



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 234 OF 2010

(From Original Conviction and Sentence in Criminal Case No. 1260 of 2009 of the Principal Magistrate's Court at Kwale:

A.M. Obura (Mrs.) – R.M.)

DANDA MWEROAPPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGEMENT

The Appellant **DANDA MWERO** has filed this appeal challenging his conviction and sentence by the learned Resident Magistrate sitting at Kwale Law Courts. The Appellant had been arraigned before the subordinate court on 10th September 2009 charged with **DEFILEMENT CONTRARY TO SECTION 8(2) OF THE SEXUAL OFFENCES ACT**. The particulars of the charge were that:

“Between 31/08/09 and 07/09/2009 in Kinango District within the Coast Province, defiled M.C, a girl aged thirteen years”

The Appellant entered a plea of ‘not guilty’ and his trial commenced on 22nd October 2009, at which trial the prosecution led by **INSPECTOR SIBUDA**, called a total of five (5) witnesses in support of their case. The complainant was a 13 year old girl who gave her name as ‘**N.C**’. She told the court that the accused who was a neighbour had approached her grand-mother, who was the complainant’s guardian seeking her hand in marriage. The grand-mother declined this request on the ground that the complainant was a school girl. The complainant however decided to overrule her grandmother and on her own accord went to the Appellant’s home and began to live with him as a wife. The two engaged in sexual intercourse. The complainant lived with the Appellant for one week. The complainant’s brother **N.C**,

discovered her whereabouts and reported the matter to the village elder who went and removed the child from the Appellant's home. The matter was reported to police. The Appellant was then arrested and charged.

At the close of the prosecution case the Appellant was found to have a case to answer and was placed on his defence. He gave an unsworn defence in which he denied defiling the complainant at all. On 16th April 2010 the learned trial magistrate delivered her judgement in which she convicted the Appellant and sentenced him to serve twenty (20) years imprisonment. It is against this conviction and sentence that the Appellant now appeals.

MR. ONSERIO, learned State Counsel who represented the Respondent State conceded this appeal. I have carefully perused the record of the trial before the lower court and I am inclined to agree with the stand taken by the State.

Firstly the charge as framed is fatally defective. The Appellant is charged with Defilement contrary to S.8(2) of the Sexual Offences Act. This S. 8(2) only deals with the punishment for the offence of defilement on a girl aged 11 years or less. No mention is made of S.8(1) which defines and creates the offence of Defilement as it provides –

“8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement”

The correct charge ought to have read ***‘Defilement contrary to S.8(1) as read with S. 8(2) of the Sexual Offences Act.’*** S.8(2) on its own creates no offence and therefore cannot be the basis of a charge. This is a fatal defect which is not curable. Any trial pursuant to such a defective charge is null and void.

Even if this were not the case I have noted certain other anomalies in the proceedings which render this conviction unsound. The learned trial magistrate did carry out a Vive Voce examination on the complainant as required by law. The child clearly indicated that she did not understand the nature of an oath. Indeed the trial magistrate found at page 4 line 5 –

“Court: I am satisfied that the witness is a minor of 13 years old. She does not understand the nature of an oath but knows that it is wrong to lie. She can answer questions put to her intelligently sworn [sic]”

Yet inspite of this finding the court proceeded to swear the child. It is futile to swear a witness who does not comprehend the meaning or nature of an oath. Given her finding the learned trial magistrate ought to have directed that the complainant give unsworn evidence.

Lastly from the evidence adduced in court the complainant's grandmother was a key crucial witness being the child's guardian. She was not called to testify before the trial court. No reason or explanation is given for this omission which in my view seriously weakens the prosecution case.

From the foregoing I find that the Appellant's conviction had no legal basis and cannot stand. I hereby quash the same. The subsequent 20 year sentence is also invalid and must be set aside. This appeal succeeds. The Appellant to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and Delivered at Mombasa this 9th day of March 2011.

M. ODERO

JUDGE

in the presence of:
Appellant in person
Mr. Muteti for State