



REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL NO. 24 OF 2014

BETWEEN

SAMSON BOKE MARWA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 312 of 2012 at Principal Magistrate's Court at Kehancha, Hon., C. M. Kamau, Ag. SRM dated on 6th February 2014)

JUDGMENT

1. The appellant in the matter **SAMSON BOKE MARWA** was initially charged with the offence of sexual exploitation of a child contrary to **section 15** as read with **section 20** of the **Children Act, 2001**. The particulars of the offence were that on 16th February 2012 in Kuria West District, he was found cohabiting with a child, ERR, aged 16 years causing her not to continue her education in form one in secondary School.

2. He pleaded not guilty and at the ensuing trial the prosecution called 3 witnesses; the complainant, the arresting and investigating officer and the complaint's mother. The prosecution closed its case thereafter. The learned magistrate then reserved the decision under **section 210** and **211** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)**.

3. In the ruling delivered on 13th December 2012, the learned Magistrate, after considering the evidence, stated as follows;

There was however no evidence that the defendant herein was cohabiting, did cohabit or was found cohabiting with the child as alleged in the particulars of the charge. It would also be difficult as confirmed by PW2, for the prosecutor to base his case on the fact that the defendant's sexual act with the complainant led to the conception. That requires serious medical evidence on the same which necessarily must be in the form of DNA examination.

4. Having found that there was insufficient evidence to place the appellant on his defence, the learned magistrate, instead of dismissing the case for the prosecution and acquitting the accused under **section 210** of the **Criminal Procedure Code**, proceeded to direct the police to conduct a DNA test on the accused in terms of **section 122A(1)** of the **Penal Code (Chapter 63 of the Laws of Kenya)**.

5. **Section 210** of the **Criminal Procedure Code** provides as follows;

If at the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as the prosecutor and the accused person or his advocate may wish to put forward, it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case and shall forthwith acquit him.
[Emphasis mine]

Section 122A of the **Penal Code** provides as follows;

A police officer of or above the rank of inspector may by order in writing require a person suspected of having committed a serious offence undergo a DNA sampling procedure if there is reasonable grounds to believe that the procedure might produce evidence tending to confirm or disprove that the suspect committed the alleged offence.

6. In the decision, the learned magistrate then proceeded to order that appellant be tried afresh for the offence of defilement contrary to **section 8(4)** of the **Sexual Offences Act** on the basis of **section 192** of the **Criminal Procedure Code** which states as follows;

If on a trial for a misdemeanour the facts proved in evidence amount to a felony, the accused shall not be therefore acquitted of the misdemeanour; and no person tried for the misdemeanour shall be liable afterwards to be prosecuted for a felony on the same facts, unless the court thinks fit to direct that person to be prosecuted for felony, whereupon he may be dealt with as if not previously put on trial for misdemeanour.

7. Thereafter the appellant was charged with the fresh offence of defilement contrary to **section 8(1)** of the **Penal Code**. He was tried and convicted on the basis of the results of the DNA test which were conducted by the police as directed by the learned magistrate. The appellant was sentenced to serve 15 years imprisonment. He now appeals against the conviction and sentence.

8. From the facts I have outlined, this appeal must succeed on the ground that the learned Magistrate disregarded the mandatory provision of **section 210** of the **Criminal Procedure Code** which required him to acquit the accused in the event there was lack of evidence. The Magistrate could not, after the close of the prosecution case and upon finding that there was insufficient evidence, direct the prosecutor to investigate, conduct a DNA test and charge the appellant with a fresh offence.

9. I also find that the learned magistrate could not rely on **section 192** of the **Criminal Procedure Code**. The opening words of the section leave no doubt that the power to convict a person of a felony when he or she has been charged with a misdemeanour can only be exercised once the case is completed and if the evidence supports the conviction for the felony. The words, “*if on a trial for misdemeanour the facts proved in evidence amounts to a felony*” leave no doubt that the learned magistrate could not reopen the prosecution case once it had been closed. He could only consider the evidence after the close of the defence case and decide whether it disclosed a felony under the said section.

10. Furthermore, the power given to a police officer under **section 122A** of the **Penal Code** to extract DNA from a person is part of legal tools available to the police for investigation. It was improper for the learned magistrate to direct the prosecution after the close of its case, and without application from the prosecutor, to investigate the accused in a particular way. This intervention was a serious encroachment on the prosecutorial discretion and authority and an abdication of the judicial role to be an impartial arbiter. It is worth noting that despite the clear sentiments of the appellants guilt expressed by the learned Magistrate in the ruling, he still proceeded to try him on the defilement charges. Although, a different magistrate took over and continued the trial under **section 200** of the **Criminal Procedure Code**, this was after the prosecution had completed its case. The old adage that justice must not only be done but be seen to be done applies in this case.

11. The errors I have pointed out were grave and rendered the fresh trial and consequent conviction and sentence a nullity. In the circumstances, the State properly conceded the appeal.

12. I have considered whether a fresh trial should be ordered. The prosecution had closed its case in the initial trial and the learned magistrate had concluded that there was insufficient evidence and should have acquitted the appellant. The second trial on new charges was clearly defective. The appellant has in effect faced two trials. It would not be in the interests of justice to subject him to a third trial.

13. The result is that the appeal is allowed, the conviction and sentence are quashed and the appellant is set free unless otherwise lawfully held.

DATED and DELIVERED at MIGORI this 4th September 2014

D.S. MAJANJA

JUDGE

Appellant in person.

Ms Owenga, Senior Prosecuting Counsel, instructed by the Director of Public Prosecutions for the respondent.