REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 90 OF 2012

NICHOLAS MUTHEMWA MWANDI .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No. 223 of 2012 in the Senior Resident Magistrate's Court at Mwingi-V.A. Otieno (RM) on 23rd August, 2012)

JUDGMENT

The Appellant, Nicholas Muthemwa Mwandi, was charged at the Principal Magistrate's Court at Mwingi with the offence of attempted rape contrary to Section 4 of the Sexual Offences Act No. 3 of 2006. He was faced with an alternative charge of committing an indecent act with an adult contrary to Section 11A of the Sexual Offences Act No. 3 of 2006.

At the conclusion of the trial, the magistrate (V.A. Otieno, RM) convicted the Appellant for attempted rape and sentenced him to serve 7 years imprisonment. Although at the conclusion of his judgment the trial magistrate indicated that the Appellant had been convicted for "attempted defilement" I find this to be an error that can be rectified by invocation of Section 382 of the Criminal Procedure Code (cap 75). The Appellant being dissatisfied by both the conviction and sentence has appealed to this Court.

In his Amended Petition of Appeal filed on 13th March, 2013 the Appellant faults the trial magistrate for failing to accord him an interpreter. He also averred that he was convicted on unsubstantied evidence. He argued that the prosecution had failed to call a material witness by the name K.

When the appeal came up for hearing on 17th October, 2013 Mr. Mulama for the state conceded the appeal on two grounds namely failure to call a material witness and non-disclosure of the language used in the trial.

I have gone through the proceedings before the lower court and find that the conviction would still have stood notwithstanding the prosecution's failure to call one K. I do not agree with the state counsel's conceding the appeal on this ground.

As for language, I find that nowhere in the trial Court proceedings is the language used disclosed. The language used by the witnesses is not disclosed. The cross-examination of the witnesses by the Appellant was minimal and one cannot confidently say that the said cross-examination amounted to full participation in the proceedings. I would therefore allow the appeal on this ground.

There is also something not raised by the parties but which has come to my attention. At the close of the prosecution case the trial magistrate stated that a prima facie case had been established against the Appellant. There is nothing in the Court record to show that Section 211 of the Criminal Procedure Code was complied with. Although there is an indication that the Appellant had opted to give sworn testimony and did not intend to call any witness, I find that compliance with Section 211 is a matter that goes to the root of a criminal trial. The trial Court should clearly indicate in the proceedings that Section 211 of the Criminal Procedure Code has been complied with. The answer of an accused person should also be recorded in the proceedings.

The end result is that this appeal is allowed and the conviction and sentence set aside. The Appellant is therefore set free unless otherwise lawfully held.

Prepared, Dated and signed this 27th November 2013

W. KORIR,

JUDGE OF THE HIGH COURT

Dated and delivered on 2nd day of December, 2013

S.N.MUTUKU

JUDGE OF THE HIGH COURT