REPUBLIC OF KENYA

High Court at Nyeri

Criminal Appeal 33 of 2010

EDWARD THUKU MONJO.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

(arising from the judgment of Hon E.K. Usui S.R.M Murang'a in CriminalCase No.470 of 2009)

JUDGMENT

1. The appellant was charged with defilement of a girl contrary to section 8(2) of the Sexual Offences Act No. 3 of 2006 the particulars of which were that on 10th day of February 2009 at Murang'a District of Central province intentionally and unlawfully had carnal knowledge of P.M.K. a girl of 5 years.

2. He faced an alternative charge of indecent Act with a child contrary to section 11(1) of Sexual offences Act No. 3 of 2006 the particulars of which were that on the 10th day of February 2009 at Murang'a District of Central Province intentionally and unlawfully did indecent act to P.M.K. By touching her private parts.

3. He pleaded not guilty and was tried convicted and sentenced to serve life imprisonment and being aggrieved by the said conviction and sentence filed the appeal herein and subsequently through the law firm of Gacheru & co. Advocates on 19th May 2011 filed an amended grounds of appeal wherein the following grounds were set out.

1. The learned trial magistrate erred in law and fact in failing to give reasons as to why she arrived to convict the appellant of the offence of indecent assault.

2. The learned trial magistrate erred in law and fact in failing to hold and inform the appellant that his constitutional rights as provided by Section 72(3) of the constitution was breached.

3. the accused person was detained for 2 days in police custody instead of the 24 hours allowed by the constitution.

4. The learned trial magistrate erred in law and fact in convicting the appellant while there was no enough evidence to convict him with the offence charged.

5. The learned trial magistrate erred in law and fact in holding that P.W.2 was a child capable of testifying on oath without testing her as provided by the Oaths and Statutory Declarations Act.

6. The learned trial magistrate erred in law and fact in acting and giving weight to the uncorroborated evidence of P.W.2 who was a child of tender age as provided by the law of evidence.

7. The learned trial magistrate erred in law and fact in disregarding the appellants defense and failing to balance the same with the prosecution evidence.

8. The learned trial magistrate erred in law and fact in relying on the evidence of the prosecution witnesses which was inconsistent and contradictory.

9. The learned trial magistrate convicted the appellant of the offence of rape which was not proved beyond reasonable doubt for example the complainant did not give evidence of penetration which is an important ingredient of the offence of indecent assault

4. When the appeal came up for hearing Mr. Njuguna Kimani for the appellant submitted that the appellants constitutional rights were violated in that he was arrested on 10th February and taken to court on 12th February 2009 and that since no explanation was given on the authority of **Gerald Macharia Githuku V r. Court of Appeal criminal Appeal No. 119/2004 Nairobi** he urges the court to allow the appeal.

5. It was submitted that the trial court recorded the evidence of P.W.2 without following the procedure provided for under section 19(1) of Oaths and Statutory declarations Act and that the examination of the witness should have ascertained whether the same understood the nature of oaths and the purpose of the same before being allowed to take oath and on the authority of PATRICK WAMUNYU WANJIRU V R. HIGH COURT CRIMINAL APPEAL NO. 6 OF 2006 AT NYERI where the court held that the court must be satisfied first that the child understands the meaning of oath second if not then whether or not she is possessed of sufficient intelligence to be allowed to testify either on oath or otherwise.

6. It was further submitted that the appellant was convicted on insufficient evidence and that the appellant should have been charged with incest under section 20(1) since in his defence he stated that they were related.

7. Miss Maundu for the state submitted that the delay of two days was not inordinate and that the appellant can be compensated for the violation of his constitutional right.

8. It was submitted by the state that under section 124 of evidence Act no corroboration is required in sexual offences where the complainant is a minor.

9. Miss Maundu however conceded that voir dire was not properly conducted and that affected the trial.

10. It was submitted that though the appellant was charged under the wrong section of the law he did not suffer any prejudice since the sentence for both offences is the same.

11. From the submissions herein I am of the considered opinion that the appellant has raised technical issues which needs to be dealt with first.

CONSTITUTIONAL ISSUE

12. The appellant has submitted that his constitutional rights were violated and therefore urges this court to allow the appeal. I have noted that there was a delay of two days but as submitted by Miss Maundu for the state I agree with the same that a delay of two days was not inordinate. It should be noted that in the ALBANUS MWASIA MUTUA's classic case the delay was from a whole eight months whereas in DANCAN KAGIRI WAHOME V. Republic the court said that

"there was a delay of three (3) days which this court can countenance".

I also hold the view that not all delay leads to prejudice of the appellant as the court needs to look at what happened to the accused during the period the same is in custody.

13. Should I be wrong in this holding then the appellant still has a remedy to seek for damages in respect of the alleged breach. I therefore find no merit on this ground of appeal.

14. **CHARGES OF DEFILEMENT**

It was submitted that the appellant should have been charged with incest since evidence tendered shows that he was related to the complainant.

15. Whereas it is true that the appellant should have been charged with the offence of incest I take the view that there was no bar in him being charged with the general offence of defilement under section 8(1) (2) of the Sexual Offences Act. In this holding I find support in the following decisions of the High Court:

1. GK v. R. MERU HIGH COURT CR. NO. 77 2007 wherein Lady Justice J. Lessit had this to say

"Before I end I must comment that the appellant was charged under a general section. The more appropriate charge that should have been preferred against him is incest by male Having said so the charge of defilement he faces is still appropriate as a general offense which he committed", (emphasis mine)

2. DNM v Republic Nairobi High court Criminal case No. 182/2009 where in Lady Justice L. Achode held.

"***That from the reading of section 20(1) and section 8(1)(2) there is nothing to preclude the appellant being charged with either since both where applicable in the case and the same carry the same punishment".***

16. I have also been guided by the provision of section 382 of the criminal procedure code which provides as follows:

"Subject to the provision herein before contained, no finding sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error omission or irregularity in the complaint, summons, warrant charge proclamation order judgment or other proceedings before or during trial the trial or in any inquiry or other proceedings under this code unless the error omission or irregularity has occasioned a failure of justice."

17. This court does not see any miscarriage of justice suffered by the appellant herein having been charged with the offence of defilement instead of incest.

VOIR DIRE

18. It was further submitted by Mr. Kimani that the court did not conduct proper voir dire in respect of the minor herein. From the proceedings the court had this to say.

p.w.1 female minor of very tender years preliminary test

Court: child is intelligent and understands the meaning of bad and good. To give sworn testimony and in her judgment the court had this to say.

"The court also observed that the child understands the different between truth and lies. She knows lying is bad. She also attends church she could understand nature of oath very well so she gave her testimony under oath."

19. To my mind the trial court complied with the requirement of section 19(1) of the oaths and statutory declaration Act and therefore find that the evidence of the minor was properly received.

20. Having disposed of the technical issue raised by the appellant the only issue now is for the court to analyse the evidence tendered before the trial court and to come to my own conclusion on the same though taking into account the facts that I did not have the advantage of seeing and hearing the witnesses.

21. PW.1 Martin Kariuki Mwangi a clinical officer testified that the age of injury was five hours and that the complainant had injuries on her Virgina. They were bruised hymen injury, probable object of injury blunt like penile. There were bruises/inflammation on both labia minora and majora hymen was freshly broken. The accused was also examined on same date. His penile tissue was bruised. I assessed that the girl was penetrated on her vagina and bruise on accused penile tissue.

22.P.W.2 PMK testified that she knew the appellant by name Thuku who bought her mandazi and defiled her and that she felt pain and that the appellant warned her not to tell her mother. She stated that the appellant never removed her cloths but that she told the mother that the appellant pulled up her cloths and lay on her. Under cross examination she states that the appellant lay on her whole body and she got injured all over her body.

23. P.W.3 G.W.K the complainants mother testified that she met the complainant at the gate of the appellant and she was crying. She confirmed that the appellant was in the house and that the appellant came to the window and said he could slap her.

24. P.W.2 p.c Festus Gathure received the complainant and her mother and that the appellant was brought to the station by members of the public.

25. When put on his defence the appellant gave sworn evidence and stated that on 10th February 2009 he came across children who were related to him and they asked for a coke and he gave them money. He got home and went to fetch some water and on the way back met some people who started to attack him saying he had sex with a child called M. Under cross examination he said there was no grudge between him and the parents of the complainant.

26. It has been submitted by Mr. Kimani that there are contradictions in the testimony of the minor and that vital witness were never called. I am of the considered view that those contradictions were not material to the prosecutions case and therefore does not find fault with the trial courts finding on facts.

27. I therefore find that the prosecution case against the appellant was proved to the required standard and therefore dismiss the appellants appeal herein.

Dated and delivered at Nyeri this 14th day of February 2013.

J. WAKIAGA

JUDGE

Mr. K. Njuguna for the appellant

Mr. Cheboi for the state

Judgment read in open court in the presence of the the above.

J. WAKIAGA

JUDGE