



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 20 OF 2010

(From original sentence and conviction in Criminal Case No. 728 of 2004 the Senior Resident Magistrate's Court at Kilifi Before Hon. C. O. Obulutsa - SRM)

JOHNSON JEFA KALAMA.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

JUDGEMENT

The appellant Johnson Jefwa Katana was jointly charged with Hassan Rimba Mwalungu for the offence of conspiracy to commit a felony contrary to section to commit a felony contrary to section 393 of the Penal Code that on 29th day of September 2004 at Msenangu Clinic, Kilifi Township in Kilifi District on diverse dates between the said date and 30th September 2004, together conspired to procure miscarriage on a woman namely E.S.D.

They faced a second charge of attempt to procure abortion contrary to section 158 of the Penal Code that on 30th September 2004 at Msenangu Clinic in Kilifi Township, jointly with intent to procure the miscarriage of a woman namely E.S.D, inserted a scoop wire into her vagina to remove the foetus. Both denied the charges and after due trial in which seven witnesses testified on behalf of the prosecution while the two accuseds were the only prosecution witnesses, the appellant was acquitted on the first count but convicted on the second and sentenced to serve seven years imprisonment.

PW2 (Elivina Deche) a girl aged 16 years old the trial court that when she got pregnant and informed her boyfriend Ali Hassan about it, he took her to Kilifi, saying the pregnancy had to be terminated. So they went to the doctor's clinic and after interrogation and examination, the doctor who was identified as the appellant inserted a metal object into her genitalia and poked inside it. While the procedure was being carried out police officers burst into the clinic and arrested the appellant. On cross-examination PW2 said it was not her intention to abort.

PW2 also informed the court that apart from the wire, the appellant had cotton wool, a pair of gloves and a syringe.

Police officers acting on a tip off that there were abortions being carried at the clinic proceeded to the Msenangu Clinic – PW4 APC Gona Johnson told the trial magistrate how upon getting into a cubicle within the clinic, they found PW2 in pain while touching her stomach and recovered a wire, syringe,

tablets, gloves and cotton wool all in a box – these were produced in court.

On cross-examination both PW4, and PW3 (Snr Sgt. Kibwana) confirmed that they did not know what gadgets are used to procure an abortion, nor did they see the foetus that was aborted but there was blood on the floor, and the girl was in pain. There was blood on the cotton wool which when presented for examination and cross matching confirmed that the girl was of blood group O and the cotton wool and gloves also stained with blood of group O, making it possible that the blood belonged to the girl.

PW2 was examined and Dr. Ondiek (PW7) of Kilifi District Hospital who produced the P3 form, confirmed that she was terminating a pregnancy. The findings which were contained in the P3 form were to the effect that she was bleeding from the private parts, and there was discharge from the cervix with products of conception (i.e particles of the foetus). On being shown the wire in court Dr. Ondieki on cross-examination confirmed that it was capable of effecting an abortion. APC Lense Tabu (PW1) who was present at the clinic when PW2 was called in by the appellant confirmed that her clothes were blood stained.

Appellant in his unsworn defence confirmed that he worked at Msenangu clinic and that Elvina (PW2) had gone to the clinic on the date in question but according to him she went there already bleeding and just as he begun an internal examination, police officers arrived and he was arrested. He confirmed that the officers collected cotton wool, gloves, bicycle wire, syringe. He confirmed that the wire can be used to procure an abortion. He did not have notes of the examination carried out on the girl.

In his judgment, the trial magistrate noted that the presence of PW2 in the clinic was not disputed or the fact that police found her being examined by the appellant and recovering of the implements was also not in dispute.

He also took into account that the blood stained items recovered from the clinic matched PW2's blood group and Dr Ondieki's evidence that PW2 had a pregnancy which had been tampered with.

The trial magistrate was persuaded that the wire (which appellant confirmed was recovered from the clinic was the one used to interfere with the pregnancy).

The appellant's defence was considered and rejected on the strength of PW2's evidence and absence of clinical notes.

The grounds of appeal are that:

- (a) The trial magistrate never warned himself that the complainant was being used to incriminate him.
- (b) The government analyst's evidence as not conclusive
- (c) The trial magistrate did not allow him to produce the medical particulars of the complainant which was taken by police.

At the hearing of the appeal, Mr. Kemo appeared for the State whilst appellant acted in person and relied on his written submissions in which he argued that there was variance between the charge and the evidence because whereas PW2 alleged that a foetus was aborted at Msenangu Clinic, she initially claimed to have old Hassan that she was pregnant, then later denied having done so and that his alone is a contradiction which ought to be resolved in favour of the appellant. He also protests at the manner in which PW2's evidence was taken, saying there ought to have been a voire dire examination, in the absence of which the court ought to find that he was prejudiced and acquit him. He also submits that since the police officers said they did not see the aborted foetus inside the clinic, yet PW2 claimed that the foetus was aborted at the clinic, then that contradiction should also be resolved in his favour.

It is his contention that it is PW2 and 1st accused who tampered with the pregnancy and only went to him for assistance when things got bad.

Appellant also submitted that his rights were violated as he was arrested on 30-9-04 and taken to court on 6-10-04 – yet he ought to have been presented in court within 24 hours of his arrest; and in the spirit of it decision by the Court of Appeal in the case of **Albanus Mwasia Mutua v R Criminal Appeal No. 120 of 2004** then he ought to be acquitted as the delay was unexplained.

In opposing the appeal Mr. Kemo submitted that the evidence was overwhelming and left no doubt urging the court to uphold the trial magistrate's findings. The only error Mr. Kemo made was his presumption that appellant was convicted for conspiracy to commit a felony and sentenced to 4 years – upon the appellant pointing out this mistake, Mr. Kemo acknowledged his error but maintained the very submissions.

Is the charge at variance with the evidence? I think not PW1, PW3, and PW4 all described the scenario they found at the clinic – this was after a tip off that there as an intention by a school girl and a school boy to have an abortion performed at the clinic. When the officers walked in, they noted that PW2 was holding her stomach in pain and there was blood on the floor – Dr. Ondieki's evidence confirmed tampering with the pregnancy. The charge was not procuring an abortion but an attempt at procuring an abortion – which is confirmed by the presence of products of conception which were being discharged from the girl's pelvis/genitalia. This was also confirmed by the evidence of the police officers who were categorical that they did not see any foetus – what they saw was blood on the floor and the girl's blood stained clothes. The appellant's argument that there was interference by PW2 and his co-accused are defeated by his own acknowledgment that a bicycle wire (which he confirms can be used to procure an abortion) was found inside the examination room in a box alongside the blood stained cotton wool and gloves. It would be myopic to crush down the prosecution case simply because PW2 said the foetus was aborted at the clinic precisely because she is a layperson who may not realize the significance of use of certain phrases or terms. My finding is that the charge and the evidence were not at variance, and there is no reason to interfere with the trial magistrate's decision on account of that.

As regards voire dire examination, from the record the trial magistrate indicated he had carried out the same by asking PW2 her name, age, class, and establishing whether she attends church and the duty of telling the truth.

The basic statutory provision relating to the evidence of children of tender years is to be found in section 19 (1) of the Oaths and Statutory Declarations Act (Cap 15 of the Laws of Kenya):

“19 (1) where, in any proceedings before any court, or person having by law or consent of parties, authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court, or such person aforesaid, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court ...he is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth....”

The requirement really is simply for the court to carry out an investigation so as to ascertain whether the child of “tender” years understands the nature of an oath and the duty of telling the truth. I would be hesitant to define 16 as tender years – although still defined as a child under the Children's Act. If my view is wrong, then, secondly, the case of **Kinyua v R (2002) 1KLR pg 256** set out the procedure that a trial court should follow when receiving the evidence of a child of tender years which was to this effect.

“a) the court should first ascertain whether the child understands the nature of an oath. An investigation to this effect must be done by the court, immediately the child witness appears. The investigation need not be long but it has to be directed to the ...question whether the child understands the nature of the oath....”

Obviously the trial magistrate did not strictly follow what is set out in Kinyua's case – it was a feeble attempt a investigating PW2's intelligence and understanding – she said she understood the meaning of an

oath without the court recording what her comprehension involved.

Yet even if that failure was to then affect the status of the evidence presented to the trial court by PW2. It would still not dislodge the evidence of the other prosecution witnesses, i.e the police officers and the doctor.

I have just one curious observation regarding the Government Analyst's report, my understanding of grouping of blood is that it is either positive or rhesus negative – never neutral – so that it would be O+ or O- not just O. However this is not fatal as defence did not dispute that the blood stained items bore blood from the girl.

Finally is the question of the appellant's rights being violated under section 49 of the present constitution. This is a new ground which appellant had not raised in his grounds of appeal so as to give the prosecution a chance to respond – he only introduced it in his submissions. Section 350(2) of the Criminal Procedure Code is clear that an appellant shall not be permitted, at the hearing of the appeal, to rely on a ground of appeal other than those set out in the petition of appeal. The purpose of this is so as to avoid ambushing the prosecution.

As a consequence then, my finding is that the conviction was safe and I uphold it.

The sentence meted was legal and I confirm the same. The appeal is dismissed.

Delivered and dated this 17th day of **February 2011** at Malindi.

H. A. OMONDI
JUDGE