



REPUBLIC OF KENYA

High Court at Mombasa

Criminal Appeal 177 of 2009

(From Original Conviction and Sentence in Criminal Case No. 3740 of 2008 of the Chief Magistrate's Court at Mombasa – H. B. Yator (RM))

MWETU KABAKA MAINGI APPELLANT

- Versus -

REPUBLIC RESPONDENT

J U D G M E N T

The Appellant was convicted and sentenced to twenty (20) years imprisonment for the offence of defilement of a girl contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006.

The Appellant has raised several grounds in this appeal the first one being on the charge being defective for failure to indicate the time of the occurrence of the offence arguing that it offends the provisions of Section 137 of the Criminal Procedure Code.

The second ground is that his rights were violated for failure by police to produce him in Court within the 24 hours stipulated under Article 49(a) of the Constitution.

The 3rd ground is that the evidence adduced before the Court was contradictory and unreliable. There was no voire dire examination conducted by the Court while receiving the evidence of the complainant and lastly that there was no age assessment as required under the law.

On the first ground a perusal of the record of proceedings shows that the Appellant was arrested on the 4th day of December 2008 and was arraigned in Court on 8th December 2008. There is no evidence as to whether there was a weekend or holiday in between but suffice to point out that the Appellant did not raise any complaint to the trial Magistrate at the time of the plea alleging that his Constitutional rights had been infringed and nor did he do so in the Court of the subsequent proceedings before the Court.

This is the first time he is raising the alleged infringement. It is rather late in the day as there is no opportunity for the prosecution or the State to explain the reasons why the Appellant was not arraigned in Court when the stipulated period for the Court to make an informed finding.

Further under Article 23(1) of the Constitution the Appellant may commence proceedings for reliefs

which include declaration of rights conservatory orders compensation or Judicial Review. The matter before the Court is not a Judicial Review and no acquittal can be canvassed.

I have perused the proceedings before the learned trial Magistrate in particular those related to the complainant who was (PW3) and this is what the Magistrate noted-

“Court – The third witness is the complainant and is a child of tender years. She understands that she is in Court. That the Accused called the witness and gave me sweets and he did insert his penis in my vagina. It was very painful. I went home and informed my mother saw some sperm oozing from my vagina. He called me alone and left other children while playing, he did not call me any other day. He is our neighbour. That is all.”

From the above it is not practical to ascertain where the voire dire evidence started if any and where it ended. It is not possible to make a finding as to whether the child understood the meaning of an oath or not. It is also not indicated whether the child gave sworn or unsworn evidence upon affirmation. It becomes next to impossible for the Court to appreciate what weight to place on the complainant's evidence and or if at all.

Age Assessment. The P3 form which was produced in Court by Dr. Ngone (PW7) shows that he had given the age of the complainant as approximately 3¹/₂ years old. Apart from that approximation there is no other evidence on the age. The mother (PW1) did not testify at all on the issue of the age. She did not produce any documentary evidence in the form of a Birth Certificate or Clinical Card. The age of the complainant therefore was not a settled issue.

Weight of evidence – The complainants whether (PW1) was on the 3rd day of December 2008 doing her daily chores when she observed that her daughter (PW3) was not her usual self. When she was bathing her she noticed that there were traces of sperms on her private parts. The child was saying that she was feeling pain but she enquired from her as to what had taken place. She was not responding the mother decided to call her neighbour to ascertain what she had seen and also to interrogate the child. There is evidence from PW2, PW4, PW5 to the effect that the child (PW3) had mentioned the Accused whom she referred to as ‘Babu’ as person who had inserted his penis into her vagina. The same witnesses also testified of how after the Appellant was confronted with the allegations made by the child he offered to solve the matter out of Court and gave the complainants mother Kshs. 1,500/- to forego charges against him with a promise for a further Kshs. 1,500/- payment.

The investigating officer (PW8) produced the Kshs. 1,500/- given to him by the complainants mother as exhibit in the case. The trial Magistrate did find that the complainant did positively point out the Appellant as Babu and the one who had called her from where she was playing with other children and offered her sweets. She had taken PW2 to the house of the Appellant but they did not find him at the time.

The Doctor who examined the complainant found that her hymen was not intact but there were no other physical injuries. No spermatozoa seen on her vaginal area. There is scant evidence on age assessment and the voire dire examination but this does not mean that the Appellant did not touch the private parts of the complainant with his penis.

The Appellant had been charged with defilement and in the alternative with indecent act contrary to Section 11(1) of the Sexual Offences Act in that he committed an indecent act by causing his penis to come into contact with the vagina of the complainant a girl aged 3¹/₂ years.

While the conviction for defilement was not safe, I find that of indecent act to have been proved. The conviction on defilement contrary to Section 8(2) of the Sexual Act is substituted with that of the alternative count of indecent act contrary to Section 11(1) of the Sexual Offences Act. The sentence of 20 years imprisonment is reduced to ten years. The Accused to serve ten years imprisonment from the time of first conviction.

Dated and delivered at Mombasa this 19th day of April, 2013.

**M. MUYA
JUDGE**

In the presence of:-

Miss Okwengu for State

Accused - present

Court clerk – Mr. Musundi