REPUBLIC OF KENYA

High Court at Nakuru

Criminal Appeal 122 of 2011

PETER MWANGI KIGOTHO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No. 3102 of 2010 of the Principal Magistrate's Court at Nyahururu, T. Matheka, P. M.)

JUDGMENT

The Appellant was charged with the principal offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act, 2006 *(No. 3 of 2006),* and the alternative charge of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act.

The prosecution alleged that on the night of 15th–16th July 2010, at Kipipiri District within Central Province, the appellant unlawfully and intentionally caused his genital organ, namely penis to touch the vagina of E M ,a child aged five years.

The evidence led through the mother, PW2, showed that there was a disagreement between the Appellant and PW2 over the relationship between the Appellant's brother, and PW2 *(the Appellant's wife),* because the Appellant's brother had given Appellant's wife (PW2) shs 1,000/= allegedly to keep for him. This suspicion developed into a fight at night, and PW2, ran away, as the Appellant threatened to stab her with an arrow. PW2 stated in her evidence she slept in the home of PW4 – which PW4 confirmed in his evidence.

PW2 evidence showed that as she ran away, she left the child, E M, asleep with the Appellant, until the next day – 10.07.2010, when she went back to the their house to check for the child and found the child had already gone to school. After some objection from the school authorities, PW2 managed to take away the child from the school.

According to her evidence, upon being released to her, the child informed her that her father had done her *"mitugo miuru" (tabia mbaya)* in the morning. That he had sucked her lips and put his fingers inside her private parts, but would not let the mother check her private parts. Instead the mother took the child to Mawingu Dispensary through the Assistant Chief's Office. After having the child examined she reported the matter to the Police at Miharati Police Station where she was sent to Ol Kalou where the child was examined again and given P3 Form which was duly completed.

There was no action thereafter until 29th December 2010 when PW2 was rung and informed that the *"arrested person was the suspect"* who had been arrested earlier and released. PW2 found the Appellant in cells.

When cross-examined by the Appellant, PW2 reiterated her evidence in chief, and also stated that the child had informed her that it was not the first time the Appellant had sexually assaulted the child, that every time she run away the Appellant would remove the child from his mother's house to sleep with it.

PW5, a Clinical Officer at Ol Kalou District Hospital filled and produced the P3 Form for the child aged 5 years. The child had given him a history of sexual assault by her father on several occasions and the last being 15th/16th July 2010. PW3 testified that the child looked frightened and terrified. He observed healing tender bruises on labia majora, the hymen was broken, but was not fresh. Although he received her evidence after 5 days, he concluded that there was penetration because of the bruised labia majora and broken hymen.

PW5 a Corporal from Kipipiri Police Station confirmed receiving a report from PW2 who was accompanied by her 5 year old daughter, and reiterated PW2 information to them on 17th July 2010 about the defilement of the child. He interviewed the child who informed him that the Appellant took her laid her on the bed and removed her pant and that her father put his *"finger"* in her private parts. That is the language she had used. He completed the P3 Form and referred her to Ol Kalou Hospital. He completed his investigations, and then went back for the suspect. He was not at home. He did not get him till 24th December 2010 when the Appellant was brought to the station by Administration Police Officer after being arrested by members of his family for creating disturbance against his mother.

It is after being brought to the Station on that date that PW2 went to confirm that he was the person arrested. PW5 interrogated and charged him with the offences, the subject of this appeal.

When put to his Defence, the Appellant gave an unsworn statement but unwittingly confirmed the evidence of PW5.

He had woken up on 24th December 2010 took a walk, had some alcohol, went back home and disagreed with members of his family who took him to the Police Station where he stayed until he was taken to court on 28th December 2010. He denied the offence, and said he would continue to deny.

In its judgment the trial court found that there was no evidence to support a charge of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act. The court also found that there was no evidence to support the charge of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. The court however invoked the provisions of Section 179 of Criminal Procedure Code *(Cap. 75, Laws of Kenya)* which donate to a trial court when a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it (S. 179(1)), and when a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.

In this case the trial court, found that the evidence supported conviction of the lesser charge of Sexual assault contrary to Section 5(1)(a)(i) of the Sexual Offences Act.

Section 5(1) provides -

5(1) Any person who unlawfully

(a) penetrates the genital organs of another person with -

(i) any part of the body of another or that person,

(b) ….

is guilty of an offence termed sexual offence,and is liable upon conviction to

imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life."

The Appellant was consequently found guilty of the offence of sexual assault contrary to Section 5(1)(a)(i) of the Sexual Offences Act, and sentenced the Appellant to fifteen years imprisonment and declared him a dangerous sexual offender under Section 39 of the Sexual Offenders Act, and granted him a right of appeal to this court.

The Appellants six ground of the Petition of Appeal filed on 25th November 2011, was substituted at the hearing with three grounds namely -

- ***That the trial court erred in law and fact and/or misdirected itself in both failing to accord the appellant a fair and impartial hearing as guaranteed under the current constitution Article 50(2)(c)(g)(h)(j) and (k) and that such failure is not an irregularity curable under Section 382 of the Criminal Procedure Code,***

- ***that the trial court erred in law and fact and misdirected itself in basing the appellant's conviction on the evidence of PW2, PW3 and PW4, so as to invoke the the provisions of Section 179(2) of the Criminal Procedure Code and failing to note that this was made up case, in collusion by the said witnesses with PW2, and that evidence of PW3 was contrary to Section 77 of the Evidence Act, (Cap. 80, Laws of Kenya),***

- ***that the trial court erred in both law and fact and misdirected itself in failing both to find that the entire case for the prosecution was not proved at all.***

OPINION

I have already in the foregoing paragraphs of this judgment set out the facts and evidence which led to the Appellant's being charged and convicted. In this regard I have also considered the Appellant's written submissions on each of the grounds of appeal. The first ground is whether the appellant received a fair and impartial hearing as envisaged under Article 5(2)(c)(g)(h)(j) and (k) of the Constitution.

Article 50(2) of the Constitution guarantees a fair hearing in among others in these terms -

- ***adequate time and facilities to prepare his defence (50(2)(c)),***

- ***to choose and be represented by an Advocate and to be informed of his right promptly,***

- ***to have an advocate assigned to the accused person by the State and at the State expense, if substantial injustice would otherwise result, and to be informed of this right promptly (50(2)(b) & (h),***

- ***to be informed in advance of the evidence the prosecution intends to rely upon, and to have reasonable access to the evidence (50(2)(j),***

- ***to adduce and challenge evidence.***

The Appellant's challenge does not in my opinion vitiate his trial, conviction and sentence. None of the provisions alleged to have been contravened by the prosecution declare that the trial would be vitiated if those provisions are not strictly adhered to.

I will begin with the appellant's right to witness statements. He asked for witnesses statements on 5th January 2011, and the court ordered that he be supplied with the statements. The Appellant again asked for witness statements on 18th February 2011 and once again the court ordered that he be given those statements.

It is a cardinal principle of fair hearing under our Constitution that the accused person be availed witness statements so as to have adequate time and facilities to prepare his defence. It was a contravention of Article 50(2)(j) of the Constitution not supply him with such statements.

Similarly it is the accused's right to be represented by an Advocate of his own choice in matters where substantial injustice would result if no advocate was assigned to the accused. This is a right which is enjoyed by persons accused of murder only. The State has not deemed it fit to appoint counsel for every accused person in respect of every other offence presumably because it has not considered that substantial injustice to an accused would be done in respect of other offences. As of now, this right as other third generation rights are guide posts to the future when the State would have either a Legal Corporation or a permanent arrangement with the Law Society of Kenya to avail its members to act for accused persons in each and every offence. In the meantime every accused person has a right as, it always was, to hire counsel of his or her choice at his or her own expense.

I think the proper approach to these rights in relation to the fair trial of the accused, is for the court to see and ensure that no prejudice is caused to an accused person by virtue of being unrepresented by counsel. The issue becomes a question of fact in each case.

In this case, there were only five witnesses. The possible 6th witness was a vulnerable witness, the child of five years, and the victim of molestation in this case. That child or victim had a right to be assisted by an intermediary the complainant to communicate with the court. That is a right guaranteed under both Article 50(7) of the Constitution, and Section 31 of the Sexual Offences *(concerning vulnerable witnesses).* The child victim in this case when subjected to a *voire dire* did not express itself and did not know where it was, and was clearly scared and frightened by the appellant's stare at her. It therefore could not testify. What she told the mother is what the mother reiterated in court and the Appellant had opportunity to cross-examine the mother as PW2. I cannot say that the Appellant was prejudiced at all.

The Appellant also raised objection to the testimony of PW3 on production of the P3 Form as being contrary to Section 77(2) of the Evidence Act *(Cap. 80, Laws of Kenya)* on the ground that PW3 did not offer any treatment to the victim some days after the event. The evidence of PW3 is clear. He received the complainant some five days after the event. He reviewed her condition and established the injuries she had suffered from the Appellant and drew his conclusions, and completed the P3 Form. His evidence was properly admitted under Section 77 and signature under Section 77(2) of the Evidence Act.

As to the calling of other witnesses, or the Assistant Chief, in particular, there was nothing critical about his evidence. PW2 merely went to him to inform him of her complaint en-route to the Police Station. His evidence would only have been critical if he had handled either the child or the Appellant. In any event, the Appellant admits in his unsworn statement that it is members of his family who frog-matched to the Police Station, not even the Assistant Chief.

Lastly on the question of sentence, the Appellant contended that there was no material upon which the court declared him a dangerous sexual offender under section 34(1) of the Sexual Offences Act. The conditions for declaring a person who has been convicted of a sexual offence, a dangerous sexual offender are -

(a) more than one conviction of a sexual offence,

(b) been convicted of a sexual offence which was accompanied by violence or threats of violence, or

(c) been convicted of a sexual offence against a child.

Although the Appellant was properly convicted of sexual assault against the child, there was no evidence that he had a previous conviction, or that assault was accompanied by violence. There was consequently inadequate material upon which to declare the Appellant a dangerous sexual offender. I

would therefore set aside that part of the sentence against the Appellant.

Similarly, there was no material or aggravating circumstances such as violence upon which the prescribed punishment of not less than ten years was enhanced to fifteen years. I would consequently reduce the term of fifteen years to ten years in terms of the discretion donated to this court by Section 354(3)(i)(ii) and (b) of the Criminal Procedure Code.

In summary, I set aside the orders declaring the Appellant a dangerous sexual offender. I also set aside the sentence of fifteen years, and reduce it to ten years to run from the date of conviction.

Save as aforesaid, I find no merit on the other legs of the Appeal and dismiss the same.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 12th day of October, 2012

M.J. ANYARA EMUKULE

JUDGE