REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO.58 OF 2012

BERNARD GITONGA KIMBO……..APPELLANT

V E R S U S

REPUBLIC……RESPODNENT

(*From the original conviction and sentence of Senior Resident Magistrate P.M. Kiama at MARIMANTI, Criminal Case No. 351 of 2011).*

JUDGMENT

Bernard Gitonga Kimbo was charged with the offence of defilement contrary to section 8(1) (3) of the Sexual Offences Act 3 of 2006 (SOA). The particulars of the charge are that on the 2.11.2005 at [particulars withheld] Location in Tharaka South District, caused his penis to penetrate the vagina of L M K child aged 14 years. In the alternative, he faced a charge of indecent act with a child contrary to section 11(1) of the SOA 3 of 2006.

He was arrested and sentenced to serve 20 years imprisonment. Being dissatisfied with the conviction and sentence, he preferred this appeal based on grounds found in this petition of appeal filed in court on 11.4.2012. At the hearing of the appeal, the appellant abandoned his appeal on conviction and urged the court to only consider the sentence. He submitted that he was arrested in 2005, was sentenced to serve 14 years imprisonment; that he appealed and the court ordered a retrial. After the retrial, he was convicted and sentenced to serve 20 years imprisonment. He contends that since the imprisonment, he has learnt tailoring skills, grade 3 and has a certificate in making soap and is now a transformed man.

Mr. Mungai Learned Counsel for the State urged that if the offender was charged under the Sexual Offences Act instead of the Penal Code, there is miscarriage of justice and the court should look at the Penal Code and sentence accordingly.

Although the appellant did not wish to challenge his conviction, yet it seems the appellant was charged under a law that did not exist as of the time the offence was allegedly committed. The charge indicates that the offence was committed on 2.11.2005. The charge was preferred under S.8 (1) (3) of the Sexual Offences Act of 2006. The Sexual Offence Act came into force on 21.7.2006. Before the SOA came into force the applicable law was the Penal Code. The provisions relating to defilement were repealed by Act 3 of 2006.As of 2005, the SOA was not in existence and the appellant could not have been charged with an offence that was not in existence in 2005. The Appellant was therefore wrongly charged and convicted under the wrong provisions of law. Both the prosecution and the court did not notice the illegality of the charge. So even though the appellant did not raise the issue of the illegality of the charge, and the subsequent conviction, this court cannot close its eyes to such a miscarriage of justice. In

the circumstances I hereby quash the conviction and set aside the sentence.

Should the court order a retrial? The principles to be considered by a court before ordering a retrial are well settled. Generally whether a retrial should be ordered depends on the circumstances of the case. In **FetehaliManji v. Republic 1966 EA 343** the East Africa Court of Appeal said.

In general, a retrial will be ordered only when the original trial was illegal or defective.It will not be ordered where the conviction is set aside because of insufficiency of evidence or for purpose of enabling the prosecution to fill up the gaps in its evidence at the first trial;even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered.Each case must depend on its peculiar facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause any injustice to the accused person."

The court in ordering a retrial will also consider whether the admissible or potentially admissible evidence is likely to result in a conviction.

I have read the record of the proceedings before the trial court.Even though there seems to be evidence that may result in a conviction if a retrial is ordered, yet the court takes into account the fact that the appellant was charged in 2005. He told the court that he was convicted, sentenced to 14 years and that on appeal, a retrial was ordered. It is after the retrial that appellant was convicted and sentenced to the 20 years imprisonment upon which this appeal is filed. The appellant has been incarcerated since 2005, for about 9 years. In my view, it would be unfair and prejudicial to the appellant if the court were to order a retrial. I also feel that this is not an error that can be cured by section 382 of the CPC which provides that no finding or sentence passed by a court of competent jurisdiction shall be reversed or altered on appeal on account of error,omission or irregularity in the charge, warrant, order or judgment unless the error or has occasioned a failure of justice. In this case, the accused should not have been charged with an offence that did not exist as of 2005 when it was allegedly committed. A retrial is prejudicial to the accused because the offence of defilement under section 8(1) and 3 of the SOA provides a minimum sentence of 20 years yet an offence of defilement under the repealed section 145 of the Penal Code was a maximum 14 years imprisonment.

In the end I find that this is not a case where retrial should be ordered as the appellant will suffer prejudice. He is set at liberty forthwith unless otherwise lawfully held.

DATED AND DELIVERED AT MERU THIS 16th DAY OF OCTOBER 2014.

R. P .V. WENDOH

JUDGE

…….Appellant

…….Respondent

…….Court Assistant