REPUBLIC OF KENYA

High Court at Machakos

Criminal Appeal 50 of 2010

JULIUS KASOYO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence of the Senior Resident Magistrate H.M. Nyamberi

delivered on 19/6/2009 in Mwingi Senior Resident Magistrate Criminal Case No. 244 of 2008)

(Before George Dulu JJ)

J U D G M E N T

The Appellant **Julius Kasoyo** was charged in the subordinate court with **defilement** of a girl contrary to **section 8 (1)** as read with **section 8 (3)** of the **Sexual Offences Act No. 3 of 2006**. The particulars were that on 24th February 2008 at **[particulars withheld]** of **Mwingi District** within **Eastern Province** caused penetration of his genital organ namely penis into the genital organ namely vagina of **M.M.** a girl aged twelve years. In the **alternative**, he was charged with **indecent act** with a girl contrary to **section 11 (1)** of the **Sexual Offences Act No. 3 of 2006**. The particulars were that on the same day and place unlawfully and intentionally caused contact of his genital organ with the genital organ of **M.M.** a girl aged twelve years. He denied the charges.

After a full trial he was convicted on the main count and sentenced to serve **twenty years** imprisonment. Being aggrieved by the court's decision, he has appealed to this court. His grounds of appeal are that he was not given an opportunity to cross-examine PW3; that the magistrate did not comply with **section 200** of the **Criminal Procedure Code (Cap 75)** when he took over from a previous magistrate; that his Constitutional rights were infringed as he was kept in custody for more than 24 hours before being brought to court; and that documentary exhibits were produced contrary to the requirements under **section 33** and **77** of the **Evidence Act (Cap 80).**

The appellant on the hearing date, with the permission of the court, tendered written submissions. In addition, he stated that the evidence of PW4 was contradictory, and the sub chief to whom an initial report was allegedly made by PW4, did not testify in evidence.

The learned State Counsel, **Mr Mwenda**, opposed the appeal. Counsel submitted that there was sufficient evidence to sustain the conviction. Counsel contended that the identification of the appellant was positive and safe as the incident occurred in broad daylight. The doctor who filled the P3 form found that the hymen of the complainant (PW1) was broken. Counsel finally submitted that the complainant was confirmed to be 12 years of age.

This being a first appeal, this court has to remind itself that it is duty bound to re-evaluate the evidence on record afresh and come to its own conclusions and inferences – *See* **Okeno –vs- Republic (1972) EA 32.**

The first issue is whether **section 200** of the **Criminal Procedure Code (Cap 75)** was complied with when the fresh magistrate **H.M. Nyaberi SRM** took over from the previous magistrate **DM Ochenja Ag. P.M.** Indeed, **H.M. Nyaberi SRM** took over the case on 11/5/2009 after 4 prosecution witnesses had testified. He conducted the proceedings in which one prosecution witness testified as well as the defence case. **Section 200 (3)** of the **Criminal Procedure Code** provides:-

200. (3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the person of that right.

In the proceedings at the trial court; **section 200** is not specifically recorded as having been referred to. However, it is recorded as follows:-

"Court: Accused reminded of his right of calling any of the witnesses who have testified.

Accused: I do not wish to recall any.
Court: Case to proceed from where it has reached."

In my view though the section is not specifically recorded as having been explained to the appellant in the proceedings, it was complied with. In my humble view, the record shows that the appellant was informed of his right to re-call witnesses. He elected not to call any. There was therefore no violation of his rights, as **section 200** of the **Criminal Procedure Code** was complied with.

Was the appellant not accorded his right to cross-examine PW3? PW3 was a minor of tender years. She was not sworn before tendering evidence. She could therefore not be cross-examined. Though the appellant did not cross-examine her, he did not have a right to cross-examine her as her testimony being unsworn was not subject to cross examination. That ground is therefore dismissed.

I now go to the substantial ground, whether the evidence was adequate to sustain a conviction. In my view, the evidence was not sufficient to sustain the conviction. Though the complainant, PW1 **M.M.** was defiled, the evidence does not establish that it was the appellant who did so. The appellant is said to have gone to the home of the complainant at 4 p.m. He is said to have followed the complainant into in the field where the complainant was grazing goats at 5.30 p.m. The mother of the complainant PW 4 **M.M.** came home around 7 p.m. After she called for the complainant a number of times at the farm, the appellant is said to have emerged from somewhere and mounted his bicycle and rode away. In the meantime, the complainant never appeared. She was sought for until 11 p.m. but was not traced. She came back home on her own at about 2 a.m.

Nobody interrogated her to know where she was and what she was doing all that long night. In my view, it is possible that the complainant was with another man. It is always on the prosecution to prove an accused person guilty beyond reasonable doubt. That burden does not shift to an accused person – *See* **Sebitoleko –vs- Uganda (1967) EA 531**. In my view, the evidence of the prosecution on record leaves a wide gap for conjecture. No attempt having been made to close the wide gap of conjecture, and there being no other evidence to connect the appellant to the offence, the benefit of the doubt has to be given to the appellant. I give the benefit of the doubt to the appellant. The prosecution has failed to prove beyond any reasonable doubt that the appellant committed the offence.

The appellant has complained that his Constitutional rights were violated as he was kept in custody for more than 24 hours before being charged in court. **Article 49 (1) (f)** of the Constitution provides:-

"49 (1) An arrested person has the right

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

(i) twenty four hours after being arrested, or

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

Even assuming that the above provisions of the Constitution were violated, the results would not be an acquittal. Such a violation can give rise to an action for compensation. The methods of enforcing Constitutional rights are clearly spelt out in the same Constitution.

Since I have found that the prosecution did not prove its case against the appellant beyond reasonable doubt, I will allow the appeal.

Consequently, I allow the appeal quash the conviction and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.

Dated and delivered at Machakos this **20th** day of **November** 2012.

George Dulu
Judge

In presence of:-
Appellant present in person
N/A for State
Nyalo – Court clerk