REPUBLIC OF KENYA

High Court at Nakuru

Criminal Appeal 198 of 2011

GUSHASHI LELESIT ……..……APPELLANT
VERSUS

REPUBLIC…….RESPONDENT

(From original conviction and sentence in Criminal Case No.205 of 2011 of the Seniore dREsident Magistrate's Court at Maralal – A.K. ITHUKU, SRM)

JUDGMENT

Gushashi Lelesit, the appellant herein, was charged with the offence of unnatural offence contrary to **Section 162(a)** of the **Penal Code** before the Senior Resident Magistrate, Maralal, in Criminal Case No. 205 of 2011. It was alleged that on 14/3/2011, at about 9.00 a.m. in Samburu District, he had carnal knowledge of SL against the order of nature. He denied the offence, the case went to full trial, he was found guilty, convicted and sentenced to 15 years imprisonment. Aggrieved by the said conviction and sentence, he filed this appeal citing several grounds in the petition of appeal and amended petition of appeal. They can be condensed into the following grounds:-

1. That the appellant's constitutional rights under Article 50 of the Constitution were breached;

2. That the court erred by relying on the uncorroborated evidence of PW2;

3. That the prosecution evidence was full of contradictions;

4. That the appellant's rights under Article 49(f) of the Constitution were violated in that there was an unexplained delay of 3 days before he was taken to court.

As a result, he prays that the appeal be allowed, conviction set aside and sentence quashed.

Ms Idagwa opposed the appeal for reasons that the complainant, PW2 knew the appellant well as they were grazing goats together, that the minor PW2, was examined by PW1 who found that he had been injured in the anal cavity, which was swollen, tender and bleeding. Ms Idagwa also noted that the appellant should have been charged under the **Sexual Offences Act** but not the **Penal Code** and that the relevant **Section was 8(2)** of the **Sexual Offences Act**. The complainant having been a child of 7 years, the appellant should have been sentenced to 21 years imprisonment. Counsel urged the court to convict the appellant under the said **Act** and sentence him accordingly.

Briefly, the case before that trial court was that PW2, a minor, aged about 7 years went to look after goats with the appellant on 14/3/2011. When they returned home in that evening, PW2 reported to his father

PW3, TL and PW4, ML, that the appellant had sodomised him. The appellant was a herdsboy for one, Longopire. The appellant was arrested on the same date and PW2 was examined by Peter Lekaite (PW1), a Clinical Officer at Maralal District Hospital who found that PW2 had a tear to his anal orifice, it was swollen, tender and there was bleeding. A rectal swab revealed that he had been infected. The appellant was arrested and charged for the said office.

The appellant generally denied committing the offence. He said he was arrested on 15/3/2011 while grazing goats and does not know why he was arrested.

In sum the appellant names two issues. Whether the charge was proved to the required standard and secondly, whether his Constitutional rights were violated. I think I will start by considering the second issue of breach of **Constitutional** rights. The appellant complains that he was arrested on 14/3/2011 and was taken to court on 17/3/2011, in contravention of **Article 49(1)(f)** of the **Constitution** which requires an arrested person to be arraigned before the court within 24 hours and there is no explanation for the delay and therefore his **Constitutional** rights were violated rendering the trial a nullity. The testimony of PW2 and PW3 does disclose that the appellant was arrested on 14/3/2011. The court record does show that indeed the appellant was arraigned before the court on 17/3/2011. From that date till the trial was conducted on 15/7/2011, the appellant never complained that his **Constitutional** rights had been violated so that the trial court could make an inquiry into the said allegation. Had he done so, the prosecution would have been accorded a chance to explain the delay and the court would have ruled on whether the delay in bringing the appellant to court was justified or not. Making the complaint at this stage comes a bit too late in the day because the prosecution cannot be in a position to explain. **Article 49(1)(f)** provides as follows:-

> **"An arrested person has the right –**
>
> **(a) – (d) …;**

(f) to be brought before a court as soon as reasonably possible, but not late than –

(i) twenty four hours after being arrested; or

(ii) if the twenty four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next day;

(g) – (z)."

Under the above provision, if prosecution delay in bringing the arrested person to court, the prosecution can be accorded an opportunity to explain why the delay. The courts have held that a person alleging breach of his fundamental rights should name such allegations at the earliest time possible so that the State can respond. In the case of **Mwalimu v Rep [2008]KLR 111**, the Court of Appeal said:-

"1.Under section 72(3) of the Constitution, where a person charged with a non-capital offence was brought before the Court after twenty-four hours or, where he was charged with a capital offence, after fourteen days, complained that the provisions of the Constitution had not been complied with, the prosecution could still prove that he was brought to Court 'as soon as was reasonably practicable' notwithstanding that he was not brought to Court within the stipulated time.

2 The mere fact that an accused person was brought to court either after the twenty-four hours or the fourteen days, as the case might be, stipulated in the Constitution, did not ipso facto prove a breach of the Constitution. Each case had to be decided on its own facts and circumstances and in deciding whether there had been a breach, the Court must act on evidence.

3. Section 84(1) of the Constitution suggested that there had to be an allegation of breach before the Court could be called upon to make a determination of the issue and the allegation had to be raised within the earliest opportunity.

4. The appellant did not complain in the trial Court that he was not brought to Court as soon as was reasonably practicable and it followed that the prosecution was not called upon to show that he had been brought to court as soon as was reasonably practicable. Therefore, there was no merit in the ground of appeal alleging a breach of his constitutional right."

The allegation of breach of fundamental rights is being raised about 2 years after the event. It would be unfair to the respondent if it were considered at this stage.

The above decision was made pursuant to provisions of the old **Constitution** but the same principles apply to the current provisions. In any event, if the applicant established that his rights were violated, he has a different cause of action. What is before court is different whereby a complaint had been made and the prosecution cannot be curtailed because of a violation committed by a police officer. If the police officer is found to have violated an individual's rights that party has a right to sue for such violation. For that reason, the proceedings cannot be declared a nullity just because one's rights were violated.

The complainant, PW2, Letwaa was a child aged about 7 years at the time he was assaulted. He gave a sworn statement. He explained that the appellant did **"tabia mbaya"** to him through his anus which he showed to the court. He explained how it was done by his shorts being removed and he felt pain. The complainant was taken to the Clinical Officer who filled the P3 form on 15/3/2011. The P3 form was issued on the same date. **"Tabia mbaya"** is a Kiswahili phrase commonly used by children to describe sexual abuse, or words which are taboo for them to pronounce. PW1 upon examining PW2 found that indeed his anal orifice had tears, was swollen, tender and had blood. He formed the opinion that PW1 had been sodomised. PW3 and PW4 also examined PW2 and found that he was bleeding in the anus and there was semen. I find that there is overwhelming evidence that an unnatural act was committed on PW2.

The next question is who committed this heinous act? PW2 told the court that he knew the appellant and that he was grazing goats with the appellant when he committed the **Act**. PW3 confirmed that PW2 went to herd cattle with the appellant on that day. PW4 confirmed that fact. Although the appellant was employed by one Longogire as a herdsboy, PW2 was grazing goats together with PW2. Although PW2 gave an unsown evidence there is overwhelming evidence connecting him with the offence. After the trial court considered the evidence he found that PW2's evidence was corroborated by the evidence of PW1, PW3 and PW4 and that PW1 vividly explained what happened to him. The court had the opportunity to see the witnesses and it believed the witnesses. There is no reason why this court which had no such opportunity to doubt them. There is no longer a requirement that the unsworn evidence of a child of tender age be corroborated. It is sufficient that the court believes the victim. **Section 124** of the **Evidence Act** was amended in 2006 and it provides as follows:-

"S.124. Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

The trial court having believed PW2's evidence which was found to have been corroborated by that of PW1, PW3 and PW4, this court has no reason to arrive at a different finding.

In his defence the appellant made a mere denial. I find no reason why PW2 would make such allegations against the appellant and will dismiss the defence as untruthful.

As the first appellate court this court is required to re-evaluate and analyze the evidence afresh and arrive at its own conclusions while bearing in mind that this court did not have a chance to see the witnesses

testify. I find that there was overwhelming evidence against the appellant that he committed the act. I find no good ground to disturb the conviction and I confirm it. As regards the sentence, under **Section 162(a)** of the **Penal Code**, where the victim is a child under the age of 11 years, the sentence is 21 years. I find that the sentence of 15 years is irregular and illegal. It is hereby quashed and substituted with a sentence of 21 years imprisonment. It is so ordered.

DATED and DELIVERED this 22nd day of November, 2012.

R.P.V. WENDOH
JUDGE

PRESENT:
The appellant – in person
Mr. Mereti for the State
Kennedy – Court Clerk