REPUBLIC OF KENYA

High Court at Machakos

Criminal Appeal 139 of 2009

JOSEPH MUTISO MUTISYA…….…….APPELLANT

VERSUS

REPUBLIC ……..…….....RESPONDENT

(Being an appeal from the original conviction and sentence in Machakos Chief Magistrate's Criminal Case No. 15/2008 by Hon. E. Nderitu, SRM on 31/7/2009)

JUDGMENT

1. The appellant, **Joseph Mutiso Mutisya** ("*Appellant*") was arraigned, together with another person, before the Chief Magistrate's Court, Machakos, on 6th October, 2008 and charged with the offence of defilement contrary to section 8(3) of Sexual Offences Act, 2006. The particulars of the offence were that on the 1st day of October, 2008, at {*particulars withheld*} in Machakos District within Eastern Province, in association with others not before court unlawfully and intentionally committed an act which caused penetration with the genital organ (vagina) of **W. M.,** a girl aged 15 years.

2. The Appellant and his co-accused also faced an alternative charge of committing an indecent act contrary to section 11(1) of the Sexual Offences Act, 2006. The particulars of the alternative charge are that on the 1st day of October, 2008, at {*particulars withheld*} in Machakos District within Eastern Province, in association with others not before court, indecently assaulted **W. M.** by touching her private parts.

3. After a fully-fledged trial in which the Prosecution marshaled the evidence of eight witnesses and the Appellant called one witness and his co-accused gave an unsworn testimony, the Learned Trial Magistrate convicted both the Appellant and his co-accused of the main count. Upon finding that the co-accused was a minor, the Learned Magistrate ordered him to be committed to a Borstal Institution. At the same time, the Learned Magistrate sentenced the Appellant to twenty years imprisonment.

4. The Appellant has not appealed against both the conviction and sentence. Through his advocate, the Learned **Mr. L.N. Ngolya,** the Appellant filed ten grounds of appeal. The State opposed the appeal and urged the Court to affirm the conviction and sentence. Both **Mr. Ngolya** and **Mr. Mwenda,** the Learned State Counsel opted to canvass the appeal by way of written submissions. I have carefully read both sets of written submissions and taken them into account.

5. The Court must begin by reminding itself the standard for review in criminal appeals such as this one. As a first appellate court, this Court has an obligation to re-evaluate all the evidence given at trial in the lower court and come to its own independent conclusions. The Court is not to merely confirm or disconfirm particular hypothesis made by the Trial Court. Even then, the Court must be acutely aware that

I never saw nor heard the witnesses as they testified and, therefore, I must make an allowance for that. See *Okeno v R* [1972] E.A. 32 and *Kariuki Karanja v R* [1986] KLR 190.

6. The Appellant listed ten grounds of appeal in his petition of appeal. However, in the written submissions, he seemed to have collapsed them into four major complaints. First, the Appellant complains that the evidence adduced at trial was simply insufficient to displace the very high burden placed on the Prosecution to prove its case beyond reasonable doubt. In particular, the Appellant complains that the evidence of the two crucial Prosecution witnesses (PW1 and PW2 – the Complainant and her sister, respectively) who were the only eye witnesses to the assault, was ***"incredible, concocted and patently inconsistent."*** The Appellant gives two reasons for coming to this conclusion. One, he says that PW2 claimed that when he was chased away by the assailants as they took away her sister, she joined a **Mwikali** as she ran away; yet the said **Mwikali** was never called to testify. Similarly, PW1 claimed that when she came out of the forest early in the morning, she narrated her ordeal to a Watchman; yet that said watchman was never called to testify. To the Appellant's mind, the failure to call these two witnesses points to the incredulity of the Prosecution's case. That incredulity is compounded, according to the Appellant, by the fact that even though PW2 claims to have seen the Appellant and identified him as one of the assailants, and reportedly told her father as much, the father, who testified as PW3, talked of having been told that one of the assailants was **Kasia** – and not the Appellant. Due to how I have resolved this appeal below, I propose not to analyse this argument in detail save to say that neither complaints by the Appellant justify the conclusion that the Prosecution evidence was incredible and contradictory. While the evidence of **Mwikali** and the Watchman might have been useful to consolidate the Prosecution case, I do not think failure to call them was necessarily fatal to the Prosecution case. Also, the fact that PW3 talked of **Kasia** and not the Appellant can easily be explained by the fact that there were at least six assailants – four of whom have never been arrested.

7. The second complaint raised by the Appellant is about the identification evidence. It is simply that the Appellant claims that it was 7.00 pm at night and even though PW1 and PW2 claim that it was not dark, they do not disclose the source of light. The Appellant complains that the Learned Trial Magistrate "***invented***" evidence when she claimed that there was electricity light but there is nothing in the testimony of PW1 or PW2 suggesting presence of electric light. On this complaint, suffice it, for now, to point out four things: First, that this was evidence of identification by recognition which is generally more reliable. Two, it is corroborated by two witnesses. Three, it is strengthened by the on-site arrest of the Appellant. Four, in fact, PW2 did talk of electric light. Upon cross-examination by the 2nd Accused Person, PW2 said: "***We were near a place where fish is sold when you first talked to us and asked if we wanted fish. I saw you as there was bulb light."***

8. The third complaint by the Appellant is that in his view, there was lack of medical evidence sufficient to convict him. He says that even though he was arrested only shortly after the alleged sexual assault, he was not taken for medical tests which could link him with the offence. Likewise, he points out that the P3 form produced as evidence ***"did not find any problem with the Complainant's labia minora, labia majora, vagina or cervix"*** yet ***"it is a matter of common knowledge that a girl of the complainant's age would have serious injuries to her genitalia if sexually assaulted by numerous men in turns."*** Neither of these complaints gets the Appellant too far. Nexus between a person who has committed a sexual offence and the offence can be established by evidence other than medical evidence once the Prosecution establishes beyond reasonable doubt that the sexual assault happened. In this case, that nexus was the identification evidence by PW1 and PW2. In an ordinary case, such satisfactory identification witness would be sufficient to sustain a conviction. As to the claim that lack of injuries to the Complainant's genitalia proves that no sexual assault happened, one can only point out at this stage that forceful penetration does not always lead to violent injuries in a victim. Sometimes, like here, signs of sexual activity coupled with other evidence is sufficient to establish sexual assault.

9. Finally, the Appellant complains that the trial in the Court below was conducted in a language he did not understand. To demonstrate this, he says that the Court record does not show the language used in the proceedings. The Appellant relies on two decisions of the Court of Appeal – ***Rwaru Mwangi v R*** (*Court of Appeal Crim. App. No. 18 of 2006*) and ***Degow Dagane Nunow v R*** (*Court of Appeal Crim. App. No. 223 of 2005)* – for the position that failure to record the language of trial is fatal to a criminal conviction.

10.In the ***Rwaru Case***, the Court of Appeal rendered itself thus on section 198 of the Criminal Procedure Code – which guarantees the right of an accused person to interpretation to a language he understands:

In our view, the only way a trial court would demonstrate compliance with those provisions [of section 198, CPC] is to show on the face of the record at the beginning of the trial, the language which the accused person has chosen to speak.

11.The ***Degow Dagane Nunow Case*** is in accord. In material part, it enunciates that:

It is the responsibility of trial courts to ensure compliance with these provisions [section 198, CPC]. Trial Courts are not only obliged to ensure compliance with the provisions; they are also obliged to show in their records that the provisions have been complied with. There is no reason why a trial court should leave an appellate Court to presume that the provisions must have been complied with while it can easily be demonstrated by the record that compliance did in fact take place.

12.Finally, in ***Cisse Djibrilla v Republic*** where it was held that;- "***the failure by the trial magistrate to keep a record of the nature of interpretation was a serious defect in the trial".***

13.In the instant case, the magistrate who took the plea indicated that the charge was read and explained to the accused who pleaded not guilty in Kamba. It is safe to assume that the language the Appellant preferred was Kamba. It was, therefore, incumbent on the trial Court to ensure that all the proceedings were translated to Kamba throughout the trial. However, the record shows that PW1 testified in Swahili. There is no indication that there was any translation done. The language of cross examination is not indicated. The position is exactly the same for PW2. For PW3, the record indicates that he spoke in Swahili but the testimony was translated to Kikamba. Similarly, the record indicates that the cross examination was done in Kikamba and translated to Swahili. Even if we were to stop there, the Court would have enough to find that there is no demonstration that the rights of the Appellant to a fair trial were protected at trial. There is no demonstration that the Appellant understood the testimonies of PW1 and PW2 since he had indicated to the Court that he was only conversant in Kamba. The problem persists with later witnesses including PW4 who testified in English with translation provided in Kiswahili; PW6 who testified in Swahili with apparently no translation provided; PW7 for whom no language of testimony is recorded and PW8 who testified in Kiswahili with no indication of any translation.

14.Hence, from a review of the record of the proceedings, it is clear that the Appellant's right of fair trial as guaranteed by our law was violated. For this reason alone, this Court must quash the conviction and set aside the sentence imposed. No more analysis is required: it is in keeping with our stipulated law as interpreted and given flesh by our Court of Appeal.

15.The only question I must answer is what the implication of this decision is. There are only two choices: to order a re-trial which complies with the rights of the Appellant or to find that any such re-trial would be prejudicial to the rights of the Appellant and to order that he be released forthwith. After careful consideration, this Court has come to the conclusion that this is an appropriate case for a re-trial. Though, by now considerable amount of time has passed since the offence was committed, the charges brought against the Appellant were quite grave in nature. As this opinion shows, the evidence adduced against him at trial was substantial. It would seem that all the witnesses who testified would still be available to do the same; and the evidence produced at trial is still intact. In this Court's view, the facts and circumstances point strongly to an order for retrial. Consequently, this Court allows the appeal, sets aside the conviction and sentence imposed and order that the Appellant shall be tried *de novo* on the self-same charges. The Appellant shall be detained in prison pending the new trial. He shall be presented before the Chief Magistrate's Court within the next four days for arraignment and directions on the new trial.

16.Those, then, are the orders of this Court.

DATED at **NAIROBI** this **6TH** day of **NOVEMBER, 2012**

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J.M. NGUGI
JUDGE

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this day **7TH** day of **NOVEMBER, 2012**.

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ASIKE-MAKHANDIA
JUDGE