



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 165 OF 2012

STEPHEN WACHIRA MWANGI APPELLANT

VERSUS

REPUBLICRESPONDENT

**(APPEAL ARISING FROM THE JUDGMENT OF THE SENIOR RESIDENT MAGISTRATE'S
COURT AT BARICHO (J.N. MWANIKI – P.M) IN CRIMINAL CASE NO. 24 OF 2011
DELIVERED ON 27TH SEPTEMBER 2011)**

JUDGMENT

The appellant herein was convicted after a full trial by J.N. MWANIKI Senior Resident Magistrate at Baricho Court with the offence of defiling a child with mental disabilities contrary to **Section 7 of the Sexual Offences Act**. The particulars were that on 26th December 2010 in Kirinyaga West District within Central Province, he intentionally caused his penis to penetrate the vagina of JWN a child aged 17 years with mental disabilities. The magistrate imposed a prison sentence of ten (10) years hence this appeal in which the appellant raises the following grounds:-

1. ***That the trial magistrate failed to consider that he was kept in custody for more than 24 hours contrary to Article 49 (F) of the Constitution since he was arrested on 26th December 2010 and taken to Court on 5th January 2011.***
2. ***That the magistrate failed to consider that he was not taken to hospital to be examined***
3. ***That the charge was defective since the complainant's mother said she was 18 years old while the father said she was 19 years old***
4. ***That he magistrate erred in law and in fact by relying on single evidence and also hearsay evidence***
5. ***That the learned magistrate erred in law and in fact by failing to consider that he was not issued with some statements by the prosecution such as the P3 Form and also that his defence was not considered.***

The State through Ms Kambanga State Counsel supported both the conviction and sentence.

This is a first appeal and in **OKENO VS REPUBLIC 1972 E.A. 32**, the duty of the Court on a first appeal was stated as follows:-

“ An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (PANDYA VS REPUBLIC 1957 E.A. 336) and to the appellate Court's own decision on the evidence. The first appellant Court must itself weigh conflicting evidence and draw its own conclusion

(SHANTILAL M. RUWALA VS REPUBLIC 1957 E.A 570). It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusion; it will make it's own findings and draw it's own conclusions. Only then can it decide whether the magistrate's findings should be supported. In so doing, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses – see PETERS VS SUNDAY POST 1958 E.A 424”

I am guided by the above principles in this appeal.

The case in the lower Court hinged primarily on the evidence of the complainant JWN who gave her age as 18 years when she testified on oath on 12th May 2011 after the magistrate had put some questions to her. Her mother JW (PW1) had earlier confirmed that the complainant was mentally retarded. The complainant narrated how on 26th December 2010 at 4. p.m. the appellant found her at Kiandai market, took her to his home in Kianyaga where he proceeded to remove his clothes and raped her the whole night and next morning, he told her to wash her face and go home. On her way home, she passed through the pastor's house and the pastor called her father to whom she narrated the previous night's events. Her mother later joined them. She described the appellant's house as two bedroom made of mud and iron sheets and added that the appellant was alone.

Pastor S W (PW3) confirmed that indeed on 27th December 2010, the complainant went to her home and informed her that a man whom she knew had tricked her and taken her to his home in Kiandai where he gave her food and later had sexual intercourse with her. PW3 called the complainant's parents and she narrated the incident to them.

Complainant's mother JW (PW1) confirmed that on 26th December 2010, the complainant left home for Kiandai market but did not return home and the following day, Pastor S called her saying the complainant was at her home and when she went there, the complainant informed her that the appellant had taken her to his house. Similar evidence was given by complainant's father JMG (PW2).

Complainant was examined by DAVID WAHOME (PW4) a Clinical officer at Baricho Health Centre who told the Court that complainant had abrasions on the inner vagina which had brown discharge and he concluded that she had had penetrative sexual intercourse and prepared the P3 accordingly. CPL MUTAI (PW6) informed the Court that he received a report of this incident on 27th December 2010 which he recorded and issued the complainant with a P3 Form and later the appellant was arrested and charged.

The appellant gave an un-sworn statement in his defence in which he denied knowing the complainant or committing the offence. He called his wife G N K (DW2) as a witness and she said she recalled on 26th December 2010, she sent her children to their grandmother's home and went to Kiandai market and returned home at 5 p.m. and on 5th January 2011, the complainant's father went to their home and arrested appellant.

I have re-examined the evidence as I should so as to draw my own conclusions.

There is n doubt that the complainant is mentally retarded. When she testified, she said her age was 18 years and her mother said the same although her father put the age at 19 years. The Clinical officer who filed her P3 Form on 28th December 2010 put her age at 17 years. The appellant has taken issue with those contradictions to state that they render the charge defective. I think that ground of appeal has no basis because in an offence under Section 7 of the Sexual Offences Act, the age of the complainant is not an issue. On the mental condition of the complainant, **Section 125 (2) of the Evidence Act** states as follows:-

“ A mentally disordered person or a lunatic is not incompetent to testify unless he is prevented by his condition from understanding the questions put to him and giving rational answers to them”

It is clear from the record that before the complainant testified on 12th May 2011, the trial magistrate, being alive to complainant's mental condition, decided to perform what amounted to a voire dire examination before allowing her to testify. Of course the complainant was not a child of tender years but the magistrate was being cautious and I think he did the right thing. It is better to err on the side of caution. The complainant was the only witness to the defilement and the issue therefore is whether her evidence alone was sufficient to warrant a conviction.

The complainant's age has been put at between 17 years to 19 years. That means that she was not at that time a child of tender years whose evidence would require corroboration. A child of tender years is, under the Children's Act, one who is under 10 years. The complainant was clearly not such a child and the trial Court was entitled either to believe or disbelieve her testimony. In believing the complainant's testimony, the trial Court stated as follows:-

“ The Court has carefully considered the charges herein, the evidence on record and the exhibits produced. From the evidence on record, I have no doubt the complainant did engage in sexual intercourse at around the time the offence was allegedly committed. She said the incidence was on the night of 26th December 2010 and was with the accused person. She narrated in detail the events that led to her meeting with the accused person and the subsequent events. Complainant was said to be mentally unstable. The psychiatric report produced in Court (P Exhibit 4) stated that she had no mental illness but her condition bordered mental retardation. The opinion of the psychiatrist was that she was an incompetent witness. However, the Court did probe the complainant and found that she did retain sufficient mental agility to recognize one thing and distinguish from another. She was possessed of sufficient intelligent (sic) and did understand the nature of an oath and importance of speaking the truth”

The record shows that notwithstanding the complainant's mental condition, whatever it was, she was able to communicate in Court and gave a vivid account of how the appellant, whom she said she knew physically and by name, met her at Kiandai market, took her home, proceeded to rape her and the following morning, told her to wash her face and go home. The complainant was also able to respond to questions put on her by the appellate in cross-examination and insisted that the appellant took her to his house in the absence of his wife and raped her. Clearly therefore, in terms of Section 125 (2) of the Evidence Act, the complainant's condition did not prevent her ***“from understanding the questions put to (her) and giving rational answers to them”!*** The magistrate's finding that she was intelligent and spoke the truth must be respected because he had the advantage of observing her during the trial.

The appellant denied all that. There is evidence, however, that on the morning after the incident, the complainant reported it to the Pastor (PW3) and her parents PW1 and PW2. She named the appellant as the person who had defiled her and medical evidence confirmed that she had had penetrative sexual intercourse. There was no reason why the complainant would fabricate such a lie against the appellant and if there was, none was brought to the trial Court's attention and the magistrate was entitled to reject the appellant's defence as he did. I see no reason to fault him on that. The appellant's wife only said how she sent the children to their grandmother then went home. It is obvious that she accompanied the children to the grandmother as well because appellant was at home alone when complainant spent the night there. There is cogent evidence from complainant's mother that infact complainant did not spend the night at home and she could only have spent it at appellant's home where she was raped and she told both the Pastor and her parents first thing the following morning. I too see no merit in appellant's defence. It was clearly for rejection.

The appellant has complained that he was held in custody well beyond the period allowed by the Constitution. Article 49 (1) (f) requires that a person arrested be taken to Court not later than twenty four hours and if the twenty four hours end outside the ordinary Court hours, then by the end of the next Court day. In his grounds of appeal, he say that he was arrested on 26th December 2010 and taken to Court on 5th January 2011. The charge sheet, however, shows that he was arrested on 10th January 2011 and taken to Court on 12th January 2011. It is not clear what day 10th January 2011 was as I have been unable to access the calendar for the year 2011. But if for instance it was a Friday, then his complaint would

be un-justified. I do not know where the complainant got the dates 26th December 2010 and 5th January 2011 because the record of the proceedings show he was charged on 12th January 2011. Therefore, the dates on the charge sheet must be the correct dates. However, even assuming that he was taken to Court after twenty four hours, the Court of Appeal has now taken the position that even where there is a violation of an accused person's Constitution rights, the remedy is not to declare the proceedings a nullity or to acquit him. Rather, the remedy is an action in a civil suit for damages – **JULIUS KAMAU MBUGUA VS REPUBLIC C.A CRIMINAL APPEAL NO. 50 of 2008**. In the circumstances, that ground of appeal has no merit.

The appellant has also argued that he was not taken for medical examination neither was he given the PW2 (he must have meant PW3 form) or statement of PW3. There was no evidence that the complainant was infected with any sexually transmitted disease so there would have been no need to examine the appellant and so that was not fatal to the prosecution case. Appellant also says he was not issued with P3 Form. However, the Clinical officer who signed it testified in his presence and no questions were put to him and the same is Exhibit 1 in the record.

From the evidence on record, the conviction of the appellant was well founded and I see no reason to interfere with that finding.

On sentence, **Section 7 of the Sexual Offences Act** provides for a minimum sentence of 10 years and that sentence was therefore lawful.

The up-shot of the above is that the appeal against conviction and sentence is hereby dismissed.

B.N. OLAO

JUDGE

23RD OCTOBER, 2013

23/10/2013

Coram

B.N. Olao – Judge

CC – Muriithi

Appellant – present

Mr. Sitati State Counsel – present

Language – English/Kiswahili

COURT: Judgment delivered this 23rd day of October 2013 in open Court.

Mr. Sitati State Counsel present

Mr. Muriithi Court clerk present

Appellant present in person.

Right of appeal explained.

B.N. OLAO

JUDGE

23RD OCTOBER, 2013