REPUBLIC OF KENYA

High Court at Nakuru

Criminal Appeal 252 of 2011

(From original conviction and sentence in Criminal Case No. 924 of 2011 of the Senior Principal Magistrate at Nyahururu – A.B. MONGARE, SRM)

D.W.M (name withheld)…….……..…APPELLANT

VERSUS

REPUBLIC……APPELLANT

JUDGMENT

D.W.M, the appellant, was charged before Nyahururu Senior principal Magistrate's Court, in Criminal Case No. 924/2011, with the offence of incest contrary to **Section 20(1)** of the **Sexual Offences Act No. 3 of 2006**. The particulars of the charge were that on 24/4/2011, at (name withheld) Laikipia County, unlawfully caused his genital organ to penetrate the genital organ of F.W.D(name withheld), who was to his knowledge his daughter who was aged 4 years old. In the alternative, he was charged with committing an indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act**. The appellant was convicted, I believe, on the main charge and was sentenced to life imprisonment. He is aggrieved by both the conviction and sentence and filed this appeal based on the following summarized grounds in terms of the amended grounds of appeal:-

1. That the trial magistrate failed to consider that the appellant's rights under Article 49(1) (f) of the Constitution were violated because he was detained from 25/4/2011 to 28/4/2011 before he appeared before the court;

2. That the prosecution case was full of inconsistencies and did not support the charge;

3. That PW3 was not qualified to produce the medical report under Section 77 of the Evidence Act;

4. That the court failed to consider the appellant's defence.

The appellant therefore prays that the appeal be allowed and there be a retrial under **Article 50(6)(b)** of the **Constitution**.

Mr. Marete, Learned Counsel for the State opposed the appeal. He submitted that the complainant testified clearly that her father entered her bed and defiled her. PW2, the complainant's mother

corroborated PW1's evidence that she saw the appellant lying in the complainant's bed; that the complaint's evidence was also corroborated by PW3 who examined her and found that her hymen was broken, and there was a healing laceration in her private parts.

The brief facts of this case are that the appellant is the father of the complainant, PW1, F.W (name withheld). She was aged about 4 years, having been born in 2007 according to her mother, L.W(initials used to hide identity) (PW2). The trial court conducted a ***voire dire*** examination and found that she understood the importance of telling the truth and was sworn. She recalled that on 24/4/2011, while at home, her father came home drunk, slept in her bed and did bad manners to her. She said that the father removed her pant and removed his too, and pushed his male organ into her genitals which she uses to urinate. The mother had gone to the river and upon return, took her to hospital.

PW2 recalled that on 24/4/2011, about 6.00 p.m., she left the child at home but the appellant was not there. He arrived later. She was not on talking terms with the appellant and she went to sleep with the children. The appellant went and slept in PW1's bed and PW1 started crying and saying she was feeling pain. PW2 lit the lights but the appellant switched them off and the child cried till morning. The next morning, the child cried as she tried to urinate and when PW2 asked why, the appellant took away the child on a bicycle. PW2 reported to Nyahururu Police Station and was given a letter to go and look for the appellant and child. Upon finding them, she examined the child and found her genital parts to be reddish. PW1was treated at Nyahururu District Hospital and a P3 form was filled. The complainant was examined by Dr. Waiti Kariuki on 27/4/2011 after she had been treated on 25/4/2011. The Doctor found a healing laceration on the labia minora, the hymen was broken and she made a finding that there was recent penetration of the complainant.

PW4, the Investigation Officer received PW2's report of the incident on 25/4/2011 and that on the same day about 2.00 p.m., Administration Police officers arrested the appellant with the child and took him to Nyahururu Police Station.
In his unsworn defence, the appellant said that he arrived home, drunk, PW2 pushed him, he regained consciousness about 3.00 a.m., while trying to get up, he fell on the child who started crying and PW2 alleged that he had raped the child. He denied the offence and said it is a grudge with his wife who was unhappy that he found her with a man in the house five days before the incident and it had happened more than three times and she even had a baby with the said man.

As the first appellate court, I have the duty to evaluate the evidence adduced in the lower court afresh and arrive at my own findings and draw my own conclusions. From the evidence of the complainant (PW1), PW2 and PW3, there is no doubt that PW1 was sexually assaulted. PW3 on examining the complainant, found that the hymen was broken, healing lacerations to the complainant's private parts and she was of the view that there was recent penetration of PW1. PW3 examined the complainant on 27/4/2011, whereas she had been defiled on the night of 24th and 25th April 2011. That is why PW3 found it unnecessary to examine the appellant because of the time taken before PW1 was examined. The possibility of finding spermatozoa in PW1 had disappeared. The only question is who committed the heinous act on the complainant?
The first complaint raised by the appellant is that his fundamental right to be taken before a court of law within 24 hours of arrest was breached, in that it took the police from 25/4/2011 to 28/4/2011 when he was arraigned before a court of law. 25/4/2011 was indeed a Monday. The appellant did not disclose the exact time he was arrested. If it was at 2.00 p.m. as alleged by PW4, then he should have been arraigned before the court by 2.00 p.m. on 26/4/2011. When the appellant appeared before the court, he never raised this complaint so that the prosecution would have called the police concerned to explain the delay. The fact that the appellant was taken before a court of law after 24 hours of arrest does not automatically prove that the appellant's rights were breached. This complaint is made over a year later and the police cannot respond to that allegation at this stage. It is trite law that an allegation that one's right has been violated must be raised at the earliest time possible. Besides, even if the applicant's rights were breached, that is a totally different claim. The offenders in that case would be the police officers who arrested and delayed in bringing the appellant to court. If found to have been in breach of the appellant's fundamental rights without good cause, the appellant would have a cause of action in damages against the concerned police officers. The Court of Appeal had an opportunity to consider a similar scenario under the old

Constitution. The principles applicable to **Section 72(3)** of the old **Constitution** on a similar breach are the same. In the case of **Mwalimu v Rep, [2008] KLR 111**:-

"1.Under section 72(3) of the Constitution, where a person charged with a non-capital offence was brought before the Court after twenty-four hours or, where he was charged with a capital offence, after fourteen days, complained that the provisions of the Constitution had not been complied with, the prosecution could still prove that he was brought to Court 'as soon as was reasonably practicable' notwithstanding that he was not brought to Court within the stipulated time.

2 The mere fact that an accused person was brought to court either after the twenty-four hours or the fourteen days, as the case might be, stipulated in the Constitution, did not ipso facto prove a breach of the Constitution. Each case had to be decided on its own facts and circumstances and in deciding whether there had been a breach, the Court must act on evidence.

3. Section 84(1) of the Constitution suggested that there had to be an allegation of breach before the Court could be called upon to make a determination of the issue and the allegation had to be raised within the earliest opportunity.

4. The appellant did not complain in the trial Court that he was not brought to Court as soon as was reasonably practicable and it followed that the prosecution was not called upon to show that he had been brought to court as soon as was reasonably practicable. Therefore, there was no merit in the ground of appeal alleging a breach of his constitutional right."
In instant case, there is a complainant whose rights have been infringed in that a child was defiled. A violation of the appellant's rights cannot curtail his prosecution for the said offence. For those reasons, the conviction and sentence in this matter cannot be nullified just because of a violation of the appellant's rights.
The second complaint is that the prosecution evidence was inconsistent and contradictory and specifically the evidence of PW1 and PW2 as regards what happened on 24/4/2011. It must be appreciated that PW1 was a child of tender age, aged just over 4 years old. Her capacity to explain in my view, would be limited. It is clear from the version of PW1 and PW2 that this incident happened on 24/4/2011 night in PW1's bed. It may have happened at the time PW2 had gone to the river and continued in the night when PW2 had returned because according to PW2, the appellant slept in PW1's bed. PW1's evidence was not controverted or shaken in cross examination as regards what happened to her. She explained that the father put his genital organ **'the organ he uses to urinate'** into her genital organ and she felt pain. PW2 did corroborate PW1's evidence that PW1 cried the whole night and in the morning she was unable to urinate. In cross examination by the appellant, PW1 maintained that she had said what happened to her. The appellant had no questions for PW2 and did not challenge PW2's evidence in anyway. The appellant had the opportunity to defile PW1 when he slept in her bed. PW1 was a child of tender age. It is unlikely that she would come up within such a serious allegation against her father and talk of things that are taboo for little children to pronounce on their lips.
Under **Section 124** of the **Evidence Act** the court can rely on the uncorroborated evidence of a minor provided that the court is satisfied, for good reason, that the child is saying the truth. **Section 124** of the **Evidence Act reads**:-

"S.124. Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

PW2 told the court that after the incident, the appellant took off with the child. PW4 confirmed it is only

after the report that the appellant was arrested by Administration Police officers. The appellant did not dispute that evidence. By running off with PW1, the appellant was trying to destroy the evidence and conceal the incident but was interrupted.

I am satisfied that there were no material contradictions in the prosecution case as to vitiate the conviction.

The appellant also complained that PW3 was not qualified to produce the medical report under Section 77 of the Evidence Act. Section 77 of the Evidence Act deals with production of reports by the Government Analyst, Geologist etc. In this case, no specimens were ever taken from PW1 and the appellant for analysis by the Government Analyst. PW3 is the Doctor who examined PW1, she filled the P3 form as to her findings and she was the best person to produce it in court. The appellant's objection is untenable.

In his defence, the appellant alleged that PW2 had a grudge with him yet he had the opportunity to cross examine her and he never asked PW2 a single question. He even alleged that PW2 had an affair with another man and that was the genesis of their disagreement. He did not name the said man. As properly found by the trial court, the appellant's defence was a mere afterthought and a sham. I dismiss it as untrue.

Having considered all the grounds of appeal, I find that none has merit. The conviction is proper and the court will not interfere with it.

Under **Section 20(1)** of the **Sexual Offences Act,** a person who commits the offence of incest with a person under the age of 18 years is liable to life imprisonment. In this case, the complainant was a child of tender years, who needed the appellant's care and protection yet the appellant violated her and the trust between them. The sentence meted by the trial court is legal and I find no good reason to interfere. The appeal against both conviction and sentence is hereby dismissed.

DATED and DELIVERED this 14th day of March, 2013.

R.P.V. WENDOH
JUDGE

PRESENT:
The appellant present in person
Mr. Chirchir for the State
Kennedy – Court Clerk