



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
CRIMINAL APPEAL NO.56 OF 2014

BETWEEN

ERICK OCHIENG.....APPELLANT

AND

REPUBLIC.....RESPONDENT

**(Being an appeal from the judgment and conviction of Hon. P. Achieng', PM
delivered on 8/05/2014 in Kakamega CM's Court Cr. Case No.29 of 2013)**

J U D G M E N T

Introduction

1. The appellant herein ERICK OCHIENG was charged with defilement contrary to Section 8(1) (3) of the Sexual Offences Act No.3 of 2006. The particulars of the offence are that on the night of 14th of May 2013 at [particulars withheld] location in Kakamega County within Western province ERICK OCHIENG intentionally and unlawfully caused his penis to penetrate the vagina of D.A a child aged fifteen (15) years.
2. In the alternative the appellant was charged with committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No.3 of 2006. The particulars of the alternative charge were that on the night of 14th day of May 2013 at [particulars withheld] location in Kakamega County within Western province intentionally touched the vagina of D.A a child aged fifteen (15) years.
3. The appellant was found guilty of the offence of defilement and convicted. He was sentenced to serve twenty (20) years imprisonment on the main charge of defilement.

The Appeal

4. Being aggrieved and dissatisfied by both the conviction and sentence the appellant appealed on the following grounds filed by his advocates.

1. THAT the learned trial Court erred in law and fact by denying the Appellant his Constitutional rights to a fair trial under provisions of Article 50(2) (j) and (k) of the Constitution of Kenya, 2010.

2. THAT the learned Court erred in law and fact by denying the appellant the right to re-call and further cross-examine the complainant as provided for under Section 146 (4) of the Evidence Act in light of the fact that at the time the complainant testified the appellant had not been supplied with witness statements.

3. THAT the learned Court erred in law and fact by relying upon uncorroborated and insufficient evidence to convict the Appellant.

4. THAT the learned trial Court erred in Law and fact by convicting the Appellant upon contradictory evidence adduced by the complainant on the one hand and the medical and investigations officers on the other hand as to the identity of the person (s) said to have allegedly defiled the complainant.

5. M/s Wesutsa & Co. Advocates filed written submissions on behalf of the appellant. Mr. Omwenga on the other hand supported the petition of appeal on grounds that the appellant conducted his case having not been supplied with witness statements. He submitted that the requirements of Article 50(2) (j) were not complied with and the results of the proceedings cannot be said to have been fair. He asked this Court to refer this matter to the lower Court for a re-trial.

6. Being a first appeal this Court has a duty to re-evaluate the evidence on record and come up with its own conclusions bearing in mind that it was not present when the witnesses were giving their evidence to see their demeanor. See the case of **PANDYA –VS- R [1957] E.A 336** and **KARIUKI KARANJA – VS- REPUBLIC [1986] KLR 190.**

The Prosecution Case

The Prosecution called (5) witnesses and from their testimonies the Prosecution case was as follows:- On 14/05/2013 at about 5.00p.m, the complainant went to a certain home in the neighbourhood where there was a funeral. While in that home the complainant met with the appellant who was known to her. The appellant then asked the complainant to accompany him to his home. The complainant agreed and the two went to the appellant's home where they spent the night and engaged in sex. The following morning the appellant escorted the appellant to the gate but instead of going home, the complainant went to [particulars withheld] area where she met another young man by the name Kenneth Sitati who was an employee at Small and Lovely Hotel. Kenneth took the complainant to a different hotel nearby and the two took tea together. Thereafter Kenneth took the complainant to some houses nearby and while the two of them were there, a man called Shem (Shem was not called as a witness) went there with the Police and Kenneth was arrested. The complainant was taken to Kakamega Provincial General Hospital for examination and treatment. A Post Rape Care Form was filled and produced as PExhibit 2 while the P3 form issued by the Police was produced as PExhibit 3.

7. It was on the basis of the above evidence that the appellant was put on his defence after the trial Court ruled that the Prosecution had established a prima facie case requiring the appellant to be put on his defence.

The Defence Case

8. Section 211 was complied with by the trial Court and the Appellant opted to give a sworn statement without calling any witness. He testified that on the 15th May 2013 at 11.00am he had returned from work and two people approached him saying that they wanted him to assist them with investigations. He accompanied them and they went to Shibuli AP Camp where he was locked in and later in the evening he was taken to Kakamega Police Station. He was thereafter charged with the offence herein which he denies.

9. On cross examination he explained that on the 14th of May 2013 he was in their home sleeping and that the complainant did not sleep in their home. He claimed that he was not interrogated by the Police. He also told the Court that he was nineteen (19) years old and denied telling the Police that he slept with the

girl. He also denied the contents in his statement.

Issues for Determination

10. From the evidence on record the complainant told the trial Court that on the night of 14th May 2013 he was with the appellant. She said that she slept with the appellant that night and they had sexual intercourse. The appellant on the other hand denied that he slept with the complainant and said that on that night he slept alone at his home. From PW2's testimony the complainant was seen in the company of the appellant by one Abibu who told him that he saw them at the funeral. They went to the appellants home and the appellant admitted that he was with the complainant. Abibu did not however testify.

11. PW5 examined the complainant and found that she had been defiled. The complainant testified that he was also with Kenneth on the 15/05/2013. They were found in a lodging with Kenneth. She did not explain what she was doing with Kenneth in the room.

12. The trial Court in its judgment considered whether the appellant had defiled the complainant. Relying on the evidence of PW1 and PW2 the Court found that the complainant did not spent the night of 14th May 2014 at her parent's home. The trial Court also found that from her demeanor, the complainant was a person who was telling the truth. The trial Court believed her testimony that she spent the night of the 14th May 2013 with the appellant. The trial Court added that the defence by the appellant did not rebut the evidence by the Prosecution and thus found him guilty of the offence of defilement. From the submissions by the appellant the following questions arise for determination:-

- a. Whether the appellants Constitutional rights were violated.
- b. Whether the trial Court convicted the appellant upon the evidence of a single witness, and if so, what the repercussions are.

13. On the 1st issue it is submitted that on the 18/7/2013 the appellant through Counsel sought to have the complainant recalled for further cross-examination. Counsel also asked that witness statements be supplied to the Defence. This the trial Court granted however when the matter came up for further hearing on the 12th of September 2013 the appellant reminded the trial Court that he was yet to receive the witness statements and he wished to have the matter proceed de novo, a request which the Court declined. The appellant despite reminding the trial Court that he had not received copies of the statement the trial Court failed to ensure that he received the same, more so when he was acting in person.

14. Article 50(2) provides that:

“Every accused person has the right to a fair trial which includes the right:-

(a)

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

After a careful scrutiny of the record and the proceedings herein, it is not in doubt that the appellant requested for witness statements on the 18/7/2013 through Counsel and also requested that the complainant be recalled for cross examination. This application was granted and it was recorded that **“PW1 to be recalled for cross examination by defence Counsel witness summons to be supplied as prayed.”** It is also on record that on 3/09/2013 accused requested that the case starts a fresh because it had started without him having received witness statements. He also told the trial Court he had not yet received the statement.

15. The trial Court ruled that “the application by the accused to have the witness recalled lacks merit. I disallow the same as the accused should have made the application at the earlier opportunity. I however

order that he be given witness statements.” All this happened after the Prosecution had only called one (1) witness who is the complainant (PW1). I therefore find that the trial Court failed to ensure that the appellant received witness statement before proceeding with the case because an accused person has a right to a fair hearing as provided by the Constitution under Article 50(2) (j). It is the practice of the Magistrates Court to ensure with or without an application from the accused persons to supply the charge sheet and to assist the accused to get witness statements. In a number of cases, the accused has to pay for the statements. The law also provides that an accused has a right to recall a witness for further cross examination as provided for under Section 146(4) of the Evidence Act Cap 80 Laws of Kenya. It is evidence that the appellant’s request to call PW1 was denied by the trial Court. Thus the appellant proceeded with the case herein without being given the statements. This clearly contravened and/or violated the appellant’s Constitutional rights as enshrined in the Constitution. The appeal therefore succeeds on the ground that the appellant was not provided with witness statements to help him prepare for his defence.

16. On the second issue of whether the trial Court convicted the appellant upon the evidence of a single witness this Court points to Section 124 of the Evidence Act Cap 80 of the Laws of Kenya which provides **“Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declarations Act Cap 15, where the evidence of the alleged victim is admitted in accordance with that Section on behalf of the Prosecution in proceedings against any person for an offence the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.**

Provided that where in a criminal case involving a Sexual offence the only evidence is that of the alleged victim of the offence, the Court shall receive the evidence of the alleged victim and proceed to convict the accused person if reasons to be recorded in the proceedings, the Court is satisfied that the alleged victim is telling the truth.”

17. This Court finds that the trial Court was right to convict on the evidence of the complainant. It had the opportunity to see her demeanor and also commented on her demeanor. The appeal herein therefore succeeds only on the ground that the appellant was not supplied with the statements as required and as provided under the Constitution. The trial was not fair. Both the Prosecution and defence have requested for a retrial.

18. 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. It is true that the mistakes of the Court should not be visited on an accused person. However, taking all the circumstances of this case into account, including the seriousness of the charge facing the appellant, it cannot be said that this is a case where the weight of the evidence is such that the same if properly considered, would lead to a conviction. I have noted that there are many gaps in the Prosecution case, including failure by the Prosecution to avail very critical witnesses in the chain of events which led to the arrest of the appellant. There is a high likelihood that the Prosecution will want to take advantage of the retrial and try to fill in the gaps in its evidence if such an eventuality were to occur, the appellant will suffer prejudice. I will therefore not order a retrial.

Conclusion

20. For the above reasons, I allow the appellant's appeal, quash the conviction and set aside the sentence of 20 years imprisonment. Unless otherwise lawfully held, the appellant shall be released from prison custody forthwith.

Judgment delivered, dated and signed in open Court at Kakamega this 2nd day of December 2015.

RUTH N. SITATI

J U D G E

In the presence of:

Mr. Khayumbi h/b for Mr. Kundu for Appellant

Mr. Omwenga (present) .for Respondent

Mr. Okoiti - Court Assistant