



IN THE COURT OF APPEAL OF KENYA

AT NAKURU

Criminal Appeal 278 of 2008

JOHN NJENGA KAMAU APPELLANT

AND

REPUBLIC RESPONDENT

**(Appeal from a judgment of the High Court of Kenya at Nakuru
(Koome, J) dated 28th November, 2008**

In

H.C. Cr. A. No. 167 of 2007)

JUDGMENT OF THE COURT

JOHN NJENGA KAMAU, the appellant, was after trial convicted by the Senior Principal Magistrate, Mrs. Oseko sitting at Molo, for defilement of a girl under the age of eleven years contrary to **section 8 (2)** of the Sexual Offences Act 2006 and sentenced to life imprisonment. His first appeal against conviction and sentence was dismissed by the High Court of Kenya at Nakuru (Koome, J) on 28th November, 2008 and hence this second and final appeal.

The prosecution presented the following facts to the trial court. The complainant, LW (PW1) was aged 4 ½ years old. She lived at M estate, Molo, with her mother DM (PW2). On 20th February, 2007 the mother was bathing PW1 when she noticed that she was feeling a lot of pain in her private parts. She asked PW1 what had hurt her and she replied that she had been “done bad manners by someone”. PW2 observed the vagina very closely and she saw a bruised injury. She reported the matter to the police and she was given a P3 form but she had no money to take the child to the hospital. About a month later, precisely on the 25th March 2007, the child reported again to PW2 that “someone” had done the same thing to her. As was in the first occasion nothing of significance occurred. However, on 7th April, 2007 PW1 once again complained to PW2 and Jane Macharia (PW3) that she had been sexually assaulted by their neighbour, the appellant herein. PW1 led the two women to the house wherein the appellant lived with his mother. Inside the house they found the appellant.

On 12th April, 2007 the appellant was arraigned before the Senior Principal Magistrate, Molo, for plea when he denied the charges.

It is fitting for us in this appeal to comment first on the state of the trial record and the record of

appeal presented before us. The record of the trial is most unsatisfactory. It exhibits glaring omissions as regards the most basic and elementary procedure as to what is expected of a criminal trial record. For example, it is not shown in which language the plea was taken and whether or not there was an interpreter. Further, the language in which the witnesses spoke is not stated. The record as a whole manifests a perfunctory approach to the serious trial that was before such a senior and experienced Magistrate.

We now come to the most fundamental procedural error which definitely must have occasioned the appellant a miscarriage of justice. This is the omission to follow the guidelines set by this Court in the cases of:

(a) Nyasani S/o Gichana v. R [1958] EA 190

(b) Kibangeny Arap Kolil v. R [1959] EA 92

(c) Muiruri v. R [2002] EA 264

and recently:

(d) Yusuf Sabwani Opicho v. R, Criminal Appeal No. 208/2008 (Nakuru) unreported.

These cases deal with the procedures which a trial court should follow when receiving the evidence of a child of tender years.

The Muiruri Case (ibid) which was quoted by this Court with approval in Opicho's Case (ibid) held that:

"1. Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a voire dire examination, whether the child understands the nature of an oath in which even his sworn evidence may be received. If the court is not so satisfied, his unsworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him.

2. It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided.

4. When dealing with the taking of an oath by a child of tender years, the inquiry as to the child's ability to understand the solemnity of the oath and the nature of it must be recorded, so that the cause the court took is clearly understood.

5. The judge is under a duty to record the terms in which he was persuaded and satisfied that the child understood the nature of the oath. The failure to do so is fatal to the conviction.

6. The correct procedure for the court to follow is to record the examination of the child witness as to the sufficiency of her intelligence to satisfy the reception of evidence and understanding of the duty to tell the truth."

The trial record does not show the manner in which PW1 was examined, or the questions asked of the child. This was indeed a flagrant breach of the basic statutory provision relating to the evidence of children of tender years as mandated by section 19 of the Oaths and Statutory Declarations Act and the elaborate procedure set out by this Court in the authorities we have endeavoured to cite. The omission to observe these basic procedures have prejudiced the appellant and the reception of PW1's evidence vitiates that evidence

The appellant, in his home made grounds of appeal which he incorporated in his written submission has asked us to find his trial as a nullity due to the unprocedural reception of the child's evidence. However, though admitting that the wrong procedure might have occasioned the appellant a miscarriage of justice, the learned Senior State Counsel, Mr. Njogu, nevertheless supports the conviction and the sentence.

In our view, the omission by the trial Magistrate to observe the above stated guidelines vitiates the conviction of the appellant and accordingly, because of the orders we are about to make we will not deal with the other issues raised by the appellant in the appeal since we may prejudice the trial which will be ordered de novo. We allow the appeal, and set aside the conviction and sentence of life imprisonment.

Should we order a retrial? We would think so. The predecessor of this Court in Fatehali Manji v. The Republic [1966] EA 343 held, inter alia, that in general a retrial will be ordered only when the original trial was illegal or defective; or where the interests of justice require it.

As was said in Opicho's Case (ibid): "it is in the interests of justice that the appellant also receives a fair trial and if he is to be acquitted or convicted, then it ought to be seen that it was, in either case, in accordance with the law."

This holding applies in the instant case.

The appellant shall be retried on the same charge before a court of competent jurisdiction before another magistrate other than Mrs. Oseko, SPM. He shall be produced before the court within seven (7) days and shall be tried according to law.

Those shall be our orders.

Dated and delivered at Nakuru this 2nd day of October, 2009.

P.K. TUNOI

.....

JUDGE OF APPEAL

P.N. WAKI

.....

JUDGE OF APPEAL

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.