REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 72 OF 2008

B. W. S ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Being an appeal from both conviction and sentence in the Judgment of Hon. I. Maisiba (Resident Magistrate in Eldoret Chief Magistrate's Criminal Case No. 940 of 2008 delivered on 18th August, 2009)

JUDGMENT

The Accused, B. W. S was in the main count charged with defilement of a girl contrary to Section 8 (2) of the Sexual Offences Act No. 3 of 2006.

Particulars of the charge are that on the 13th day of March, 2008 in Keiyo District of the Rift Valley Province unlawfully defiled P. C a girl aged three years old.

In the alternative, he was charged with indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006.

Particulars of the same are that on the 13th day of March, 2008 in Keiyo District of the Rift Valley Province unlawfully and indecently touched the private parts of P. C a child of three (3) years old.

The prosecution called three witnesses while the Appellant was the only witness in the defence. He gave an unsworn statement of defence. Judgment was delivered on 18th September 2008. The Appellant was found guilty in the main charge and sentenced to life imprisonment.

An amended memorandum of appeal contains five (5) grounds of appeal. Leave to amend the grounds of appeal was granted on 17th January, 2003. They were filed alongside the written submissions which the Appellant relied on during the hearing of the appeal. Therefore, only the first page of the written submissions bears the court's stamp.

The five grounds of appeal may be summarized as follows;

1. That the learned magistrate failed to uphold that the Appellant's Constitutional rights were violated for being detained in police custody beyond the stipulated period without an explanation by the prosecution.
2. That the trial magistrate erred in law and fact by convicting the Appellant based on erroneous

facts, inconsistence and contradictions by the prosecution witnesses.

3. That the trial magistrate erred in convicting the Appellant based on mere suspicion.
4. That the decision of the trial magistrate displays manifest bias and prejudice against the Appellant.
5. That the trial magistrate erred in law and fact in failing to consider the weight of the defence statement.

The appeal was heard before me on 23rd April, 2013. The Appellant relied on his written submissions while the prosecuting counsel, Mr. Wainaina, made oral submissions.

It is now settled law "**that the duty of the first appellate court is to weigh the same conflicting evidence and make its own inferences and conclusions but bearing in mind always that it has neither seen nor heard the witnesses and make allowance for that" – <u>AJODE –VS- REPUBLIC (2004) 2 KLR, 82 – a Court of Appeal decision.</u>**

Under ground of appeal No. 1 the Appellant states that his Constitutional rights as envisaged under Section 72 (3) of the Old Constitution and Article 49 (1) (f) of the Constitution of Kenya 2010 were violated. He submitted that he was incarcerated in the police custody for nine (9) days prior to his arraignment in court as opposed to the mandatory required period of 24 hours and that no explanation was given by the prosecution for this prolonged detention.

He cited a case in **<u>APPEAL NO. 345 OF 2007 – EMONI CHELAKANI –VS- REPUBLIC</u>** in which the court recognized the need for the prosecution to offer an explanation for any prolonged incarceration of an accused in custody for a longer period than is provided by the law.

I have not been able to locate this authority but I have cited other cases which will be of great assistance in determining the issue at hand.

Article 49 (1) (f) of the Constitution of Kenya, 2010 is the import of Section 72 (3) of the Old Constitution. The latter provided as follows:

"A person who is arrested or detained –

(a) for the purpose of bringing him before a court in the execution of the order of the court; or

(b) upon reasonable suspicion of his having committed or being about to commit, a criminal offence, and who is not released,shall be brought before a court within twenty four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with."

On the other hand Article 49 (1) (f) (i) and (ii) provides as follows:

1. ***"An arrested person has the right –***

(f) to be brought before a court as soon as reasonably possible, but not later than -

(i) twenty-four hours after being arrested; or

(ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day.

In the recent period, courts have held that the fact that an accused has been held in police custody

for more than is the provided legal period, renders the charge and subsequent proceedings a nullity.

In the **REPUBLIC –VS- NELSON MURIMI MACHARIA GITHUKU (2003) e KLR** Hon. Justice Kasango held,

"The Court of Appeal has held that the violation of an accused's rights under the constitution can lead to an acquittal. This was the finding in the case of ALBANUS MWASIA MUTUA Vs. REPUBLIC CRIMINAL APPEAL NO. 120 of 2004, the Court of Appeal had the following to say in respect of such violation:-

"At the end of the day it is the duty of the courts to enforce the provisions of the Constitution, otherwise there would be no reason for having those provisions in the first place. The Jurisprudence which emerges from the cases we have cited in the judgment appears to be that an unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced to support the charge. In this appeal, the police violated the constitutional right or the appellant by detaining him in their custody for a whole eight months and that, apart from violating his rights under section 72(3) (b) of the constitution also amounted to a violation of his rights under Section 77 (1) of the constitution which guarantees to him a fair hearing within a reasonable time. The deprivation by the police of his right to liberty for a whole eight months

before bringing him to court so that his trial could begin obviously resulted in his trial not being held within a reasonable time. The appellant's appeal must succeed on that ground alone".

The learned judge further noted as follows;

Similarly in the case of GERALD MACHARIA GITHUKU vs. REPUBLIC CRIMINALAPPEAL NO. 119 OF 2004, the Court of Appeal in deciding the appeal found that the appellant had been detained for a total of 17 days from the date of his arrest to the date of being taken before court.The court of appeal in upholding his appeal had the following to say:-

"..... although the delay of the days in bringing the appellant to court 17 days after his arrest instead of within 14 days in accordance with section 72 (3)(b) of the Constitution did not give rise to any substantial prejudice to the appellant and although, on the evidence, we are satisfied that he was guilty as charged, we nevertheless do not consider that the failure by the prosecution to abide by the requirements of section 72(3) of the constitution should be disregarded. Although the offence for which he was to be charged was a capital offence, no attempt was made by the Republic, upon whom the burden rested to satisfy the court that the appellant had been brought before the court as soon as was reasonably practicable."

The accused persons were detained for a period of two months with no explanation being given for their long detention. That was a violation of their constitutional rights and leads this court to hereby acquit both accused persons of the charge of murder. Both accused shall hereof be set free unless otherwise lawfully held.

In **REPUBLIC –VS- PETER KARIUKI MATHI & 2 OTHERS (2008) e KLR** Justice O. K. Mutungi as he then was said;

"***Every person, including those already in custody or prison, enjoy their constitutional rights except those which have been otherwise countermanded by a court order. For example, even a person on death roll is entitled to all his/her constitutional rights, including the right to life until and unless he/she is executed as by the law provided. Thus, if any person, including a warder, were to kill a person on death roll, that is extra judicial killing, and the warder would be charged with murder.All in all, and for the above reasons, I hold that the Fundamental Rights of the accused persons were violated by their not being brought to court within 14 days from the date they were taken out of the Kamiti Prison, on suspicion of murdering the deceased herein.***

Accordingly, I declare these proceedings against the three accused illegal, null and void. I order for their immediate release unless they are otherwise lawfully held."

But Justice H. A. Omondi, J in **ROLEX KIPNGETICH LABOSO –VS- REPUBLIC (2008) e KLR,** has recognized the tenents of offering an explanation of what may have occasioned the delay in arraigning an accused within reasonable time, as provided by law. She said;

"Of course, the very same Constitution recognizes that there may be a reasonable explanation as to the cause of delay in taking an individual to court within the twenty four hours for a no offence such as the one applicant faces – indeed an explanation is deemed to be an exception to the general rule of section 72(3) (b) and to borrow the words of Ojwang J, in High Court Criminal -- Application 860 of 2007 Fan XI and others versus the Attorney General – such an explanation:-

a. must carry elements of objective reasoning.

b. Must make sense in the light of the special circumstances of the case.

c. Must be made bona fide and not merely as a technicality in and of the prosecution case.

d. Should show such operational difficulty as may have prevented..... arraignment of the suspect in court.

e. Show that the arresting authority did exercise genuine professional care in conducting the investigations preceding the arrest.

In the present instance there isn't a scintilla of any reason for the delay and it does not help the State Counsel to seek refuge under Section 72(6) without first addressing the reasons for the delay."

This explanation has been upheld by the Court of Appeal in the case of **DOMINIC MUTIE MWALIMU –VS- REPUBLIC (2008) e KLR** when S.E.O Bosire, E. M. Githinji & J. A. Aluoch, JJA held as follows:-

"The section further provides that where such a person is not taken to court within either the twenty-four hours for non-capital offence or fourteen days for capital offence as stipulated by law, then the burden of proving that such a person has been brought to court as soon as is reasonably practicable rests on the person who alleges that the Constitution has been complied with. Thus, where an accused person charged with a non-capital offence brought before the court after twenty-four hours or after fourteen days where he is charged with a capital offence complains that the provisions of the Constitution has not been complied with, the prosecution can still prove that he was brought to court as soon as is reasonably practicable notwithstanding, that he was not brought to court within the time stipulated by the Constitution. In our view, the mere fact that an accused person is brought to court either after the twenty-four hours or the fourteen days, as the case may be, stipulated in the Constitution does not ipso facto prove a breach of the Constitution. The wording of section 72 (3) above is in our view clear that each case has to be considered on the basis of its peculiar facts and circumstances. In deciding whether there has been a breach of the above provision the Court must act on evidence. Additionally, a careful reading of section 84 (1) of the Constitution clearly suggests that there has to be an allegation of breach before the Court can be called upon to make a determination of the issue which allegation has to be raised within the earliest opportunity".

In my view Article 49 (1) (f) (i) and (ii) is framed in mandatory terms. Where the delay in arraigning an accused person in court within the provided period is beyond circumstances not under the control of those whose custody the accused is, such explanation as may have caused the delay

must be explained to court in the first instance the accused appears in court. It is also the duty of the accused to seek that explanation by bringing to the attention of the court that he had been incarcerated for a period longer than is provided in law. However, the burden of giving the explanation squarely lies with the person under whose custody the accused was.

In the instant case, the Appellant did not bring to the attention of the court that he had been incarcerated in police custody for a period longer than was provided by the old Constitution. It was therefore difficult for the trial court to call for any explanation from the police or prosecution for reasons that may have occasioned the delay in arraigning him in court within the required time. He has brought up the issue too late in the day, and unless combined by other fators that this appeal must succeed, the mere fact that he was kept in custody for more than the required period would not vitiate any strong evidence leveled against him by the prosecution. That is to say that this court cannot hold the charges and subsequent proceedings in the lower court a nullity merely on ground that the Appellant remained in police custody for a period more that the law provided.

But this is not to say that he has no recourse. If indeed he thinks his constitutional rights were violated for the reasons above, he is at liberty to file civil proceedings against the individual who violated his rights for recovery of damages (if any), arising from such unlawful incaceration.

I will consider grounds of appeal number 2 and 3 simultaneously which are to the effect that the trial court failed to evaluate the inconsistencies and contradictions raised by prosecution witnesses and the fact that the Appellant was convicted based on mere suspicion.

He submitted that, under the charge sheet, the offence is said to have been committed on 13th March, 2008 while PW1, the mother of the child testified that it was committed on 12th March, 2008. He also pokes holes on evidence relating to the number of days the complainant was admitted in hospital. That PW1 stated she was admitted for three days whereas the doctor who examined her as per P3 form said she was admitted for four days. He also submitted that there are also discrepancies as to the name of the complainant. And finally that there are contradictions on the dates the Judgment was delivered.

Let me first address myself as to the latter discrepancy. I note that the trial magistrate indicated two dates on the same date he delivered the Judgments; these are 18th September, 2008 and 18th August, 2009. The latter date is at the bottom of the notes recorded on the said date. In my view, this must have been an oversight on the part of the trial court, which does not negate the fact that a Judgment was delivered.

As to the period the complainant was admitted in hospital, is not and cannot be an issue that vitiates the fact that she was admitted at Moi Teaching & Referral Hospital for some days for treatment arising from defilement.

As to the contradictions in the names of the complainant, PW1, her mother testified as follows and as recorded in the typed proceedings:-

"I left P.C my child sleeping in the house with the accused who is my man friend who is the accused person. The child was K. K In the evening found the child mourning……"

But in hand written proceedings the same paragraph reads:-

"I left P. C my child sleeping in the house with the accused who is my man friend who is the accused person. The child was with K.K. In the evening found the child mourning ……

Effectively it is clear that the word "with" before the name 'K. K' was omitted when the proceedings were being typed. In any event the P3 form produced as P. Exhibit 1 shows it is P. C a

child of three years who was treated after a defilement ordeal. PW3, Doctor Ezekiel Imbenzi who examined the complainant and filled the P3 form was categorical that his patient was P. C, a child of three (3) years.

With respect to the date the offence was committed I note that the drafter of the charge sheet must have made the error of recording that the offence was committed on 13th March, 2008 as opposed to 12th March, 2008. According to PW1 the child was defiled on 12th March, 2008. PW2 the investigating officer also stated that the report of the offence was made on 12th March, 2008 on the same date it was committed. The P3 form too indicates that the complainant was defiled on 12th March, 2008.

What the prosecution failed to do was to seize the opportunity, after evidence was adduced supporting the date the offence was committed to amend the charge sheet so as to reflect the correct date.

But do these discrepancies vitiate the prosecution's evidence as to render a fatal blow to a conviction? Section 382 of the Criminal Procedure Codes provides that:-

"Subject to the provisions hereinbefore contained, no finding,sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice.

Provided that in determinating whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

Pursuant to this law, the minor discrepancies noted above have not in any way occasioned prejudice or injustice to the Appellant and I disregard them.

In related minor discrepancies the Court of Appeal held in **IBRAHIM KIGAME AGEVI & ANOTHER –VS- REPUBLIC (2011) e KLR** cited by court of concurrent jurisdiction in **MARK TOO KENG –VS- REPUBLIC, CRIMINAL APPEAL NO. 141 OF 2011** – Court of Appeal sitting in Eldoret, thus:-

"We do not attach any importance to those differences as in any event, the appellants suffered no prejudice as a result of such differences. Whether the case was having a different number in the charge from that in the proceedings, the charges that were read to the appellants and to which they plead and upon which they were tried remained the same. Again, whether they were taken to court as per the date in the charge sheet or the date in the proceedings did not matter. What mattered was that they were taken to court and their trial proceeded as is recorded in the proceedings. These complaints were frivolous and ought not to have been raised" (See Mark Too Keng vs. Republic, CriminalAppeal No. 141 of 2011, Court of Appeal sitting at Eldoret unreported, See also Ibrahim Kigame Agevi & Another VS. Republic [2011]e KLR)

Under ground of appeal No. 3 he stated that he was convicted based on mere suspicion. In total the prosecution called three witnesses. PW1 P.C. S testified as the mother of the complainant. She testified that on the fateful day she left her baby sleeping with the accused in the house. That in the evening the child complained to her that "**B. S dunga mimi kwa mahali ya makojoo**" which directly translated into English means "**B. S pierced me in my private parts**". She said, that at the time, the child was mourning. That when she took the child to [Particulars withheld] Hospital she was admitted until the 19th March, 2008. She stated that she had lived with the accused for about

six (6) months.

On cross-examination by the accused, she confirmed that she left the child with the accused who was to remain in the house as he was not working on that day. She further stated that the accused, after committing the offence left the house.

PW2, the investigating officer confirmed that the report on defilement was made on 12th March, 2008 at [Particulars withheld] Station and on being satisfied that the accused had committed the offence, caused him to be charged accordingly.

PW3, Dr. Ezekiel Imbenzi of [Particulars withheld] Hospital who produced the complainant's P3 form said that upon examining the complainant, he confirmed that the child had suffered vaginal tears and blood was oozing from the vagina, the vaginal orifice was dilited for the age of the child and there was tear of the hymen and posterior fourchette. Further, the P3 form which he produced as an exhibit entirely corroborated his testimony and further revealed that the complainant had been severally defiled and the act was an on-going molestation. He made a conclusion that the child was a victim of chronic child abuse.

The testimonies of the three witnesses was unchallenged on cross-examination.

The Appellant gave an unsworn statement of defence in which he confirmed that the child was his girlfriend's child. He stated that he was in the house on 13th March, 2008 and he left the house to look for menial job and returned at about 3.00 p.m. That that is the time the mother of the child informed her that the child had been defiled. That he was later arrested on allegations that he had defiled the child.

The defence did not in any way rebut the strong prosecution evidence. I have already held that the offence was omitted on 12th March, 2008 and not 13th March, 2008. The Appellant did not attempt to give an account of how he spent the day on 12th March, 2008. Evidence on record clearly leaves no doubt that it was him who had been left with the custody of the child on the fateful day. And when he committed the offence, he fled from the house leaving the little girl alone. PW1 had not entrusted any other person with the care of the child. It is therefore, without a shred of doubts that is the Appellant and no other person who defiled the little girl. He was not therefore charged on account of mere suspicion but on the basis of concrete evidence.

With regard to the fourth ground of appeal, the Appellant stated that the Judgment of the trial court manifested bias and prejudice against him. It was his submission that, from the onset, the trial court had made up its made to convict him. He referred this court to page 18 lines 1 – 4 of the record of appeal while submitting that the Judgment of the trial court was a duplicate of another Judgment.

Page 18 lines 1 to 4 of the record of appeal comprise the sentence of the trial court in the following words;

"The Sexual Offences Act provides for a sentence of life imprisonment. The hands of the court are held by the law as much as I may be sympathetic. I have no option but to sentence the accused to life imprisonment."

The above paragraph does not make any reference to another Judgment as alluded by the Appellant.

A scrutiny of the proceedings, clearly shows that the Appellant did not express any discomfort with the trial Magistrate handling his case. In this regard he would have requested him to recuse himself form handling the trial. This should be done so that justice should be seen to be done – See case of **JASHIR SIGH RAI & 3 OTHERS –VS- TARLOCHAN SIGN RAI & 4 OTHERS**

(2013) e KLR, the learned Judge of the Supreme Court, Justice Ibrahim said;

"Lord Justice Edmund Davis in Metropolitan Properties Co. (FGC) Ltd. Vs Lannon [1969] 1 QB 577 stated that disqualification was imperative even in the absence of a real likelihood of bias if a reasonable man would reasonably suspect bias. Acker LJ in R vs Liverpool City Justices, ex parte Topping [1983] 1 WLR 119 elaborated on the test applicable. The Court has to address its mind to the question as to whether a reasonable and fair-minded man sitting in Court and knowing all the relevant facts would have a reasonable suspicion that a fair trial for the applicant was not possible. If the answer is in the affirmative, disqualification will be inevitable.

In an article by a writer, Holly Stout (11 KBW) on the subject of "Bias", the author states:

"… The test to be applied by a judge who recognizes a possible apparent bias is thus a "double real possibility" test; the question he/she must ask him/herself is whether or not there is a real possibility that fair-minded and informed observer might think that there was a real possibility of bias." (referred to PORTER –V- MAGILL (2002) 2 AC 357)(See Ibrahim JSC, ibid)

The learned judge further observed as follows;

In R vs Gough[1993] 2 All E. R 724, [1993] AC 646 Lord Goff of Chieveley observed that:

"The nature of the interest is such that public confidence in the administration of justice requires that the judge must withdraw from the case or, if he fails to disclose his interest and sits in judgment upon it, the decision cannot stand. It is no answer for the judge to say that he is in fact impartial and that he will abide by his judicial oath. The purpose of the disqualification is to preservethe administration of justice from any suspicion of the impartiality." (See Ibrahim JSC., ibid)

In the case of ***Jashir Sigh Rai & 3 Others vs. Tarlochan Sigh Rai & 4Others [2013]eKLR*** the learned judges of the Supreme Court, P'K Tunoi, M.K Ibrahim, J.B Ojwang S. Wanjala and N.S Ndung'u JSC, opined as follows;

"[11] In an American case, Perry v. Schwarzenegger, 671 F. 3d 1052 (9th Circ. February 7, 2012) it was held that the test for establishing a Judge's impartiality is the perception of a reasonable person, this being a "well-informed, thoughtful observer who understands all the facts", and who has "examined the record and the law"; and thus, "unsubstantiated suspicion of personal bias or prejudice" will not suffice.

[12] Such a broad test is adopted too in South African Defence Force and Others v. Monnig and Others (1992) (3) SA 482 (A), p.491:

"The recusal right is derived from one of a number of rules of natural justice designed to ensure that a person accused before a court of law should have a fair trial."

In this regard, I am convinced in my mind that the Appellant did not and has not, in any way demonstrated existence of any real bias that in the mind of a reasonable man might create apprehension that he did not receive a fair trial. I accordingly dismiss the fourth ground of appeal.

Finally, under the fifth ground of appeal, the Appellant submitted that the trial magistrate did not weigh the strength of his defence.

Elsewhere in this Judgment, I have analyzed the words of the unsworn defence the Appellant gave. In considering what the Appellant offered in Judgment, the learned magistrate said as follows

in his Judgment:-

"He denied the offence. I have carefully considered the evidence given by the prosecution. The witnesses appeared to be very truthful. The accused even stated he left PW1 his house and went away. He flatly denied charge. I am satisfied that the prosecution proved their case beyond reasonable doubt on count 1 ….."

The above observation by the trial court is a contrast of the Appellant's assertion that the court did not weigh his defence. The fact is that he arrived at a finding that the defence offered by the Appellant would not bail him out given the strong prosecution's case. I am of a similar view and I equally dismiss the fifth ground of appeal.

I do therefore find that the prosecution proved its case beyond all reasonable doubts with regard to the main charge of defilement.

As for sentence, section 8 (2) of the Sexual Offences Act provides that "**a person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.**"

The provision places the minimum sentence under S.8(2) of the Sexual Offences Act to life imprisonment.

PW1 identified the minors immunization card which placed her date of birth at 5.4.2005. The said card was produced as P. Exhibit 2 by PW2. Hence at the time the minor was defiled she was only three years, which placed her age to below eleven years, thus necessitating the charge being drawn under S. 8 (2) of the Sexual Offences Act.

May I however point out that it was imperative upon the trial court to make an observation as to why it felt the complainant (minor) could not testify. I opine she was guided by the tender age of the minor in forming an opinion that she was not in a position to express herself. This information needed be borne on record. Its absence notwithstanding, it is my view it did not vitiate the strong prosecution's evidence. And even if I were to order a retrial based on this omission, it is likely not to add any evidential value, as in any event, the minor is unlikely to be called as a prosecution witness and the evidence already on record has sufficiently proved the prosecution's case.

In the result, I dismiss the appeal, uphold both the conviction and sentence and order that the Appellant continues to serve the jail term unless he is otherwise lawfully set free.

DATED and **DELIVERED** at **ELDORET** this 15th day of July, 2013.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:-

Appellant in person

Mr. Munene for the State/Respondent