



REPUBLIC OF KENYA

High Court at Eldoret

Criminal Appeal 200 of 2010

PETER MORU MERIKOL.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

- (1) The Appeal arises from the decision of Hon. B.N Mosoria Senior Resident Magistrate Iten, in Criminal Case Number 891 of 2009 delivered on the 23rd December, 2010
- (2)
- (3) The Appellant was charged with the offence of Defilement in violation of Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act No. 3 of 2006.
- (4)
- (5) The particulars of the offence are that on the 16th day of October, 2009 at about 8.00 a.m the Appellant did cause his penis to penetrate the vagina of VCK a child aged 6 years.
- (6)
- (7) The Appellant was convicted and sentenced to life imprisonment and being aggrieved with both conviction and sentence preferred this Appeal and listed five (5) grounds of appeal in his Amended Petition of Appeal which are as set down hereunder:
- (8)
 1. That the pundit trial magistrate failed in law and fact by convicting me, without pondering that my fundamental right in bill of rights, chapter four (4) of the constitution was infringed as I was detained for 4 days in police custody before arraigned in court, in contravention to Section 72(3) (6) of the former constitution, Section 36 of the C.P.C and Section 49 of the new constitution 2010.
 2. That the pundit trial magistrate erred in both law and facts by convicting me on contradictory and uncorroborated evidence adduced by prosecution witnesses.
 - 3.
 4. That the pundit trial magistrate erred in both law and facts by convicting and sentencing me without considering that there was substitution of the charge, that failed to observe the provisions of Section 214

(I) (ii) of the C.P.C

5. That the pundit trial magistrate erred in both law and facts by convicting me without observing that the Complainant was infected by urinary tract infection of which I was examined and became negative on the alleged infection.

6. That the pundit trial magistrate erred in both law and facts by convicting me by relying on uncorroborated evidence adduced by PW1 and PW2.

7.

(9) At the hearing of the appeal the Appellant chose to rely on his Written Submissions whilst Prosecuting Counsel for the state made oral submissions and opposed the Appeal.

(10)

(11) After hearing and reading both submissions of the Appellant and Counsel for the state, these are the issues I found for determination;

(12)

i. Violation of Appellants Constitutional rights

ii. Corroboration of evidence

iii. Defilement.

iv. Sentence

2.

(13) This being the first Appellate court it is the courts duty to re-visit, re-assess and re-evaluate the evidence and arrive at its own independent conclusion. Refer to **LUKAS KERARIO SANGAI -VS- REPUBLIC (2011) eKLR or OKENO -VS- R (1972) E.A 32.**

(14)

(15) The Appellant submitted that his constitutional rights were violated as he was arrested on the 16th October, 2009 and arraigned in court on the 21st October, 2009 which period amounted to five (5) days and this was in direct contravention of Article 49 (f) of the Constitution of Kenya 2010.

(16)

(17) After perusing the court record, I find that the Appellant was indeed arrested on the 16th October, 2009 and brought to court on 21st October, 2009.

(18)

(19) Unfortunately for the Appellant cannot rely on Article 49 (f) as the law is not applicable retrospectively as the Constitution of Kenya 2010 had not yet been promulgated.

(20)

(21) Under the provisions of the Old Constitution Section 72 (3) (b) the words used are;

(22)

1. “.....reasonably practicable.....”
2. “.....twenty- four hours of his arrest.....”
3. “.....or within fourteen (14) days of his arrest.....”
- 4.

(23) I have perused the court record and find that the Appellant did not bring this alleged violation to the attention of the trial court so as to enable the Prosecution to explain whether the Appellant was brought to court as soon as was reasonably practicable.

(24)

(25) I also find that the period of four (4) days cannot be deemed as inordinate delay in terms of the Old Constitution. Also refer to the case of **R -VS- AMOS KABUGA KARUTU HCCR. CASE 12 OF 2006** where the delay was over five (5) months.

(26)

(27) I find no merit in this ground of appeal and the same is hereby dismissed.

(28)

(29) On the second issue, the evidence of PW1 was that she was going to school at 7.00 a.m. The Appellant lured her into the forest.

(30)

(31) The evidence of PW2 JONATHAN KOSKEI was that he saw the Appellant and PW1 going into the forest. He confronted the Appellant who looked shocked.

(32)

(33) PW1 ran away to school and PW2 later arrested the Appellant and took him to the school and he asked the teachers to check PW1 and they found that she had been defiled.

(34)

(35) The evidence of PW4 May Kibor a Clinical Officer at Chebiemit District Hospital was that she examined PW1 on 17th October, 2009 and she found that PW1's vulva was inflamed and her hymen was torn. She also did a vagina swab and found the presence of spermatozoa. There was also dry semen found on the thigh and vulva region of PW1. This witness made a finding of penetration defilement.

(36)

(37) The P3 Form filled by PW4 was produced in evidence and marked as

(1) I find that on the issue of defilement the evidence of PW1 is corroborated by the evidence of PW4.

(2)

(3) I find that on identification the evidence of PW1 is corroborated by the evidence of PW2. The incident occurred during the day and I am satisfied that the conditions and circumstances were favourable for identification.

(4)

(5) I find that the Appellant was positively identified as the person who defiled PW1.

(6)

(7) I find no merit on the ground of appeal that the prosecution failed to discharge the burden of proof and the same is dismissed.

1.

(8) On the last issue of sentence An Age Assessment report was prepared and produced into court by PW4 who assessed the age of PW1 as 7 years.

(9)

(10) Section 8 (2) of the Sexual Offences Act provides that the sentence

(11)

1. “ shall be liable to life imprisonment.....”

2.

(12) This court is of the opinion that life imprisonment is the maximum and mandatory sentence imposable.

(13)

(14) This court finds that the Appellant was properly convicted and sentenced and sees no need to interfere with the decision of the trial magistrate.

(15)

(16) **CONCLUSION:**

(17)

(18) For the reasons stated above the Appeal is hereby dismissed and conviction and sentence upheld.

(19)

(20) It is so ordered.

(21)

DATED and DELIVERED at Eldoret this 24th day of January 2013.

A.MSHILA
JUDGE

Coram:

Before Hon. A Mshila J

CC: Oscar

Appellant: present in person.

Munene: Counsel for the state.

Language: Kiswahili.

A.MSHILA
JUDGE