REPUBLIC OF KENYA

High Court at Machakos

Criminal Appeal 77 of 2011

GIDEON NYAMAI ………………………………….……..APPELLANT

VERSUS

REPUBLIC…………………….………………………RESPONDENT

(Being an appeal from the original conviction and sentence in Kitui Principal Magistrate's Court Criminal Case No. 1029/2007 by Hon. B.M. Kimemia, SRM on 6/4/2011)

JUDGMENT

Gideon Nyamai, the appellant is charged with unnatural offence contrary to section 162 (a) of the Penal Code. Particulars thereof being that on the 25th July, 2007 at about 8.30am, at *[particulars withheld]*sub-location in Kitui District of Eastern Province had carnal knowledge of a boy aged eleven (11) years against the order of nature.

The appellant was tried convicted and sentenced to 21 years imprisonment.

Being aggrieved by the conviction and sentence the appellant preferred this appeal on grounds that the learned magistrate erred by failing to consider that the trial as a whole was a nullity under section 85(1) of the Criminal Procedure Code. The prosecution's case was inconsistent and contradictory and not proved beyond reasonable doubt; His constitutional rights as enshrined in the constitution, Article 50 (2) were violated; his defence was rejected and the sentences meted out was harsh and excessive.

This being the first appeal being an appellate court I am by law enjoined to revisit the evidence that was adduced before the trial court and analyse it, evaluate it and come up with my own independent conclusion (see ***Okeno vs Republic-Criminal Appeal No. 75 of 1971).***

In the lower court to prove their case the prosecution called five (5) witnesses.

PW1, M.K. an eleven year old boy encountered the appellant who requested him to hold his bicycle as he lit a cigarette. He moved towards the river. The complainant followed him. On reaching a particular spot the appellant asked him to remove his pair of short trousers but he declined. The appellant then took some ropes that were on the bicycle. He used them to tie his legs and neck. He removed the complainant's pair of trousers and unzipped his pair of trousers. He removed his penis and inserted it into his buttocks. He felt pain and bled from the anus. The appellant untied him. He cried out. PW2, **Peter Mutua** who was passing by the river on hearing screams went to his rescue. He saw the appellant running away from the scene of the incident. He found the complainant crying without his pair of shorts. He examined him and saw some discharge and blood oozing from him. He noted some ropes at the scene. He advised the complainant to report the matter to the police.

PW3, **Kavindu Kimuli** took the complainant to hospital where he underwent treatment. He reported the matter to the police who issued the complainant with a P3 form. It was duly filled.

PW4, **No. 57953 P.C. Monica Aoko** on receipt of the complaint investigated the case jointly with **P.C. Sharon Rugut.**

PW5, **Martin Ngue,** a clinical officer who was conversant with the handwriting and signature of the clinical officer who examined the complainant produced in evidence a P3 form he filled in respect of the complainant pursuant to section 77 of the Evidence Act.

On examination it was found that the complainant was in pain and discomfort. On further examination the complainant had anal lacerations with very low sphincter tone. The complainant was admitted in hospital for 9 days due to incontinence (inability *to control stool*) secondary to sodomy.

In his defence the appellant stated that he first saw the complainant in court. Denying having committed the offence, he said he was away in Nairobi from 23rd July 2007 on official duty. He went to collect his cheque from Asili Co-operative Society on 25th July, 2007 which he cashed on the same day. He attributed what befell him to a grudge he had with the area Chief whom he accused of compromising PW2 to lie.

He claimed that the chief intended to have a relationship with his daughter. Being opposed to the relationship he published the issue on media (*radio).* The incident made the chief frame him up for an offence he did not commit.

Mr. Mukofu the State Counsel opposed the appeal arguing that the offence was committed at 8.00am hence the complainant positively identified the appellant. PW2 was able to recognize physical features of the appellant since the offence was committed in broad daylight. PW1's evidence as to how he was sexually assaulted was corroborated by that of PW5 which was evidence that the act had indeed taken place. He called upon the court to take into consideration the observation made by the trial court in respect of the *alibi* defence presented which it doubted and accordingly dismissed. He called upon the court to uphold the conviction and sentence by dismissing the appeal.

I have considered the evidence on record, the judgment of the learned magistrate, grounds of appeal, written and oral.

Following provisions of section 85(1) of the Criminal Procedure Code alluded to in ground 1 of the appeal; the case in the lower court was prosecuted. The record shows that when the plea was taken in this lower court, **Chief Inspector Regina** was the prosecuting officer. The handwritten original record clearly shows it. The typed proceedings however omitted the name of the prosecutor which was a typographical error.

It has been pointed out that on the 12/8/2010 **P.C. Mutia** prosecuted the case. The case per the record was prosecuted by **Chief Inspector Kalabai.** On the 12/8/2010 the name of **P.C. Mutia Festus** appears but the case was adjourned to 23/8/2010. When the case came up on the 23/8/2010 it was prosecuted by **I.P Korir**. There is nothing whatsoever to indicate that **P.C Mutia** prosecuted the case. An Inspector has a legal mandate to prosecute a case before a subordinate court. Due process was followed which does not make the trial *null* and *void*.

It has been argued by State that identification in this case was watertight. The complainant went home after the incident but did not tell his mother. In his evidence he said he told his mother what transpired the following day. PW3, the mother however said she learnt of the incident on 28th July 2007. On 26th July, the following day the child went to school as usual. On 28th July, 2007 he came from school with a stomach ache. As the mother took him to hospital, they met the chief who advised her to find out from the child what had happened. That is when he narrated the story.

PW2 said he heard screams from the bushes when he reached near the Musambwani area, he saw someone running away from the cave. He recognized him as Gideon, the appellant herein. He then found the complainant crying and he told him what the appellant had done. He found him without pant. He examined his anus and found sperms and blood oozing. He advised the complainant to tell his mother. It was his evidence that he knew the appellant very well as they had gone to the same school. When cross-examined he said he rang the complainant's father in Nairobi and told him what happened.

If he did, the complainant's father does not seem to have acted. PW1 said after the appellant defiled him he left with his bicycle. PW2 found him crying and then took him home. PW2 on the other hand saw the assailant running away. He did not mention the bicycle. He however found some ropes at the scene which were not produced in evidence. Since the assailant of PW1 left with the bicycle but PW2 was sure he saw Gideon running away and he did not have the bicycle. The question to be posed is whether the two (2) saw the same person?

When cross-examined PW1 said by that time the assailant was working at JICA. This was an indication that he knew him. However, when cross-examined further he said he was told the name of the appellant by **Chief Kanani**. He said the chief told him that he witnessed as the appellant sodomised him. He was however not able to tell where the chief was that particular time. He confirmed that **Peter** was not the chief.

PW3 did not learn of what happened. PW1 continued going to school as usual until the 28th July, 2007 when he returned home with a running stomach. As she took him to hospital they encountered the chief who brought the issue to her attention.

In his testimony PW2 did not mention the Chief. The said chief was not called as a witness; therefore the court does not know how the chief got the information regarding the sexual assault.

In his defence the appellant said there was a long standing grudge between him and the chief. The Chief, **Kamami** wanted to have a relationship with his daughter which he opposed and had the issue broadcasted on radio. The Chief vowed to revenge. In his evidence the appellant said on the 25th July, 2007 he was away in Nairobi and was issued with a cheque that he even deposited in the bank.

His alibi defence was dismissed by the trial magistrate.

When we take into consideration the evidence of PW1 that was contradicted by that of PW2 as to how the assailant left the scene, the question that remains unanswered is if indeed it was the appellant who did the act.

The prosecution had a duty of disapproving the explanation given by the appellant in his defence. In my view this was not done to the required standard.

The appellant faulted the trial magistrate for not granting him a fair trial in accordance with Article 50 (2)of the Constitution.

Article 50 (2) (c) of the Constitution;-

"To have adequate time and facilities to prepare a defence"

The appellant herein was represented by counsel. He was given an opportunity of preparing for his case. His contention is that at the point of defending himself he was not granted an adjournment to call his witnesses. The appellant was granted an adjournment to enable him to call witnesses. When the matter came up for hearing they were not available. He was granted a last adjournment. This was in the discretion of the court. He failed to comply. The magistrate cannot be faulted for failing to comply with the provisions of Article 50 (2) (c) of the Constitution.

With regard to the sentence being high and excessive, the appellant was charged under section 162 of the Penal Code which provides as follows;-

"**162.*Any person who-***

a. has carnal knowledge of any person against the order of nature; or

b. has carnal knowledge of an animal; or

c. permits a male person to have carnal knowledge of him or her against the order of nature, is guilty of a felony and is liable to imprisonment for fourteen years:

Provided that, in the case of an offence under paragraph (a), the offender shall be liable to imprisonment for twenty-one years if-

(i) the offence was committed without the consent of the person who was carnally known; or

(ii) the offence was committed with that person's consent but the consent was obtained by force or by means of threats or intimidation of some kind, or by fear of bodily harm, or by means of false representations as to the nature of the act".

The court had the discretion of granting a last adjournment for purposes of expediting the trial. He cannot be accused of contravening Article 50(2)(c) of the Constitution.

Finally, the trial magistrate has been faulted for failure to comply with section 200(3) of the Criminal Procedure Code. The above section alluded to provide as follows;-

"***Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be summoned and reheard and the succeeding magistrate shall inform the accused person of that right."***

A perusal of the record shows that when **Hon. T.M. Mwangi** ceased to exercise jurisdiction within Kitui Law Courts, the case was taken over by **Hon. B.M. Kimemia.**

On the 23/8/2010 the court made an order as hereunder;-

"Under section 200 Criminal Procedure Code the defence is asked to opt to proceed."

It was mandatory upon the succeeding magistrate to notify the appellant of his right according to the law. The appellant ought to have confirmed that he understood what had been explained to him and respond thereto.

This position was restated in the case of ***O.V R Criminal Appeal No. 200 of 2006.*** It was held as follows:-

"***The succeeding trial magistrate was required to inform the person of his right to have all the previous witnesses testify afresh or to be further cross-examined. The violation of that right rendered the appellant's trial a nullity".***

Similarly, in the instant case the aforesaid violation of the appellant's right renders the trial a nullity.

Having re-evaluated the evidence adduced and considered submissions in their entirety, I find the trial magistrate having misdirected himself in some aspects.

In the result I allow the appeal, quash the conviction, set aside sentence and order the appellant to be released forthwith, unless held for some other lawful purpose.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **23RD** day of **MAY 2013.**

L.N. MUTENDE
JUDGE