



JOHN KIVUVA KIOKO.....APPELLANT

VS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant was tried before the Resident Magistrate Garsen for the offence of Defilement of a girl contrary to section 8 (3) of the Sexual Offences Act, it being alleged that on 15th October, 2009 in G village of Tana Delta District he defiled C.W a girl aged 13 years. He was convicted and sentenced to 30 years imprisonment.

2. His 8 amended grounds of appeal to this court can be summarised as follows;-

1. That the charge sheet was defective.

2. That the trial magistrate being a Resident Magistrate had no jurisdiction to try the offence.

3. That the appellant's constitutional rights were violated because he was arraigned in court beyond the prescribed period.

4. That the substance of the evidence used to support the conviction was wanting.

3. The appellant gave lengthy written submissions in support of his grounds. The appeal was opposed by the state. Mr Naulikha restated the prosecution evidence in the trial and further submitted that the appellant's objections to the charge sheet and evidence on record have no basis.

4. As a first court of appeal, I am under obligations to consider afresh and re-evaluate the evidence of the trial. **(OKENO VS R 1972 EA 32)** The prosecution evidence was as follows. CW, the complainant (Pw 1) was a 13 year old school going girl. She resides with her parents at G K during the material period. On 15/10/09 her parents left home to attend a funeral. It was 8.00pm. CW was left at home with her siblings. The appellant is known in the neighbourhood by his alias Wamutongoi Mwaa. He was a regular visitor at CW's home where palm wine was sold. On the material date the appellant was at the home with other revellers.

5. CW and her siblings eventually retired to bed. Later though she was lured to open the door by a knock by the appellant who asked first for a match and then water. He then held CW's hand and pulled her outside to a bed at the veranda of her house where he had intercourse with her. CW went into the house and informed her siblings but the appellant slept on the veranda until the next morning. He was found there by CW's father WK(Pw 3), when he returned home at 7.00am the next day.

6. When CW's mother EMW(Pw 2) arrived CW told her about the events of the night. She informed Pw 3 and a search party went to the home of James Mayiwoo(Pw 4) where the appellant worked. He was confronted and escorted to the police station as the complainant was referred for treatment at Kipini Health Centre. She was examined by Buya Said(Pw 5) who confirmed partial penetration.

7. Upon being placed on his defence, the appellant gave a short statement to the effect that he had differences with the complainant's father (Pw 3) and that he had threatened to teach him a lesson. He dismissed the charges as trumped up.

8. I have looked through the evidence of the prosecution at the trial. It was consistent and I cannot see any material contradiction as suggested by the appellant, and secondly, it is not clear which other witnesses should have been called. As submitted by Mr Naulikha there is no legal requirement that any fact in dispute in that case required a certain number of evidence in proof(see section 143 of the Evidence Act).

9. On the voire dire examination of Pw 1, I do agree that it was not carried out in a question – and – answer format as required. But the answers recorded show that the trial magistrate understood his duty under section 19 of the oaths and statutory declaration act. The appellant has not been prejudiced by the format used in the voire dire examination. The trial magistrate had the opportunity to see and hear Pw 1 and the other witness. He was impressed with their evidence and believed them. He was entitled to convict on the evidence of Pw 1 alone if he believed that she was telling the truth. (See section 124 Evidence Act).

10. In this case however, the evidence of Pw 1 was heavily corroborated by her father. Pw 3(he found the appellant asleep on the veranda of his house after the offence); by Pw 2(she noted oozing on pw1's private parts); by Pw 4(the appellant admitted the offence and blamed the complainant for seducing him); by Pw 5(he noted white substance "suggestive of seminal fluid" on the left labia of the complainant).

11. The evidence of these witnesses was not shaken by cross-examination and neither did the appellant canvass with them the allegation that the charges were trumped because he had a land dispute with Pw 3. Notably, did not put this allegation to Pw 3 or even the local headman. If the dispute involved the appellant and Pw 3, the other witnesses would have no reason to frame him as alleged.

12. These allegations coming in his defence appear to be an afterthought and the trial magistrate was entitled to disregard them. Indeed earlier in the trial the appellant seemed to be rooting for the defence that the complainant, a minor consented to have sex with him. The trial magistrate reviewed the evidence with great care and cited appropriate legal authorities to back his findings. I agree with his conclusion that the prosecution case was watertight. It cannot be accurate therefore for the appellant to allege that the case was not investigated.

13. And having perused the charge sheet, I am satisfied that it meets the requirements of section 134 Criminal Procedure Code in that it contains sufficient information for purposes of the trial. The record shows that the appellant understood the charge facing him and notwithstanding the fact that the statement of the offence did not include subsection 8 (1) of the Sexual Offences Act. That omission does not render the charge defective but it is correct that the offence should have been laid as created by section "8(1) as read with section 8(3) of the Sexual Offences act." However, there is no reason to believe that this omission occasioned any prejudice to appellant.

14. Similarly, if the appellant's rights were violated by delayed arraignment in court, his remedy lies in a suit for damages(see **Julius Kamau Mbugua VsR (2010) e KLR**).

15. Finally, the sentence imposed by the trial magistrate was valid as the trial magistrate though holding the rank of Resident Magistrate is duly empowered under section 7(2) of the Criminal Procedure Code.

In conclusion, I have found no merit in the appeal and dismiss it in its entirety. I uphold both conviction and sentence.

Delivered and signed at Malindi this 20th day of June, 2012 in the presence of Miss Otieno for 2nd accused, Mr. Naulikha for state.

C.W.MEOLI

JUDGE