REPUBLIC OF KENYA

High Court at Nakuru

Criminal Appeal 175 of 2011

MUSA KIPROTICH KITILIT…….....APPELLANT

VERSUS

REPUBLIC…….....…….....RESPONDENT

(An appeal from original conviction and sentence in criminal case No.331 of 2008 by Hon. D.M. Machage R.M, Eldama Ravine dated 10th December, 2008).

JUDGMENT

The appellant, Musa Kiprotich Kitilit, was charged that on the 22nd day of June, 2008 at [particulars withheld] Rift Valley Province he intentionally committed an act which caused the penetration of his genital organ into the genital organ of CK, a child under the age of 16 and with mental disability contrary to **Section 7** of the **Sexual Offences Act No. 3** of **2006**. He also faced an alternative charge of committing an indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act**, **No. 3** of **2006**.

Upon being satisfied that the evidence proved the main charge beyond reasonable doubt the trial court convicted the appellant of that offence and sentenced him to serve ten (10) years imprisonment.

Aggrieved by the sentence the appellant has filed this appeal on five (5) grounds to the effect that the sentence was harsh and excessive.

In arguing the appeal the appellant pleaded for mercy and reduction of the sentence. After counsel for the respondent conceded that the appellant had been wrongly charged and applied for a retrial, the appellant appeared to have changed his mind and sought to withdraw the appeal.

Section 7 of the **Sexual Offences Act** under which the appellant was charged and convicted provides:-

“7. A person who intentionally commits rape or an indecent act with another within the view of a family member, a child or person with mental disability is guilty of an offence and is liable upon conviction to imprisonment for a term which shall not be less than ten years.”

Under this section the wrongful act is not the rape or indecent act *per se*. The prosecution must in addition to proving the prohibited conduct prove that the act was committed within the view of a family member, a child or a person with mental disability.

The charge before the trial court alleged that the appellant intentionally committed an act which caused the penetration of his genital organ into the genital organ of CK, a child under the age of 16 and

with mental disability. Those particulars are clearly at variance with the particulars of the offence created under **Section 7** of the **Sexual Offences Act** as such was fatally defective.

The appellant's trial and conviction on the charge was, therefore, irregular and the same is hereby quashed and the sentence of ten years is set aside.

Counsel for respondent submitted that the appellant ought to have been charged with the offence of knowingly having or attempting to have unlawful carnal knowledge with an idiot or an imbecile contrary to **Section 146** of the **Penal Code**. He urged the court to order for retrial so that the appellant may be charged and tried under that offence.

For this court to order for retrial it has firstly to be satisfied that the conviction in respect of which it is ordering a retrial was not vitiated by a gap in the evidence or a defect for which the prosecution is to blame. Secondly, it has to be satisfied that it is in the interest of justice to make the order and thirdly that the order will not amount to an injustice to the accused person. See **Ekimat** V. **Republic** (2005) 1 KLR 182 where the Court of Appeal held:

"..... Where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not follow that a retrial should be ordered; that a retrial should not be ordered unless the court is of the opinion that on the consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on its particular facts and circumstances but an order for the retrial should only be made where the interest of justice require it and should not be made where it is likely to cause an injustice to an accused person."

In the circumstances of this case, it is clear that both the trial court and the prosecution did not notice that the charge with which the appellant was being tried was defective. In my view, both the trial court and the prosecution owed the appellant a duty to ensure that he was not made to plead to an offence that is not known in law. Ordering for a retrial presupposes that the appellant will be tried on the same defective charge. This will be of no use. This court will not order for a retrial in order to allow the prosecution to rectify the defect in the charge. To do so, would in my view, occasion injustice to the appellant considering that he has already served about four years for the wrong charge.

For the foregoing reasons, I decline to order the retrial and order that the appellant be forthwith set at liberty unless otherwise lawfully held.

Dated, Signed and Delivered at Nakuru this 5th day of October, 2012.

W. OUKO
JUDGE