REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Criminal Appeal 2 of 2008

MWANDIKWA MUSUNZA…..……………………..……..APPELLANT

VERSUS

REPUBLIC………………………………………………..RESPONDENT

(Being an appeal from the original conviction and sentence in Mwingi Resident Magistrate's Court Criminal Case No. 466/2005 by Hon. R. Odenyo, SRM on 17.12.2007)

JUDGMENT

1. The Appellant was tried before the Senior Resident Magistrate's Court at Mwingi with the defiling a girl contrary to Section 145(1) of the Penal Code. The particulars of the charge were that on 16/03/2005 at Mwingi District within the Eastern Province he had carnal knowledge of KM, a girl under the age of 16. He also faced the alternate charge of indecent assault contrary to Section 144(1) of the Penal Code.

2. The Magistrate's Court in Mwingi heard the case and found the Appellant guilty of defilement, sentencing him to 14 years in jail. The Appellant was dissatisfied with the conviction, thus this Appeal.

3. The case against the Appellant was presented by six witnesses. The first witness – PW1 - was the Complainant. She testified that on 16/03/2005 while heading to school in the company of some friends, her lunchbox fell and she remained behind to pick it. The Appellant assaulted her with a stick, dragged her into a bush and defiled her. She reported the incident to her mother at about 2:00pm of the same day. Her mother took her to hospital. On their way back from hospital she saw her assailant and pointed her out to her mother. Her mother asked a school teacher about the assailant, and was told that he was called Kinyasa. She pointed out the Appellant in court as her assailant. She also narrated her defilement ordeal, and stated that she recognized the accused on their fourth visit to the hospital. She stated her age to be 9 years.

4. The Complainant's mother testified as PW2. She stated that on 17/03/2005 she was telephoned to return home because her child was sick. When she returned home, she found the Complainant who had a swelling in her private parts. The child told her that she had been defiled. She went to the Chief who advised her to take the child to Mwingi District Hospital. On one of their trips back from the hospital the Complainant identified the Appellant who was about 20 meters ahead as the man who had assaulted her. She asked about his name and forwarded the name to the Chief. Later on she accompanied the Complainant to the Chief's Office where she positively identified the Appellant as the attacker. She was

not very familiar with the Appellant but had heard his name before. They then went to the spot where the complainant had been defiled but it had been cleared using twigs. She indicated the complainant's age as 9 years.

5. The Chief was called as PW3. He testified that on 19/03/2005 the complainant and her mother went to him to report that the complainant had been defiled by a man she could identify by appearance. He advised them to go to hospital. On 21/03/2005 he got reports that the complainant had seen her assailant and he mobilized local youth to arrest him. He then escorted him to the Police Station the following morning. The Appellant is a man he had known before.

6. PW4 was an Administration Police Officer who assisted the Chief in escorting the Appellant to the Police Station. The last witness (PW5) was Inspector David Muli who received the Appellant in the Police Station and charged him in court. He also produced a P3 form in court during his testimony.

7. The Magistrate found that the Appellant had a case to answer and put him on his defence.

8. In his defence, the Appellant gave an unsworn statement denying the allegations against him, and the testimony by the witnesses as lies. He stated that on the day he supposedly defiled the complainant he was doing his usual duties as a labourer. In the meantime he had heard that a certain girl had been defiled. A few days later (22/03/2005) he walked by the Complainant and her mother near Mutomo Primary School and chatted them briefly. Later that day he was surprisingly arrested by the Chief on suspicion of defiling the complainant and taken to Mwingi Police Station. Some 21 days later he was charged in court. He denied the offence. The Appellant indicated that he would call a witness but when the witness did not show up after an adjournment, the court ruled that the Appellant did not seem to be interested in concluding the case. The Appellant therefore closed his case, and a date for judgment was set.

9. The Court considered the main issue as identification and concluded that since the defilement took place in broad daylight, and was by a man who the Complainant had been seeing, she properly identified him to her mother. The court also found the other witnesses credible since they had no known grudge against the Appellant. His defence was therefore dismissed as unbelievable in light of the evidence adduced by the prosecution. In the judgment, the court found the Appellant guilty of defilement and sentenced him to 14 years in prison.

10.The Appeal is based on 6 grounds, i.e.

a. The learned trial magistrate erred both in law and facts by misdirecting himself by not understanding these was formed offence by parents of the complainant due to a land dispute between me and the parents of the complainant.

b. The learned trial magistrate erred both in law and facts by ignoring my defence my defence witnesses

by not allowing and giving me chance to testify before the court as my defence witnesses.

c. The learned trial magistrate erred both in law and facts by not considering that I was not examined by the doctor to assure that I committed the offence.

d. The learned trial magistrate erred both in law and facts by misunderstanding himself that their was no anything to show blood stained to approve that the offence was committed.

e. The learned trial magistrate erred both in law and facts by not considering the P3 to be produced and to be read by the doctor and because these was an alleged offence, the P3 was read by a police officer instead.

f. The sentence of 14 years imprisonment passed upon me by the sitting magistrate was manifestly harsh, and cruel piting matter in question that it was just an alleged offence.

0. The Appellant expounded these grounds in his written submissions and oral arguments when the appeal came up before me. He insisted that he did not commit the offence, and that he had suffered in jail while the real defiler – a Mr. Mutinda Maundu who supposedly defiled the Complainant then ran to Mombasa had not been arrested.
1. He also pointed out some errors and inconsistencies in the evidence against him. He wondered how no one noticed that the child had been defiled between 7:00am and 2:00pm when she reported the matter. He also wondered how an 8 year old child could go to school after she has been defiled. Additionally, he argued, first, that he had not been medically examined to check if he had committed the offence and secondly, that the P3 form had been produced by a Police Officer rather than the clinical officer/doctor.
2. In his amended supplementary grounds of appeal, he argued that the conviction was based on the sole identification evidence by PW1 which was not corroborated by any other witness; that he was denied his right to fair trial since he was not given the chance to cross-examine the Complainant and that the trial should be declared a nullity because he was detained for 29 days without good cause, which contravenes his constitutional right to be produced in court within 24 hours.
3. I will deal first with the ground that the P3 form in the case was produced by a police officer rather than the person who filled it. There is a long line of authorities from our courts advising prosecutors on the production of P3 forms. My brother Justice Ouko faced a similar dilemma in ***Republic v Julius Karisa Charo* [2005] eKLR** where he dealt with it as follows:

There have been a criticism on the manner documents are generally produced in the courts, particularly, the subordinate courts. I have myself stated in David Jefwa Kalu V R Cr. Appl No. 133/03 that

“Medical evidence if sought to be adduced ought to be so done with propriety and not in such slipshod manner”

Very clear warning was issued by the Court of Appeal in* Sibo Makovo V R *Criminal Appeal NKR No. 39/1996 in the following words

"it appears to us that production of P3 forms in courts is not taken seriously and we wish to impress upon trial magistrates to be careful in admitting P3 forms when the maker is not called".

In that case a P3 form filled by a medical officer was produced by a police constable in respect of a case of rape. Decided cases in this point are unanimously that with regard to the production of expert evidence in court, police officers must not be the people to play that role. The ordinary consideration being the chance for the accused person and his counsel to cross-examine the person called to produce the document. Since, medical (or scientific) evidence normally tends to be conclusive, great care has to be taken to ensure that where the person who conducted the examination is not available the person called in his place is technically qualified in the field in question to provide opinion.

0. The starting point of the law is therefore that the maker of P3 forms should be the ones producing them in court. However, the position in the present case seems a little different. The record indicates that the Prosecution applied to have the Police Officer produce the P3 form, and the Appellant consented to such production. In ***John Otieno Obwar v R 2011 (Kisii HCC Crim. Appeal No. 34B of 2010***) Justice Asike-Makhandia had this to say about production of P3 forms by persons other than their makers:

…as correctly observed by the appellant, the P3 form of the complainant was not produced by the maker as required by law. It was produced by a police officer and not the clinical officer under section 77 of the Evidence Act. Much as section 77 allows for such production, certain precautions have to be met before any other person other than the maker can produce such document in evidence. First the court, must seek the consent of the accused person. If the accused objects to such production, his decision must be respected. Secondly, the court must inform the accused of his right to insist on the presence of the maker. It is only after the accused has intimated to the trial court that he has no objection to the production of the document by another person other than the maker and or does not insist on the presence of the maker, that such document can then be admitted in evidence.

0. In the present case the court record indicates that the prosecution made the application and the Appellant left it to the Court to determine. The Court then allowed the police officer to produce the form. The Appellant cannot therefore base his appeal on the ground that the P3 form was produced by a person other than the maker.
1. The Appellant also claims that he was unjustly denied the opportunity to cross-examine PW1 – the Complainant. Learned Counsel for the State Mr. Mwenda conceded that there was a discrepancy between the typed proceedings which indicated that PW1 had been sworn and the handwritten court record which did not indicate that she had been sworn. He however argued that this was an indication of why there was no *voir dire* examination of the child witness, and more importantly, it was an explanation as to why the Appellant had no right to cross-examine the witness.
2. Trial courts are advised to exercise special caution before admitting evidence from children of tender age. PW1 in this case is clearly a child of tender age since she was 8 years old at the time of trial. There is a long line of authorities to the effect that trial courts have the obligation to conduct a *voir dire* examination to determine if the child witness understands the duty to tell the truth and can be sworn. One such case is ***Yusuf Sabwani Opicho v Republic [2009] eKLR*** where the Court of Appeal referred to, among others, the case of **Nyasani S/o Gichana UR [1958] EA 190**, where the East Africa Court of Appeal stated that:

It is clearly the duty of the court under that section to ascertain, first whether a child tendered as a witness understands the nature of an oath, and if the finding of this question is in the negative, to satisfy itself that the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth.

The Court in ***Yusuf Sabwani*** concluded that:

The child was a vital witness in the trial and the failure bythe court to comply with the procedure in the reception of his evidence vitiates that evidence.

0. In the present case, there is nothing in the Court record to indicate that any such examination was conducted. The record merely reflects that the child gave her testimony in Kikamba. The omission vitiated her evidence. Given that this witness was the only one who testified as to the actual defilement by the Appellant while all the other witnesses merely received reports of the defilement from the child, this omission is fatal to the conviction. There is simply no other direct connection between the crime and the Appellant.
1. The Appellant also argues that even though the Complainant stated that she was with other pupils on her way to school when he allegedly assaulted the Complainant, none of those pupils was called to testify. The law in Kenya is that the prosecution is not bound by law to produce each and every person who might have witnessed the events in question if their testimony will not add much to the case. As such, an omission to call such a witness does not automatically lead to an acquittal. Plurality of witnesses, though often important in adding credibility and credence to the Prosecution case, is not always a virtue in criminal cases. I do not think it would be a sufficient ground of appeal that the two girls were not called to testify. However, their testimony would have been helpful to the Prosecution to shore up its case against the Appellant. Without their testimony, the only evidence placing the Appellant at the scene of the crime is that of PW1. However, as I have found above, PW1 testified without any *voir dire* being done. This vitiated her testimony. Without any other identifying witness, the Prosecution case received a fatal blow.
2. Although my analysis above would be sufficient to dispose of this appeal, I will briefly deal next with the argument that the Appellant's lengthy detention should lead to his acquittal. From the charge sheet, it is evident that he was arrested on 22/03/2005. He first appeared in court on 21/4/2005, some 29 days later. No explanation is offered anywhere by the prosecution for his lengthy detention. This is clearly a violation of Section 72(3) of the Old Constitution which was in place at the time of his arrest and trial. The prosecution should have, at a minimum, attempted an explanation as to why the accused was in detention longer that by law required. Even if the procedural infirmities outlined above were not a factor, I would have found this lengthy delay to be a flagrant violation of the Constitution; one entitling the Appellant to an independent ground of a verdict of acquittal.

22.In reaching this conclusion, I have taken into account the Court of Appeal's decision in ***Julius Kamau Mbugua v R [2010] eKLR*** and its application to the present set of facts. In that case, the Petitioner sought a declaration that the unlawful detention for a period of 107 days and the subsequent criminal charge amounted to a gross violation of his constitutional rights guaranteed by Sections 72 (1) and (3); 77 (1) and 81 (1) of the Old Constitution. The Court of Appeal held that the constitutional violation was not trial-related and, therefore, did not entitle the Petitioner to an automatic acquittal.

23.My reading of this case is that it overruled the inflexible dogmatic rule that held sway until then that any delay in presentment to Court beyond the constitutionally-mandated 24 hours, however trifling, entitled an accused person to an automatic acquittal. As the Court of Appeal pointed out, this often led to disproportionate effects when considering public interest in criminal matters. However, the Court of Appeal did not, in my view, intend to replace that inflexible rule with another inflexible and dogmatic one that delays in presentment would never be sufficient to entitle an accused person to an acquittal. Rather, the Court is not that delays in presenting suspects to Court will now be tolerated by Courts and will have no bearing on the trial. Rather the Court of Appeal simply stated that such a delay will not lead to an automatic acquittal because one can be adequately compensated by way of monetary damages. However, there would be times when such a delay leads to a miscarriage of justice in the trial process itself. In such cases, monetary damages would not suffice to remedy the constitutional violation; only a declaration that

the trial itself is a nullity would. In my view, where there is a deliberate or long, unexplained delay of presentment of an accused person with the conscious intention of suppressing his rights or prejudicing his ability to defend himself, the Courts have an obligation to declare the whole trial a nullity as an instance of the procedural rights to a fair trial enshrined in both the Old and New Constitutions. In my view, such was the case here.

0. In the event, the appeal herein is allowed for all the reasons stated above. The conviction of the Appellant is hereby quashed and the sentence set aside. The Appellant shall be set at liberty forthwith unless otherwise lawfully held.Orders accordingly.

DATED and **DELIVERED** at **MACHAKOS** this **28TH** day of **SEPTEMBER, 2012.**

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J.M. NGUGI

JUDGE