REPUBLIC OF KENYA

High Court at Kakamega

Criminal Appeal 12 of 2008

JUMA SAID ……..……..….. APPELLANT

V E R S U S

REPUBLIC …… RESPONDENT

J U D G M E N T

The appellant was charged with the offence of defilement of a girl contrary to **section 8(1)** as read with **section 8(3)** of the Sexual Offences Act No. 3 of 2006 Laws of Kenya. The particulars of the offence were that the appellant on the 28th day of March 2008 at Kakamega South District within Western Province unlawfully and intentionally inserted his genital organ namely penis into genital organ namely vagina of **M.S** a girl aged thirteen years.

The appellant pleaded guilty and was sentenced to serve 20 years imprisonment. His grounds of appeal are that he pleaded guilty to the charge. That there was no court interpreter in the language he understands better hence section 77(2) of the Constitution was violated. That he overstayed at the police station and that violated his rights under section 72(3) of the Constitution. That **section 84(1) & (2)** were also violated and that the conviction is null and void.

During the hearing of the appeal he pleaded for leniency and stated that he pleaded guilty to the charge. Mr. Orinda for the state submitted that the charge was read over to the appellant in Kiswahili language and the appellant understood Kiswahili which language he was using to prosecute his appeal.

The record of the trial court shows that the appellant was arraigned before the court on 1.4.2008. The substance of the charge was read to the accused person but the language is not clearly indicated. The record only bears a stamp and the language is not indicated by hand. The typed record show that the plea was taken in a language which the accused understands but the language is not given. The facts were also read to the appellant but it is not stated in which language the facts were read. The appellant respondent that it was correct. He held the complainant and defiled her.

The charge sheet indicates that the offence occurred on the 28.3.2008. That was a Friday and he was arraigned before the court on the following Tuesday 1.4.2008. This offence occurred before the promulgation of the new Constitution. The delay of one is not unreasonable and I do find that there was no violation of the appellant's Constitutional right relating to arraignment in court within reasonable time. Under Article **77(2b)** of the old constitution an accused person was entitled to be informed as soon as reasonably practicable in a language that he understand and in detail of the nature of the offence with which he is charged. The court record does not show which language the appellant understands. The incident occurred in 2008 inside a mosque at Kakamega. It is unfortunate that a simple appeal lodged four days after the conviction has taken over four years to be determined.

Given the record of the trial court, I do find that the appellant was not properly prosecuted. It is also desirable for presiding magistrates to explain to the accused persons the consequences of pleading guilty especially where the sentence is harsh. I do find that there was no proper prosecution of the appellant. In view of the gravity of the offence, while noting the time lapse, I do still order that the appellant herein be re-tried at Kakamega before another magistrate. The appeal is hereby allowed. The appellant shall be retried at Kakamega by another magistrate. The appellant shall remain in custody until when the plea is taken.

Delivered, dated and signed at Kakamega this 31st day of January, 2013

SAID J. CHITEMBWE
J U D G E