



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Appeal 125 of 2011

THOMAS OKIRA OMBONYOAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 4169 of 2007 in the Chief Magistrate's Court at Makadara – T. Mwangi (SRM) on 12th May 2011)

JUDGMENT

1. The appellant herein **Thomas Okira Ombonyo** was convicted for the offence of defilement of a child contrary to **Section 8(1)** as read with Section **8(2)** of the **Sexual Offence Act No. 3 of 2006**. In the alternative, he was charged with the offence of indecent Act with a child contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**.
2. He was convicted on the 12th May 2011, and sentenced to serve 8 years imprisonment and he appealed against both conviction and sentence.
3. Brief facts were that on the 22nd day of September 2007 at Nairobi within Nairobi Area province, intentionally and unlawfully committed an act which caused penetration of his male genital organ into the female genital organ of B. G. (name withheld on account of her age) a child aged 13 years.
4. M/s. Betty Rashid the learned counsel for the appellant submitted that since the appellant's constitutional rights under **Section 77** of the Constitution (repealed) were violated, the subsequent trial and other proceedings were a nullity and on that basis alone the appeal ought to be allowed. She urged that the appellant was arrested on the 25th September 2007, and he was charged on the 2nd October, 2007, seven days later. In the context of this case I suspect the learned counsel meant to refer to **Section 72(3)** and not **Section 77** of the Constitution (repealed)
5. The learned counsel referred me to the case of **ALBANUS MWASIA MUTUA VS REPUBLIC, CR. APPEAL NO. 120 OF 2004**, in which the Court of Appeal stated that:

“At the end of the day it is the duty of the courts to enforce the provisions of the constitution, otherwise there would be no reason for having those provisions in the first place.”

She also referred me to the case of **GERALD MACHARIA GITHUKA VS REPUBLIC, CR. APPEAL NO. 119/04** in which the Court of Appeal held that:

“On the one hand is the duty of the court to ensure that crime where it is proved, is appropriately punished; this is for the protection of society; on the other hand it is equally the duty of the courts to uphold the rights of persons charged with criminal offences, particularly the human rights guaranteed to them under the Constitution.”

6. In response Miss Venda the learned state counsel submitted that though the appellant was not apprehended in court within the stipulated time, this does not render the lower court proceedings a nullity, because there is civil remedy available to him. The learned state counsel cited the case of **Julius Kamau vs. Republic – CRA No. 50/2008** (unreported), where the learned Judge said that

“The proof unexplained violation of one’s right does not lead to automatic acquittal or discharge of an accused or appellant. All other circumstances of the case must be looked into, as closing our eyes to these other circumstances would lead to an injustice to the person who was offended. It is the duty of the court to balance the accused’s rights Vis a Vis those of the complainant. After being arraigned in court the trial proceeded well up to conclusion. Even if his rights were violated, I do find that the violation had nothing to do with the court that tried him. The appellant may pursue that issue before the right forum as there are ways in which he may be compensated for that violation.”

7. The Court of Appeal settled this question of violation of rights under **Section 72(3)** of the repealed Constitution in the case of **JULIUS KAMAU MBUGUA VS REPUBLIC CR. APPEAL No. 50 OF 2008**. The Court of Appeal reviewed a wide range of previous decisions on the issue of remedies available to accused persons who are taken to court later than provided for, and had this to state:

“Moreover, it was not shown that the alleged unlawful detention had any link or effect on the trial process itself or that it caused trial related prejudice to the appellant which affected the validity of the trial. 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.”

8. The second ground of appeal was that there was no first report made by the complainant either to her parents or to anyone in authority and that that goes to the credibility of the evidence of **PW1**. It was urged that **PW1** testified during cross-examination that **“while in standard 3 I had reported another incident of defilement by a man”**. That **PW1** had been defiled before and had reported the matter, yet on this occasion she failed to make a first report until her teacher and the WRAP N.G.O. personnel talked to her. That therefore, it was not safe to rely on her evidence alone.

9. M/s. Rashid also submitted that the court placed reliance on the uncorroborated evidence of **PW1** a single witness. That **PW1** was a crafty liar whose evidence should not be believed unless there was corroboration by some other independent source, because she admitted that her first report to her mother that she delayed as the grocer was cutting vegetables was a lie. That there was serious doubt as to the truthfulness or otherwise of the testimony of **PW1**, whom the counsel referred to as a “self-confessed liar for convenience.”

10. To counter this argument Miss Venda submitted that the complainant did not make a first report to her parents or anyone because she feared that she would be beaten, and that the appellant also had warned her not to tell anyone what had happened to her on the promise that he would buy her shoes. The complainant did disclose what had happened to her, to the Kiswahili teacher Mrs. Maina after they had been taught about AIDs in class.

11. The complainant was a 13 year old minor and this court therefore, understands the fear that she would have if she thought that she would be beaten by her parents if she disclosed what had happened to her. At the end of the day she did disclose her ordeal to an adult whom she trusted.

12. M/s. Rashid argued on the third ground that upon examination the hymen of the minor was found to be intact and that there was therefore nil possibility that there had been any penetration of the vagina of **PW1**, since Dr. Adan testified that the widening of the hymen is a subjective issue.

13. **PW4**, Dr. Adan based at Nairobi Women's Hospital testified that on examination of the minor on 26th September 2007, she was found to have normal external genitalia which was covered with a foul smelling whitish discharge. That the hymen was intact but widened; an indication of penetration save that force used was not great. **PW1**'s evidence was also corroborated by the evidence of **PW5** Dr. Zephaniah Kamau that the complainant had a small vaginal tear at 6 o'clock when he examined her. At that time she had no discharge, and had been treated at Nairobi Women's hospital.

14. From the evidence on record the age of the complainant at the time of the said incident was 13 years. The appellant was charged under **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act No. 3 of 2006** which caters for children aged 11 years and below. Miss Venda prayed to the court to invoke **Section 382** of the **Criminal Procedure Code** to correct the anomaly, by substituting **Section 8(2)** with **Section 8(3)** of the **Sexual Offences Act No. 2006** which caters for children aged 13 years.

15. **Section 382** of the **Criminal Procedure Code** gives the court the mandate to make such a correction in cases where the errors, omission or irregularity on record has not occasioned failure of justice. In this case no failure of justice is discernable if the correction is made, since there is no dispute as to the minor's age, and the sentence under **Section 8(3) Sexual Offences Act** is less severe.

16. This being a criminal case the appellant was under no obligation to prove his innocence as the burden of proof rested unshiftingly with the prosecution. In his defence the appellant however opted to give sworn testimony in which he denied the offence and stated that he was on duty at Mars Security at the material time.

17. The record shows that the learned trial magistrate considered the defence testimony alongside all the other evidence on record and dismissed it as a mere afterthought. She gave the appellant a chance to avail the records from his place of work to support his averment that he was on duty at the material time. This bore no fruit despite several adjournments.

18. On the sentence **Section 8(3)** of the **Sexual Offences Act** under which the appellant should have been sentenced carries a minimum sentence of 20 years imprisonment upon conviction. The appellant was sentenced to 8 years which is therefore unlawful. I note however, that this issue was not addressed by any of the counsels on record, and neither was notice of enhancement served upon the appellant. For that reason alone I cannot enhance the sentence to that which is provided by the law.

19. After a careful analysis of the grounds of appeal and the submissions of the counsels on record I am satisfied that there was proof of defilement and that the appellant was properly identified.

The appellant's appeal is therefore without merit, and I accordingly dismiss it.

SIGNED DATED and **DELIVERED** in open court this **21st** day of **February 2013**.

L. A. ACHODE

JUDGE