REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO.60 OF 2010

M.S……..……APPELLANT

VERSUS

REPUBLIC ……..RESPONDENT

J U D G M E N T

1. This an appeal arising out of the conviction of M.S (“**the Appellant”)** on the offence of Defilement of a Girl contrary to Section 8(3) of the Sexual Offences Act No.2006 . Upon conviction the trial Court sentenced the Appellant to serve 20 years imprisonment. The appeal is against both conviction and sentence.
2. It had been alleged that on the 2nd day of February 2010 at [particulars withheld], Teso South District within Western province, intentionally and unlawfully committed an act which caused his penis to penetrate into the vagina of R.O a girl aged 15 years.
3. R is the sister-in-law of the Appellant in that her sister G.A is married to the Appellant. It was her testimony that she was living in Appellants’ house as she attended school. That during her stay, on a date she did not disclose, she had sex with the Appellant. Her sister was away at the market. She says that she willingly removed her pants and skirt. That she had had sex with him on more than one occasion. It was also her testimony that the Appellant took her to the home of his Grandparents at Butere. The purpose of the visit being to introduce R to them. They stayed at Butere for about a month as husband and wife. She told Court that the Appellant intended to marry her and that they were lovers.
4. A.O.O (PW2) is the father of R and recalls that on 7th February 2010 his other daughter G reported to him that R who was staying with her was not at home. It was the report of G that R had disappeared on 1st January 2010. That prompted him to make some inquiries. He found that the Appellant had taken his daughter to Butere. That on 12th February 2010, the father of the Appellant by the name M.E sought him out and apologized on behalf of the Appellant. PW2 reported the matter to the Sub Chief who convened a Baraza which ended up in disagreement.
5. Dr. Zacharia Njau (PW3) is a Medical officer at Alupe Sub District Hospital and carried out a medication examination on R on the 7th of February 2010. He also carried out an age assessment of her on the same day. He concluded that she was 15 years old. The medical examination revealed that although R had no obvious injuries to her genitalia, her hymen was broken.
6. It fell to Cpl Esther Kipchumba (PW4) of Adungosi Police Station to investigate the matter before Court. She summoned the parents of the victim and they brought R for an interview. Thereafter PW4 had the victim medically examined and her age assessed.
7. At the close of the prosecution case, the Court found that the prosecution had established a prima facie case that warranted the Appellant to be placed on his Defence. In a sworn statement made on 6th of August 2010, the Appellant denied defiling R. He however conceded that he loved the girl and intended to marry her. It was his testimony that the complainant was at his home from

December 2009 to February 2010 but he denies having any sexual intercourse with her.

8. In his appeal, the Appellant raised 6 grounds of appeal. Those grounds are collapsible into 2 grounds:

    i. That the police infringed on his Constitutional right by arraigning him in Court after 24 hours after his arrest. That amounted to a violation of Section 72(3) of the old Constitution.

    ii. That a conviction was returned against the weight of evidence.

9. This being a first appeal, I am obliged by law to re-assess and re-evaluate the evidence before the trial Court and to come to my own independent decision of the various issues raised without unduly ignoring that the findings and conclusions made by the trial court who had the advantage of physically seeing and hearing the witnesses testify. (**Okeno –vs- Republic [1972]E.A 32).**

10. Before I consider the evidence it would be convenient to deal with the Constitutional question that was raised. The issue is whether or not an unexplained violation of constitutional right to an accused committed in the course of arrest will automatically result in an acquittal irrespective of the evidence adduced. That question was settled in the decision of **Nairobi Criminal Appeal 50 of 2008 Julius Kamau Mbugua And Republic** [2010] Eklr where the Court of Appeal rendered itself as follows:-

    "Lastly, had we found that the extra judicial detention was unlawful and that it is related to the trial, nevertheless, we would still consider the acquittal or discharge as a disproportionate, inappropriate and draconian remedy seeing that the public security would compromised. If by the time an accused person makes an application to the court, the right has already been breached, and the right can no longer be enjoyed, secured or enforced, as is invariably the case, then, the only appropriate remedy under Section 84(1) would be an order for compensation for such breach. The rationale for prescribing monetary compensation in Section 72 (6) was that the person having already been unlawfully arrested or detained such unlawful arrest or detention cannot be undone and hence the breach can only be vindicated by damages. Again, we respectfully agree with Emukule, J. that breach of Section 72 (3) (b) entitles the aggrieved person to monetary compensation only. That is the relief that this Court gave in Kihoro v Attorney General of Kenya [1993] 3LRC 390 for breach of right to personal liberty." (my emphasis)

    Quite obviously the Appellant cannot benefit from the alleged infringement and his remedy lies elsewhere.

11. The only direct evidence adduced against the Appellant is that by R. And there is common ground between the Prosecution and the Defence that R was at the home of the Appellant sometime in December 2009 to February 2010. It is also common ground that the Appellant and R were lovers. The point of departure is whether the Appellant defiled the victim on 12th February 2010. It was the evidence of R that the Appellant had sex with her on several occasions. This was denied by the Appellant. The finding by Zacharia Njau suggests that the complainant was sexually active. The question to be answered is whether in fact the Appellant defiled the girl as charged.

12. The complainant told Court as follows:

    "We left Butere in February 2010, in January 2010 I went to school for only one week. We left Butere on 10/2/10 between 2nd Week of January 2010 and 1st week of February 2010 I was just at the home of the accused."

    She also said that she parted with the Appellant on 14th of February 2010. Looking at the testimony of the complainant, there is no telling whether or not the Appellant indeed defiled the girl on the date appearing on the charge sheet. And although in other circumstances, a mere

misdescription or non-disclosure of date can be over-looked, this Court bears in mind that the only evidence in this matter that incriminates the Appellant is the word of the complainant. It is the word of the Appellant against that of the complainant. Given the uncertainty of the dates and the scanty evidence, this Court is not sufficiently assured that a safe conviction could be returned. Let the Appellant benefit from that doubt.

13. The upshot is that this Court would allow the appeal and quash the conviction and set aside the sentence. The Appellant shall be set at liberty forthwith unless otherwise lawfully held.

DATED, DELIVERED AND SIGNED AT BUSIA THIS 23RD DAY OF JULY 2013.

IN THE PRESENCE OF:

KADENYI ……COURT CLERK

……FOR APPELLANT

F. TUIYOTT

J U D G E