini Kivuva

Thank you for referring the above to me for mental health assessment.

Today, I have assessed the above in the presence of a medical officer, a psychiatric nurse, a counselor and the prison warder accompanying the accused.

Findings

- ***Normal mental status***

- *Substance abuse in 1996*

Opinion

Fit to plead in a court of law.

Thank you.

Dr. Kokonya

Psychiatrist in Charge

Machakos General Hospital

13. The trial court considered the report and held as follows:

“Court: *I have seen the medical assessment report of the accused dated 20/11/2008. I have noted from the said report that there is nothing to establish that accused had mental problem on 17/9/2008 when he committed the offence herein. I will therefore find accused guilty as charged and sentence him accordingly.*

Sentence: *Accused is sentenced to serve life imprisonment for the main count.*

Right of appeal 14 days.

S GACHERU

RESIDENT MAGISTRATE

25/11/2008”

14. The particulars of the charge were that he *‘unlawfully and intentionally committed an act which causes penetration....’* In answer to the said charge, the appellant did not accept that *‘intentionally committed’* the act of defilement; rather he pleaded that he had committed the offence because he had been sick, saying

‘I have been sick that’s why I committed the offence herein.’

The appellant’s plea was not unequivocal. No conviction ought to have resulted from such a plea. The plea contemplated a trial to establish whether the accused committed the offence because he had been sick as he claimed.

15. Such trial of the accused’s sickness, or otherwise, could not summarily be determined upon a psychiatrist’s report on accused’s fitness to plead as purported by the learned magistrate when he said:

“I have noted from the said report that there is nothing to establish that accused had mental problem on 17/9/2008 when he committed the offence herein. I will therefore find accused guilty as charged and sentence him accordingly.”

The mental assessment report finding of history of substance abuse should have confirmed the trial Court’s fears as to the accused’s mental status which prompted it to order for an assessment. The court should have sought to confirm that the plea was freely made, *compos mentis*, with full knowledge of the particulars of the offence and its penal consequences before accepting the plea of guilty.

Procedure for plea taking

16. Caution in accepting a plea of guilty is built into the provisions of the Criminal Procedure Code where section 207 provides as follows:

“207. (1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement;

*(2) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and **the court shall convict him and pass sentence upon or make an order against him**, unless there appears to it sufficient cause to the contrary:*

*Provided that **after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.***

*(3) If the accused person **does not admit the truth of the charge**, the court shall proceed to hear the case as hereinafter provided.*

(4) If the accused person refuses to plead, the court shall order a plea of “not guilty” to be entered for him.

(5) If the accused pleads -

(a) that he has been previously convicted or acquitted on the same facts of the same offence; or

(b) that he has obtained the President’s pardon for his offence, the court shall first try whether the plea is true or not, and if the court holds that the evidence adduced in support of the plea does not sustain it, or if it finds that the plea is false, the accused shall be required to plead to the charge.”

17. In addition, the Court of Appeal authority in **Osike Emongonyang' and 2 Ors v. R**, Court of Appeal at Nairobi (Kwach, Akiwumi & Shah, JJ.A.) Criminal Appeal No. 69 of 1990 counsels the trial court to exercise caution in accepting the plea of guilty particularly in capital offence as follows:

*“No matter what may have been the case before, it is to us now well settled and for obvious good reasons, that a court these days should not and will not as a matter of course, accept a plea of guilty to a charge of murder which carries the mandatory capital sentence, **without first warning the accused person of, and explaining to him fully, the consequences of his plea of guilty.** Similarly in this day and age, where the mandatory sentence upon conviction of the offence with which the appellants were charged is the death sentence, we are of the view that even if the plea of guilty is to be accepted, **it must only be done after due warning has been given to the accused person of the consequences of pleading guilty, so that he may fully consider the full implications of the step that he wishes to take.**”*

18. The **Emongonyang'a** principles of plea taking must in my view apply in all cases where the accused stands to suffer stiff penalty upon conviction as in the cases of capital offences and the lengthy imprisonment terms under the Sexual Offences Act. The Court ought to have informed the accused of the penalty applicable to the offence to which the accused sought to plead guilty and confirm that that is what the accused wanted to do. The offence of defilement under section 8

(2) of the Sexual Offences Act carries with it a mandatory sentence of in the case of a girl aged 9 years as follows:

“(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”

19. The case before the court is exacerbated by the fact there were questions of the accused’s mental health and his ability to plead and effectively participate in his trial.

Whether a retrial shall be ordered

20. A retrial may be ordered in the interest of justice where the trial is found to have been defective or illegal. See the decision of the Court of Appeal in **Opicho v. R.** (2009) KLR 369 which laid out the circumstances in which retrial will be ordered as developed in several decisions considered therein, as follows:

“We must first discuss whether, in view of the transgression of procedure evident in the trial, the appellant ought to be retried before another court. If so, any analysis of the evidence on record may well prejudice the retrial. Should we order one?”

“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 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 own facts and circumstances and an order for retrial should only be made where the interest of justice require it.”

*That was stated in **Fatehali Manji v. The Republic** [1966] EA 343. In many other decisions of this court it has been held that although some factors may be considered, such as illegalities or defects in the original trial; the length of time elapsed since the arrest and arraignment of the appellant; whether mistakes leading to the quashing of the conviction were entirely the prosecution’s making or not; whether on a proper consideration of the admissible or potentially admissible evidence, a conviction might result from a retrial; at the end of the day, each case must depend on its particular facts and circumstances and an order of retrial should only be made where the interests of justice require it. See **Muiruri v. Republic** [2003] KLR 552, **Mwangi v. Republic** [1983] KLR 522, and **Bernard Lolimo Ekimat v. Republic** Criminal Appeal No. 151 of 2004 (UR).”*

21. In considering whether to order a retrial, the appellate court must take into the account the circumstances of the particular case, including such factors as the gravity and prevalence of the offence, as shown in **Opicho**, supra, at p. 375 where the Court considered the public interest in the prosecution of child abuse cases and held retrial appropriate, as follows:

*“The allegations made against the appellant are extremely serious and of public interest as they relate to **child abuse**, a phenomenon now topical on the world stage, and in this country, due to its prevalence. It is in the interests of justice that the appellant receives a fair trial and if he is to be acquitted or convicted, then it ought to be seen that it was, in either case, in accordance with the law. We are inclined in all the circumstances of this case to order a retrial.”*

See also **Mwangi v. Republic** (2006) 2 KLR 94

22. In this case, two considerations come into play in the determination whether to order a retrial. On

the one hand, Public Interest demands prosecution of Defilement as an offence of violence against women which has grave consequences to the life of the victim. On the other hand, the charge of defilement, if proved, carries the heavy sentence of imprisonment for life for the perpetrator. Again, if he accused is found to have been insane at the time of commission of the offence, he would be entitled to a special finding of guilty but insane under section 166 of the Criminal Procedure Code. In the public interest for prosecution of offences relating to violence against women as a vulnerable gender, and on account of the seriousness of the charge of defilement for the accused, I consider retrial of the appellant to be not only necessary but desirable.

23. While the incident for which the appellant is charged allegedly occurred some seven (7) years ago, I have no basis for supposing that the Prosecution will not be in a position to produce witnesses to prove the charge. Furthermore, upon considering the facts set out to support the charge, without prejudice to the findings by the Court on retrial, I do not find that there is no evidence upon which a court properly directing itself may convict in a fair trial of the charges herein.

CONCLUSION

24. Accordingly, I find that the guilty plea entered for the appellant herein was defective for want of un-equivocality of the plea where the appellant explained his plea as a result of his being 'sick' and for the failure by the court to inform the accused of the penalty applicable to the offence to ensure that the appellant exercised informed choice to plead guilty to the charge.

25. The appellant's conviction for the offence of defilement contrary to section 8(1) as read with section 8 (2) of the Sexual Offence Act, 2006 will be quashed and the sentence of life imprisonment set aside. The appellant will be retried by the trial court constituted by a Magistrate other than Hon. S. GACHERU, *RESIDENT MAGISTRATE*.

ORDERS

26. Accordingly, for the reasons set out above, the appellant's conviction herein is quashed and the sentence of life imprisonment set aside and the court further directs that the appellant be retried in fair trial before a court of competent jurisdiction.

DATED AND DELIVERED THIS 1ST OF MARCH 2016.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Appellant present

Mrs. Saoli for the Respondent

Ms. Doreen - Court Assistant.