



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CRIMINAL APPEAL NO.78 OF 2013

PATRICK MWENDA NYAMU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in criminal case No. 4164 of 2010 of the Chief Magistrate's Court at Maua by Hon. J.G King'ori – Chief Magistrate)

JUDGMENT

The appellant, **PATRICK MWENDA NYAMU**, was convicted for the offence of defilement contrary to section 8 (1) (3) (sic) of the Sexual Offences Act.

The particulars of the offence were that on 4th December 2010 at [Particulars withheld] village, Igembe North District of Meru County intentionally caused his penis to penetrate the vagina of **M.K** a child aged 12 years.

The appellant was found guilty of the offence and sentenced to serve 20 years imprisonment. He now appeals against both conviction and sentence.

The appellant was in person. He raised three grounds of appeal as follows:

1. That the learned trial magistrate erred in law and in fact by failing to make a finding that the appellants constitutional rights were violated .
2. That the learned trial magistrate erred in law and in fact by failing to find that the charge was incurably defective.
3. That the learned trial magistrate erred in law and in fact by failing to make a finding that vital witnesses were not called.
4. That the learned trial magistrate erred in law and fact in failing to make a finding that complaint was based on a grudge.
5. That the learned trial magistrate erred on law and fact in convicting him on evidence that was inconsistent and contradictory.
6. That the learned trial magistrate erred in law and in fact by failing to consider his defence.

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

The facts of the prosecution case were briefly as follows:

When the appellant went out of their house at about 4 AM to answer a short call of nature, and while in the process of urinating, the appellant went and covered her mouth with her skirt and defiled her.

In his defence the appellant denied any involvement in the offence and contended this case was due to a grudge with the complainant's mother.

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 was wrongly drafted. It ought to have read:

"... contrary to section 8 (1) as read with section 8 (3) ..."

I however find that the appellant was not prejudiced for he understood the charge against him and he fully participated in the trial. The defect is curable under section 382 of the Criminal Procedure Code.

It is now settled law where an accused alleges that his constitutional rights were violated the only recourse open to him is to file a civil claim. This was so held by the court of appeal in the case of **JULIUS KAMAU MBUGUA v REPUBLIC [2010] eKLR** the court said:

Furthermore, we respectfully agree with the decision of Emukule J, in the Republic vs. David Geoffrey Gitonga that even where violation of right to personal liberty of a suspect before he is charged has been proved or is presumptive, the ensuing prosecution is not a nullity and that a prosecution would only be a nullity, if any of the circumstances stated in that case subsists.

In the instant case if the appellant feels aggrieved he is at liberty to institute civil proceedings.

The appellant contended that he ought to have been provided with a counsel by the state. This right is not an automatic one.

Article 50(1) (h) provides:

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

.....

.....

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would

otherwise result, and to be informed of this right promptly;

Before the article is invoked, it must be demonstrated that ;

(a) The accused cannot be able to hire the services of an advocate,

(b) That unless the state provides him with an advocate substantial injustice will occur. In the instant case these issues were not demonstrated.

None of the witnesses that the appellant claims were not called were eye witnesses or could add any vital information except for Gitonga who was said to be a fellow watchman with the appellant. It was not made clear by the prosecution why they did not call him. The failure to call this witness is therefore not fatal to the prosecution case.

The appellant denied involvement in the offence and contended that this case was as a result of a grudge with the complainant's mother. This defence was dismissed after consideration and rightly so.

Both the complainant and the appellant were examined on the same day of the alleged offence. In the girl's genitalia there was evidence of spermatozoa whereas the penis of the appellant was caked with some discharge. This medical findings dislodged the contention of the appellant.

The conduct of the complainant and the medical finding can lead one to conclude that she was sexually active and that she probably engaged in sexual intercourse with the appellant voluntarily. However, because of her age she lacked capacity to give consent.

There was overwhelming evidence on record on which the conviction by the learned trial magistrate was founded.

Section 8(3) of the Sexual Offences Act provides as follows:

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

The appellant was sentenced to the minimum penalty provided by the law. Any other sentence less than the one prescribed will amount to an illegality.

From the foregoing analysis of the evidence on record means that the appeal by the appellant must fail. The same is dismissed in its entirety.

DATED at Meru this 19th day of December, 2016

KIARIE WAWERU KIARIE

JUDGE