



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 213 OF 2010

JULIUS MAINA BARONGOAPPLICANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 1402 of 2009 in the Chief Magistrate's Court at Kibera – Mr. Karanja (RM) on 31st March 2010)

JUDGMENT

1. The appellant **Julius Maina Barongo**, was charged with the offence of defilement of a girl Contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act 3 of 2006**.

2. In the alternative, the appellant was charged with performing an indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. At the close of the trial the learned magistrate convicted the appellant on the main offence and sentenced him to serve 11 years imprisonment.

3. The appellant filed an appeal in which he advanced nine grounds of appeal that may be compressed as follows:

i) The prosecution relied on a single witness whose evidence was mere suspicion, speculation and conjecture, and did not prove their case against the applicant to the required standard.

ii) The medical evidence exonerated the appellant.

iii) Vital witnesses and documents were not availed in evidence.

iv) The prosecution evidence was contradictory and uncorroborated.

v) The learned trial magistrate misperceived crucial issues thus arriving at wrong conclusions.

vi) That the defence statement was disregarded.

vii) The sentence was manifestly harsh and excessive.

4. On the first two grounds, Miss Wangele the learned state counsel responded that the prosecution proved their case against the applicant. That **PW1** who was a nine year old minor gave testimony which the trial court accepted as consistent and truthful. That her evidence was corroborated by that of **PW4** a neighbour and two medical witnesses, whose evidence proved the alternative offence of indecent, act with a female.

5. On grounds No. 4 and No. 5 Miss Wan'gele responded that the evidence of the two medical witnesses was sufficient corroboration. Further that the error which appeared in the charge sheet giving the age of the child as 9 years in the main charge and 8 years in the alternative charge respectively, was minor and could be cured under **Section 382 Criminal Procedure Code**. That it did not prejudice the appellant in any way. I agree with the learned counsel Miss Wan'gele. **Section 382** of the **Criminal Procedure Code** provides as follows:

“Subject to the provisions hereinbefore contained, no finding, 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 determining 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.”

It is my opinion that no prejudice was occasioned to the appellant. Both **PW1**, the Complainant, **PW2** her mother and **PW5** the Doctor gave her age as 9 years old. She was therefore a minor at the time of the offence.

On the 6th ground, Miss Wan’gele submitted that indeed the trial court considered the defence evidence and observed that it was lies.

6. I have re-evaluated the evidence on record to draw my own conclusions. In so doing I bore in mind that I did not have the advantage of observing the witnesses as they testified.

7. I have perused the record and noted that according to the testimony of **PW1**, the appellant was known to her before the sexual assault. She knew him by name as Maina and that he was a neighbour, who worked as a watchman but also worked as a clobber in his spare time. He carried out his shoe mending business outside the minor’s home. This evidence was corroborated by **PW2** the minor’s mother, and **PW4** a neighbour.

8. According to the record the minor was alone when she was assaulted, and it would therefore be of no use to the case to call as witnesses, other minors who had been with her earlier but who did not know what befell her later. She told the court that the appellant put her on a mattress on the floor, lowered her panties and removed his own clothes. He tried without success to force his penis into her vagina, and thereafter resorted to the use of his fingers. The minor testified that she felt pain, but that she did not report to her mother what had transpired, because she feared that her mother would beat her, and further that the appellant had warned her not to tell anyone about the incident.

9. Two medical witnesses Dr. Kamau and Dr. Muhombe testified in support of the prosecution case. Both found that the minor did not have any lacerations on her genitalia and that her hymen was intact. However, Dr. Muhombe who examined her a day after the assault noted numerous red blood cells

in her urine and formed the opinion that non-penetrative sexual assault had occurred. This evidence therefore corroborated the minor's testimony that the appellant's penetration was not complete and that he inserted his fingers into her genitals.

10. The learned trial magistrate observed this in relation to the minor's testimony in his judgment.

“Her evidence was consistent even under cross-examination and I found her even as a 9 year old to be truthful and believable. The accused in his defence said that the girl was told what to say by the mother. From an observation of the girl in her testimony, I do not think that could be true. Her evidence was too consistent and detailed to be contrived. Also consequent events from her stomach ache to how she finally told PW4 what happened indicates that the incident did indeed happen.”

11. In his written submission the appellant stated that the neighbours and the other minors who were with the minor should have been called to testify. To this I state that the prosecution are at liberty to call witnesses who are material to their case not merely everyone who was in the vicinity. He also urged that if there was any act which was committed it was attempted defilement, and he should therefore not have been convicted on the alternative charge.

12. On his defence the appellant said that he was away at work at the time of the said offence. That he worked as a watchman at Puai Security. He also stated that the charges against him were fabricated by **PW2** with whom he had had a secret love affair which he ended, when he found another man in **PW2's** house. That out of anger **PW2** accused him of stealing money from his house and also fabricated these charges.

13. It is however evident from the record that the learned trial magistrate did consider and dismiss the defence testimony. The learned trial magistrate had this to state:

“The accused's claim that he had a relationship with the girl's mother P.A is unsupported and unbelievable. From my observation of the mother P.A and the accused when he was putting this claim to her, I wholly believe it was a consistent story, and there is no evidence of malice on the part of PW2.”

14. I have anxiously re-evaluated and analysed the evidence on record and I am not persuaded that the learned trial magistrate misapprehended any crucial issues in the evidence, nor that he arrived at the wrong conclusion in his analysis. I find no material contradictions in the prosecution case and I also find that the conviction under **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006** was fitting.

15. The sentence of 11 years imprisonment is neither harsh nor excessive in view of the minimum sentence of 10 years imprisonment provided by the law.

16. For the foregoing reasons the appellant's appeal must fail. I uphold both conviction and sentence and dismiss the appeal.

SIGNED DATED and **DELIVERED** in open court this **26th** day of **April 2012**.

L. A. ACHODE

JUDGE