REPUBLIC OF KENYA

High Court at Malindi

Criminal Appeal 21 of 2011

MANYESO KARISA KENGA..….....……APPELLANT

VERSUS

REPUBLIC…….....……RESPONDENT

(From original conviction and sentence in criminal case no. 35 of 2010 of the Principal Magistrate's Court at Kilifi before Hon. P. Gandani - PM)

JUDGMENT

1. The appellant was charged with Gang Defilement contrary to Section 10 of the Sexual Offences Act but eventually convicted under Section 9 (1) of the Sexual Offences Act and sentenced to ten years imprisonment. He now appeals to this court against both conviction and sentence raising four amended grounds of appeal which are difficult to follow.

2. I presume that the gist of the appellant's complainant is that the conviction was against the weight and quality of evidence. The State opposed the appeal, citing the "overwhelming" prosecution evidence tendered in the trial before the Lower Court. Mr. Naulikha for the State urged the court to enhance the sentence imposed on the appellant.

3. As mandated to do on a first appeal, I have considered the evidence tendered at the trial of the appellant for purposes of drawing my own conclusions (see **Okeno vs R 1972)EA 32]**. The complainant was a cousin of the appellant (and another charged with him in the Lower Court.) The complainant visited the appellant's home in Mwongea on 2nd January, 2010 the invitation of the appellant, to celebrate new year. The complainant left the home to return to her home on the next day. The appellant's mother and his wife escorted her some distance and turned to go back home, whereupon the appellant and another who were walking behind the party joined the complainant.

4. The two diverted her to an unfamiliar bushy path where they knocked her down and undressed her. The complainant was defiled first by the appellant's companion. Then the appellant pulled the complainant and started to fondle her breasts and private parts demanding sexual intercourse. The complainant resisted and managed to flee the scene. She reported to a sister and another relative. She was treated for her injuries. Eventually the matter was escalated to the local chief and police, who arrested the two accused.

5. In his defence the appellant admitted that the complainant visited his home on the material dates but he denied being in the party that escorted her home or that he attempted to defile her. He said after the complainant left his home, he remained at home until his mother who returned home from seeing the complainant off told him his brother, and co-accused in the Lower Court, wanted to see him at the local shopping center. He joined him and his pastor and later went back home.

6. Having analysed the evidence on record, I find it disturbing that despite the age of the complainant (14 years) the court did not conduct a *voire dire* examination before receiving her evidence. That is a material failure (see **John Muiruri vs Republic [1983] KLR 445)** notwithstanding the provisions of Section 124 of the Evidence Act. In her judgment, the trial magistrate expressed that she believed the evidence of the complainant "in its totality". The record however, does not with respect, show that she was alive to her duty under section 19 (1) of the Oaths and Statutory Declarations Act.

7. In proof of the offence for which the appellant was convicted the prosecution had relied mainly on the

complainant's evidence. The failure by the trial magistrate to follow the correct procedure in receiving the complainant's evidence therefore cannot be dismissed in the circumstances of this case. The trial was defective. And it is trite law that on order for retrial may be made in such a situation (see **Merali v R 1971 EA 221).** Whether or not a retrial should be ordered also depends on the particular facts and circumstances of each case and it should only be considered where the interests of justice require it and where it is unlikely to occasion injustice to an accused (see **Manji v R 1966 EA; Mwaura vs R C.A No. 58 of 1989 (UR).**

8. The appellant in this case has served close to two years of his ten year sentence. The evidence against him if properly taken and considered on the face of it might or might not result in a conviction, and a minimum sentence of ten year imprisonment. In the circumstances of this case, I am of the view that a trial will expose the appellant to further prejudice (see **Mwangi vs Republic 1983 KLR 522)** and the interests of justice may not necessarily be met. I am therefore reluctant, while quashing his conviction and setting aside the sentence to order the appellant's retrial. He is therefore to be set at liberty unless otherwise lawfully held.

Delivered and signed this **10th** day of **October, 2012** in the presence of accused. Ms. Mathangani for State.

Court clerks – Leah, Evans

C. W. Meoli

JUDGE