



REPUBLIC OF KENYA

High Court at Nyeri

Criminal Appeal 145 of 2010

JAMES MACHARIA MAINA.....APPELLANT

Versus

REPUBLICRESPONDENT

(arising from the judgment of Hon. L. Mbugua P.M

Karatina in CriminalCase No. 601 of 2008)

JUDGMENT

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1. The appellant was charged with the offence of Sexual Assault contrary to section 5(1)(1) of the Sexual offences Act No. 3 of 2006 the particulars of which were that on diverse dates during the month of October 2008 at Karatina township in Nyeri District of Central Province had carnal knowledge of K.N.N. A boy of 12 years against the order of nature.
2. He faced an alternative charge of indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006 the particulars of which were that on diverse dates during the month of October 2008 at Karatina township in Nyeri District within Central Province unlawfully and intentionally assaulted K.N.N. a child under the age of 12 years by touching his private parts (anus).
3. He pleaded not guilty and was tried convicted and sentenced to 20 years on the main count.
4. Being aggrieved by the said conviction and sentence he filed this appeal and in his home made grounds of appeal raised four (4) grounds.
5. When this appeal came up for hearing before me the appellant who was unrepresented filed an amended grounds of appeal and written submissions which he relied upon.
6. From his amended grounds of appeal the following grounds can be identified:
 - a. The prosecution case was not proved to the required standard.
 - b. His defence was never taken into account.
 - c. His constitutional rights under then section 72(3)(b) of the constitution were violated.
7. It was submitted by the appellant that the first report to the police was never tendered in evidence and that despite court orders for the production of the OB the same was not done and therefore he was prejudiced in his trial.

8. He submitted that he had tendered in a defence of grudge between him and the complainant's uncle over a debt and that he had an alibi defence which were never taken into account by the trial court.

9. He further submitted that his constitutional rights were violated in that he was held in custody for a period of five (5) days before being taken to court and finally that the prosecution case was full of contradictions.

10. Miss Maundu for the state opposed the appeal and submitted that the appellant was arrested on 18th October which was a Saturday and taken to court on 23rd October which was a Thursday and that there was only a delay of three days and that he can seek compensation if there was any violation of his rights.

11. She submitted that there was no need of an identification parade since the appellant was known to the complainant and that his defence was taken into account.

CONSTITUTIONAL ISSUE

12. Since the appellant has raised a constitutional issue this court is therefore required to deal with the same. I have noted that there was a delay of three days in taking the appellant to court but note that there is no evidence produced by the same to show that he was prejudiced in any way.

13. The court is alive to the fact that the said rule was put in place to guard against the police abusing the due process by obtaining false evidence against the victims or having them to make confessions thereof. From the proceedings before me there is no evidence that the accused other rights were violated.

14. I hold the view that a delay of three (3) days was not inordinate in the circumstances herein and in any event the appellant still has a remedy to seek compensation for the same.

15. The prosecution case against the appellant was as follows:

P.W.1 Dr. Ahmir Wasq Quresh produced P3 form on behalf of Dr. Njatha Kiere who confirmed that the complainant was frightened and walked with a stoop and a slight limp and that on examination of the complainant was found exposed to sexually transmitted disease.

16. P.W. 2 K.N.N. Testified that on 15th October 2008 at 7.00 p.m. He had gone to buy paraffin at Karatina when he met the appellant who took him to a cemetery tied his eyes with a cloth and threatened to kill him if he screamed and proceeded to sodomize him he thereafter reported to his mother and the appellant was arrested.

17. P.W.3 Rahab Nyawira Njoki testified that the headmaster of Kariko primary school informed her that they notified that the complainant had a limpy walking style and could not sit properly in class and upon being questioned stated that he had been sodomized by the appellant.

18. P.W.5 Agnes Wambui Mindo a teacher at the said school confirmed that they noticed that the complainant could not walk properly and upon questioning he confirmed that he had been sodomized previously. This evidence was confirmed by P.W.6 the headmaster of the complainant's school.

19. When put on his defence the appellant gave a sworn defence and stated that on 16th October 2008 the complainant came with police officers and told him that someone had been knocked down by a pushcart and they needed him to assist with investigation when he was locked up.

20. He states that the relationship between him and the complainant's family was not conducive.

21. From the evidence tendered before the trial court I do not find fault with the trial court's finding on facts and hold that the conviction of the appellant has been safe.

22. I therefore find no merit on the appeal herein noting that the defence was taken into account by the

trial court which had this to say.

“on the averment that the accused is being implicated because of grudge with the family of the complainant I do find that this is not plausible. In the first place it is not P.W. 2 who set in motion the process of this trial nor did any member of PW.2's initiated the complainant.”

23. I therefore dismiss the appeal herein.

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

J. WAKIAGA
JUDGE

James Macharia Maina – appellant

Mr. Cheboi for the state.

Judgment read in open court in the presence of the above

J. WAKIAGA
JUDGE