



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 58 OF 2013

NKILISHO MOONGA,.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence in Kajiado Principal Magistrate's Court Criminal Case No. 1157 of 2010 by Hon. Mary Ashisero Akala, R.M. on 27/8/2012)

JUDGMENT

1. **Nkilisho Moonga**, the appellant was charged with the offence of **defilement** contrary to **Section 8(1) (3)** of the **Sexual Offences Act, No. 3 of 2006**. Particulars of the offence were that on the 26th day of July, 2010 at around 1.00am at [**Particulars Withheld**] within **Loitokitok** District of the **Rift Valley** Province, he intentionally caused his penis to penetrate the vagina of **M M** a child aged 15 years old.
2. In the alternative, he faced a charge of committing an **indecent act** with a child contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence being that on the 26th day of July, 2010 at around 1.00am at [**Particulars Withheld**] within **Loitokitok** District of the **Rift Valley** Province, he intentionally touched the vagina and thigh of **M M** a child aged 15 years old with his penis.
3. Facts of the case were that on the 23rd September, 2010, at 1.00am **M M** (complainant) was asleep in their house with her four (4) years old sibling when suddenly there was someone lying on her. The person removed her underpants. She screamed but he gagged her mouth preventing her from being heard. He threatened to gouge out her eyes if she screamed. He went on to insert his penis into her vagina. Her younger sister woke up and the assailant threatened to kill her. On accomplishing his act of defilement, he again threatened to kill the complainant if she told her mother what had transpired. She recognized him as their neighbour.
4. The complainant sought refuge at the home of PW4, **Mary Wanjiru** their neighbor at 2.00am or thereabout. **PW2, S N**, the complainant's mother who was away on duty was notified in the morning. They reported the matter to the police. The complainant was taken to hospital and examined by **PW3, Moses Reperu**, a Clinical Officer who found her with injuries on her vagina and obvious evidence of penetration. The appellant was arrested and charged.
5. When put on his defence the appellant denied having committed the offence. He stated that on the 26th July, 2012 he visited a Traditional Herbalist, one **Sambau**, in **Namanga** where he stayed for two (2) days. When he turned home his parents notified him of the complaint. He was arrested and later charged.
6. The learned trial magistrate considered evidence adduced and found the appellant guilty. She

- convicted him on the main count and sentenced him to life imprisonment.
7. Being dissatisfied with the conviction and sentence thereof, in amended grounds of appeal he states that:-
 - i. A voice identification parade was necessary;
 - ii. Medical evidence adduced by a Clinical Officer was unsatisfactory as he was not a Medical Officer.
 - iii. His fundamental rights as enshrined in **Article 49(1) (f)** of the **Constitution** were violated;
 - iv. His mental status was not ascertained to establish whether or not he was fit to stand trial;
 8. At the hearing of the appeal the appellant relied upon written submissions. The state through **Ms Rono**, State Counsel, opposed the appeal. She argued that the complainant recognized the appellant's voice, her age and penetration were proved. And the appellant's alibi defence was not proved. She called upon the court to confirm the conviction.
 9. This being a first appellate court, it is my duty to subject the evidence tendered in the lower court to fresh and exhaustive evaluation to reach my own conclusion bearing in mind the fact that I did not see or hear witnesses who testified. (*see Okeno –versus- Republic (1972) E.A. 32*).
 10. With regard to the issue of a Clinical Officer not being a Medical Officer therefore being not competent to sign a P3 form; it is now well settled that a Clinical Officer is qualified to sign a P3 form since this is his area of competence. (See **Fappyton Mutuku Ngui -versus- Republic [2014] eKLR; Raphael Kavoi Kiilu -versus -Republic Criminal Appeal no. 198 of 2008; Section 2 of the Clinical Officers Act (Training , Registration and licensing Act, Cap 260 (LOK)**).
 11. Was the appellant positively identified? The offence was committed in darkness. The identification was by voice. In the case of **Karani -versus- Republic [1958] KLR 290** the Court of Appeal held thus ;-

“... Identification by voice nearly always amounts to identification by recognition. Yet

here as in other cases care has to be taken to ensure that the voice was that of the appellant, that the complainant was familiar with the voice and that he recognized it and that there were conditions in existence favouring safe identification”.

12. In the case of **Anjononi & Others –versus- Republic [1976 – 80] 1 KLR 1566** the Court of Appeal held:-

“...recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other”.

13. It was the testimony of the complainant that the appellant is their neighbor. This fact was confirmed by PW2 and PW4, PW1, the complainant stated that she recognized his voice when he threatened to kill her and her sibling. On cross-examination she stated that as she ran going to her sister's house, she was also able to see him as there was moonlight outside. She described him as a person who is dreaded within the area. The complainant was assertive that the person who had violated her sexually was the appellant. As soon as she reached PW4 she told her who her assailant was. The appellant was well known to the complainant such that she could not be mistaken as to his identity. As clearly stated by the trial magistrate the identification in the circumstances was reliable. It would have been pointless to hold an identification parade where the voice of the appellant would have been identified. Further, use of voice identification parades where representative samples of a suspect are obtained for comparison has not been developed in Kenya; therefore making a finding that it was necessary to prove PW1's ability to identify her attacker was far-fetched.
14. It has been argued by the appellant that his fundamental rights were violated. He faults the trial

magistrate for not considering the fact that he was not produced in court as required by the law. He submitted that he was detained in custody for sixteen (16) days prior to being arraigned in court. Although the charge sheet indicates that the appellant was produced three(3) days after his arrest, the court record indicate that infact he was arraigned before court sixteen (16)days later. An explanation ought to have been rendered at the trial stage. That notwithstanding, it has since been held that violation of the accused’s right in such an instance does not automatically entitle the accused to an acquittal, what he is entitled to is compensation for a civil wrong for violation of rights (see **Julius Kamau Mbugua versus Republic –Criminal Appeal No. 50 of 2008**).

15. Finally, the trial Court is faulted for failing to ascertain if indeed the appellant was fit to stand trial. A perusal of the record shows that on the 29th November, 2010 the court observed thus:-

“Accused appears to have a psychiatric problem. I therefore order that he be taken to Kajiado District Hospital for examination to find out if he is mentally sound.”

16.The appellant was subjected to mental examination. A report was filed dated 14/12/2010 in that regard. Per the mental assessment he was deluded. He was de-touched from reality. It was concluded that he was dangerous. Pursuant to the report, an order was made committing him to **Mathare Mental Hospital** for treatment on the 16th December, 2010. The court order was however not complied with. On the 1st November, 2011 the trial magistrate summoned the officer in-charge of Kajiado G.K. Prison to explain why the order was not complied with. **No. 29544, James Audi** explained that they were still waiting for a removal order from the **Ministry of Home Affairs** which would enable them take the appellant to **Mathare Hospital**. He concluded his statement by stating that according to them the appellant appeared quite normal. The appellant was indicated as having stated that he was normal. On that ground the magistrate vacated the order committing him to the mental hospital. Subsequently the case was heard and concluded.

17.The court having believed that the appellant’s soundness of mind was questionable inquired into that fact. He found that indeed he was not of sound mind and proceeded to make an order committing him to a mental hospital. The court record was however not transmitted to the Minister for consideration as required by the law. Consequently the court did not receive any report stating that the appellant was capable of making his defence. The court vacated its order and continued with the case contrary to the law. Having not followed the procedure as provided by **Section 162 – 163 of the Criminal Procedure Code**, the subsequent trial was not fair. The appellant’s rights to a fair trial were indeed violated.

18.The error was made by the court. Four (4) years have elapsed. Today without an order varying the order made by the psychiatrist it cannot be stated with certainty that the appellant is of sound mind. Whatever happened was prejudicial to the appellant. It was therefore unsafe for the trial court to convict on evidence adduced. Therefore the appeal succeeds. The conviction is quashed and sentence imposed set aside. The appellant shall be released forthwith unless otherwise lawfully held.

19.It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 17TH day of MARCH, 2015.

L.N. MUTENDE

JUDGE