REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MARSABIT

CRIMINAL APPEAL NO.11 OF 2016

A M D .... APPELLANT

VERSUS

REPUBLIC …………... RESPONDENT

(From the original conviction and sentence in criminal case No.336 of 2012 of the Senior Resident Magistrate's Court at Marsabit by Hon. Boaz M. Ombewa – Ag. Principal Magistrate)

JUDGMENT

The appellant, **A M D,** was convicted for the offence of defilement contrary to section 8(1) (4) (sic) of the Sexual Offences Act No.3 of 2006 and in respect of two counts of assault causing actual bodily harm contrary to section 251 of the Penal code.

The particulars of the offence were that on 7th December 2012 at ***particulars withheld*** Marsabit County, intentionally caused his penis to penetrate the vagina of **SWJ,** a child aged 16 years. On the same day he unlawfully assaulted **SWJ** and **M D W** inflicting injuries on them.

He was sentenced to serve fifteen years imprisonment in count 1 and two years imprisonment on each of the other two counts. The sentences were ordered to run concurrently. He has appealed against both conviction and sentence.

The appellant was in person. He raised several grounds of appeal that can be distilled into the following three grounds of appeal:

1.That the learned trial magistrate erred in law and in fact by convicting him in spite of the fact that he was in police custody for more than 24 hours.

2. That the learned trial magistrate erred in law and in fact by not noting that there was no ample light for recognition.

3.That the learned trial magistrate erred in law and in fact by convicting him without sufficient evidence.

The state opposed the appeal through Mr. Chirchir, the learned counsel.

The facts of the prosecution case were briefly as follows:

Some incidents appear like fiction. The facts in this case fall in that category. While the father of the

appellant was asleep in his house at about 2 a.m, he heard some commotion from outside. He went to find out what the matter was. He put on security lights and opened the door. He found his son, the appellant, with a broom. The appellant hit him on the face with it and proceeded to his bedroom. His father found him ransacking his bedside drawer. The appellant bolted him inside the bedroom and entered into another room where **SWJ** was sleeping. By this time she had been awaken by the commotion in the house and was sitting on the bed. The appellant beat her severally and forced her to accompany him out. He took her to a field where he defiled her.

The appellant denied any involvement in the offences and opted to keep mum.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **OKENO Vs. REPUBLIC [1972] EA 32.**

The charge in count one was erroneously drafted.

The offence ought to have been drafted as follows:

contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act.

From my perusal of the record of the entire proceedings, I have formed an opinion that the appellant understood the charge against him and he fully participated in the trial. He was therefore not prejudiced. The defect is curable under section 382 of the Criminal Procedure Code.

When an accused person alleges that his rights have been breached by the police by being in custody for more than 24 hours, the redress cannot be an acquittal. The breach cannot act as a sanitizer of the alleged offence complained against him. The complainant's right to seek redress in court cannot be extinguished by acts of omission or commission by another party. An aggrieved accused person is entitled to pursue his right independent of the complaint against him. This issue was settled by the court of appeal in the case of **JULIUS KAMAU MBUGUA vs. REPUBLIC [2010] eKLR** where the court observed:

The alleged unlawful detention occurred long before the appellant was charged. The alleged unlawful detention does not exonerate the appellant from the serious crime he is alleged to have committed. The breach could logically give rise to a civil remedy – money compensation as stipulated in Section 72 (6). That is the appropriate remedy which the appellant should have sought in a different forum.

Although this was during the dispensation of the former Constitution, the same position still obtains in the current Constitution. The appellant cannot earn an acquittal on the ground of being detained in police custody longer than the law prescribes.

Since the second ground touches on sufficiency of light, I will address it together with the third ground that challenged the sufficiency of evidence.

M D W (P.W 2) is the father of the appellant. He testified that when he was attracted by some noise at his door, he went out of his bedroom and put on the security lights. He then opened the door and found the appellant with a broom. He hit him on the forehead. He said he was able to see him well from the security light. The appellant then proceeded to his (P.W2's) bedroom. In the bedroom he found the appellant near his bed. He (appellant) held him by the neck with one hand while the other was opening his bedside drawer.

When the appellant left his room he had fallen down. He then heard screams from the room where the girl was sleeping. He could not move out for his door was bolted from outside. When his door was eventually opened after about 14 minutes, he found the girl missing. The girl is **SWJ** (P.W 1) the complainant in count 1 and 2.

On her part P.W 1 she was woken up by her uncle's (P.W2) voice while he was calling D. She sat on her bed. The appellant then entered her bedroom with a spotlight and slapped her on the face. He pulled her hair and pulled her outside where he continued to beat her. He pushed her through an opening in a fence. He took her to a place near madrassa where he defiled her. She graphically testified on how he defiled her. After defiling her he took her to a home where alcohol was being sold. This is where she was rescued from.

When Dr. Imbusi examined **SWJ** he found that she had sustained the following injuries:

(a) Swollen gum, (b) Bruised left eyelid, (c) Tenderness on both hands, (d) Tears on the perineum, labia majora and the introitus (the entrance into the vagina), (e) Tender anterior chest and (f) Inflamed cervix.

There was however absence of semen.

The prosecution did not call the person who rescued the first complainant. However the evidence on record is ample to prove the charges against the appellant. This was an issue of recognition by very close relatives. There was no room for any mistake being made.

Although the appellant contended that there was no sufficient light, I make a finding to the contrary. His conviction on the three counts was based on very sound evidence.

Section 8(4) of the Sexual Offences Act provides as follows:

A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

In count one he was sentenced to the bare minimum sentence as prescribed by the law.

The sentence prescribed for the offence under section 251 of the Penal code is five years imprisonment. He was sentenced to two years imprisonment on each count of assault. He cannot claim that this sentence is harsh. I have no basis to vary the sentences meted out by the learned trial magistrate.

In a nutshell, the appeal on conviction and sentence is dismissed.

DATED at Marsabit this 19th day of April, 2017

KIARIE WAWERU KIARIE

JUDGE