



REPUBLIC OF KENYA

High Court at Meru

17 of 2013

PETER KAIMENYI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against both conviction and sentence in Criminal Case No.947/10 in Meru Law Courts- before R. N. Kimingi,CM)

J U D G M E N T

The appellant PETER KAIMENYI was charged with an offence of defilement contrary to Section 8(1) (4) of the Sexual Offences Act No.3 of 2006. That on 24th day of July, 2010 at Imenti North District he intentionally caused his penis to penetrate the vagina of P K, a child aged 17 years old.

The appellant was convicted of the offence and sentenced to serve twenty five years imprisonment. Being aggrieved by the conviction and sentence he filed this appeal setting out 6 grounds of appeal. In his amended petition of appeal being as follows:-

1. *That the learned trial Magistrate erred in law by failing to comply with section 50(2) (c) of the Constitution –thus prejudiced I the appellant*
2. *That the learned trial Magistrate further erred in law and fact by failing to consider the importance of the exhibit(MFI-2) which was stuck out from the list of exhibits.*
3. *That the learned trial Magistrate still erred in law and facts by failing to observe that the prosecution had not proved their case beyond any reasonable doubt.*
 - a. *The victim’s clothes were not produced as exhibits.*
 - b. *The evidence contradictory of PW1,PW5,PW6.*
 - c. *Medical evidence tendered by Dr. Macharia raises doubt i.e. duration of examination and also as to who examined the complainant(PW1).*
4. *That the learned trial Magistrate erred in law and facts by failing to give due consideration to my defence.*
5. *That the learned trial Magistrate further erred in law and fact by failing to resolve material contradictions riddled by the prosecution case in favour of the appellant.*

6. That the learned trial Magistrate erred in law and fact by failing to weigh the integrity which was merely hearsay and assertions.

This is the first appeal from conviction and sentence. I am the first appellate court and I am guided by the principles enunciated in the case of **OKENO –V- REPUBLIC(1972) EA 32** where the Court of Appeal set out the duty of first appellate court in the following terms.

“An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [Pandya vs. Republic (1957) EA 336] and to the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)”

The appellant appeared in person and submitted written submissions which he relied upon. The appellant’s contention is that the trial Magistrate failed to comply with Article 50(2),(c) of the Constitution is that he was denied adequate time to prepare for his defence after court found that he had a case to answer. He further contended that he was convicted on insufficient evidence and that his defence was not considered.

Mr. Motende, learned State Counsel conceded to the appeal on grounds that the trial Magistrate did not as per Article 50(2), (c) of the Constitution of Kenya give the appellant sufficient time to prepare his defence. He submitted that on that ground alone the appeal ought to be allowed. He further stated that the appellant faced a serious charge and court should have given both the prosecution and defence time to submit on whether there was a case to answer or not. He was of the view that the trial court violated the Constitutional rights of the appellant as enshrined in the Constitution under Article 50(2),(c) which deals with fair trial. He conceded the appeal and sought there be retrial because the evidence on record he submitted was sufficient to prove the prosecution case. He submitted that judgment had been delivered 2 years ago and that the appellant had not served substantial part of the sentence and he won’t be prejudiced by a retrial.

On ground No.2 on age assessment of the complainant, he submitted that the court took judicial notice that the age of the complainant was 18 years. He urged that according to the evidence of PW1 and PW6 there was penetration and offence was proved. He submitted that the court rightly substituted the charge against the appellant to that of rape.

The facts of the prosecution case are that the complainant, who was born on 20.4.1992 was on 24/7/2010 at around 5.00 p.m. walking through Kambakia Forest when she saw an elephant and decided to go back so that she could use the main road. That as she was going back she met the appellant who she had not known before. The Appellant enquired from the complainant what was wrong and after she explained, he assured her, he was going towards the same direction and that he could protect her as a man of God. That as the two walked, the appellant grabbed her by her throat and told her they should get into the forest. She resisted but the appellant overcame her. He knocked her down, removed her pants, biker and had sex with her for about 10 minutes after pushing his penis into her vagina. During the time of rape she could not scream as he held her throat. That after rape and as the two walked away, the complainant saw two people going uphill on a motorcycle, she shouted to the two people that the appellant had raped her and wanted to kill her.

The appellant was then apprehended by one of the good Samaritans as he wanted to escape. The complainant was escorted to Meru Police Station and taken to Meru District Hospital where she was examined and treated. She was issued with a P3 form which was completed by a Doctor. PW2 and PW3 in their evidence confirmed that on 24/7/2010 at 5.30 p.m. they were at Kambakia forest, when the complainant PW1 shouted to them and told them she had been raped by the appellant. PW2 apprehended the appellant. PW3 corroborated the evidence of PW1 and PW2. PW4’s mother to complainant, PW1, explained how PW1 reported to her that she had been raped. PW5 No.90805 PC JA testified that on 24/7/2010 at 7.00p.m. OCS told her there was a complainant, P K and a prison Officer, PW2 who had arrested a suspect, Peter Kaimenyi, the appellant. That PW5, escorted the complainant(PW1) to the hospital whereby she was examined by a Doctor.

PW6 Isaac Macharia, testified that on 9/9/2010 he examined the complainant PW1. He testified that the complainant had sustained soft tissue injuries on her front part of the neck. That there was pain and tenderness on the external genitalia and hymen was perforated. He produced P3 form dated 9/9/2010 as exhibit P.Exhibit No.1.

The appellant gave unsworn statement. He testified that on 24/7/2010 at around 5.00pm he was going home when he met the complainant PW1 and she stopped PW2 and PW3 who were in motorcycle. He did not know why she stopped them and as such he did not escape. They arrested him and took him to the police station.

The learned State Counsel conceded to the appeal on the grounds that the appellant was not given sufficient time to prepare his defence. Article 50(2),(c) of the Constitution of Kenya, 2010 provides:-

“(2) Every accused person has the right to a fair trial, which

includes the right—

(a).....

(b)

(c) to have adequate time and facilities to prepare a defence”

The trial court’s record shows that the prosecution closed their case on 24/11/2010. The court immediately made a ruling that the accused has a case to answer and complied with Section 211 of the Criminal Procedure Code. The appellant stated that he wished to give unsworn statement and indicated to the court that he was not ready to proceed on that day and sought another date for defense hearing. He indicated that he would be ready the following day. The prosecutor sought a defence date for 30.11.2010. The court did not make a ruling on appellant’s application but in unexplained circumstances appellant is noted as stating that he was ready to proceed.

The proceedings of the trial court clearly show that the court seemed to be in a hurry of concluding the matter before it incomplete disregard of the accused Constitutional rights to a fair trial which includes right to have adequate time and facilities to prepare a defence. It matters not whether the accused intends to give sworn or unsworn statement.

In the instant case the appellant made an application to prepare for defence in open court. The prosecution did not oppose the application. One wonders why the court was in a hurry and why was the accused not given time to prepare his defence? I find the refusal of the court to grant the appellant time to prepare his defence amounted to unfair trial and denial of appellant’s Constitutional right to have adequate time and facilities to prepare a defence.

The learned State Counsel Mr. Motende quite correctly conceded to the appeal. For this ground alone the appeal succeeds as there was no fair trial. On the issue of retrial, I have considered the evidence of PW1, PW2, PW3, PW4, PW5 and PW6 particularly on identification of the appellant, his arrest and the evidence of PW1 and PW6 on the offence of rape, and I have come to the conclusion that conviction might result if a retrial is ordered and if the same evidence adduced before the lower court. I have also considered that this case was heard about 2 years ago and the appellant has served only 2 years out of 25 years imposed by trial court, I find if an order of a retrial is made in this case it is not likely to cause any injustice to the appellant. Having carefully considered this appeal, I have come to the conclusion that the trial court violated the appellant’s Constitutional rights by failing to give the appellant adequate time and facilities to prepare his defence as required under Article 50(2),(c), of the Constitution of Kenya, 2010. I find the conviction against the appellant was unfair and should not be allowed to stand. Accordingly I quash the conviction and set aside the sentence.

Since there seem to be substantial evidence against the appellant and the offence was only committed about 2 years ago, I hereby order for a retrial before any other Magistrate of competent jurisdiction other than the trial Magistrate viz Mrs. R. N. Kimingi, (C.M).

Accordingly it is hereby ordered that the appellant shall be retried as soon as possible. The trial should be presided over by any Magistrate at Meru Chief Magistrate Court other than Mrs. R. N. Kimingi (C.M). The appellant shall appear before Meru Chief Magistrate’s Law Courts on 3/5/2013 for plea and setting the matter down for hearing.

DATED, SIGNED AND DELIVERED AT MERU THIS 2ND DAY OF MAY, 2013.

J. A. MAKAU

JUDGE

Delivered in open court in the presence of:

1. Appellant in person
2. Mr. J. Motende for State

J. A. MAKAU

JUDGE