REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 277 OF 2009

(From original conviction and sentence in Criminal Case No. 33 of 2007 of the Principal Magistrate's Court at Narok - S. M. Githinji {P.M.} dated 18th September, 2009)

ALOISE MARAGIA ONYONKA…….....……...……
APPELLANT
VERSUS
REPUBLIC…….RESPONDENT

JUDGMENT

The Appellant was charged on two counts. Count I was defilement of a child under the age of eleven years contrary to Section 8 (2) of the Sexual Offences Act, 2006 *(No. 3 of 2006).*

The State alleged that the appellant on the night of 25th/26th December 2006 in Narok District within the Rift Valley Province, unlawfully and intentionally committed an act which causes penetration with a child, namely N.N, a child age ten (10) years.

On Count II the Appellant was charged with the offence of indecent assault on a child contrary to Section 5(1)(b) of the Sexual Offences Act 2006, *(No. 3 of 2006).*

The State alleged that on the night of 25th/26th December 2006 in Narok District within Rift Valley Province, unlawfully and indecently assaulted N. N a girl of the age of 10 years by touching her private parts.

The Appellant was on the evidence convicted on Count I, and was sentenced to 18 years imprisonment.

Aggrieved with both his conviction and sentence, the appellant came to this court by a Petition of Appeal dated 30th September 2009, and filed on 1st October 2009.

The grounds of Appeal are -

(1) that the learned trial magistrate erred in law and fact by basing his conviction on a defective charge sheet.

(2) that the learned trial magistrate erred in law by shifting the burden of proof from the prosecution to the accused persons.

(3) that the learned trial magistrate erred in law by finding that there was an offence

revealed under Section 8(2) of the Sexual Offences Act, 2006 (No. 3 of 2006) and proved beyond reasonable doubt.

(4) that the learned trial magistrate erred in law and fact by convicting upon the evidence tendered by the prosecution while disregarding the appellant's defence without giving any reason.

(5) that the learned trial magistrate erred in law and in fact in convicting the Appellant in the instant case without observing that he was deprived of his constitutional rights under section 72(3) (b) of the Constitution.

And for those reasons prayed that his appeal be allowed, the conviction be quashed and sentence set aside.

When this matter came before me for hearing, the appellant was represented by Mr. Mbiyu while Mr. Omutelema represented the Republic. In effect counsel for the appellant urged grounds 1, 2 and 3 of the Appeal together. He argued grounds 3 and 4 separately. I will commence with ground 4.

Counsel for the appellant argued that following his arrest, the Appellant was not brought to court within 24 hours after, or was detained beyond those hours. Counsel relied on the provisions of Section 72(3) (b) of the repealed Constitution and claimed that the appellant's prosecution was unconstitutional.

Mr. Omutelema, learned State Counsel submitted that the fact the appellant was brought to court beyond the 24 hours stipulated by old Constitution did not vitiate the prosecution.

I agree with submissions by counsel for the State, that the detention of the Appellant beyond 24 hours may have contravened his constitutional right to be brought to court within 24 hours, but it did not vitiate his prosecution. Section 72(6) provides for an action where such a right has been contravened.

The case of **PAUL MWANGI MURUNGA vs. REPUBLIC** Criminal Appeal No. 35 of 2006, and **ALBANUS MWASIA MUTUA vs. REPUBLIC** *(Criminal Appeal No. 120 of 2004)* are no longer good law on the proposition that detention beyond 24 hours or 14 days vitiates the prosecution of an accused. Such delay, if the prosecution is unable to explain, gives a right to damages only under Section 72(6) of the old Constitution. It does not vitiate the prosecution. This leg of the appeal therefore fails.

Adverting to the 1st ground that the charges were defective, Counsel for the appellant argued that the charges were defective for duplicity. Counsel submitted that the particulars referred to the appellant having committed the alleged offences on the **25th and 26th December 2006**. Counsel submitted that the particulars must support the charge. There were no particulars that the appellant committed the offence on 26th December 2006. Counsel submitted that such charge subjected the appellant to double jeopardy and is ground for allowing the appeal.

Counsel relied on the case of **ISAAC OMAMBIA vs. REPUBLIC** *(Nairobi Criminal Appeal No. 47 of 1995)* where the court allowed an appeal on the ground that the charges were defective.

On his part Mr. Omutelema urged that the appellant was charged with one principal offence, and an alternative charge of indecent assault, and was charged on proper sections of the Sexual Offences Act. If there was any defect the same was curable under Section 382 of the Criminal Procedure Code *(Cap. 75, Laws of Kenya).* The time of the offence was the night of 25th/26th December 2006. The appellant was not prejudiced at all.

Section 134 of the Criminal Procedure Code provides that -

134 "Every charge or information shall contain, and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged together with such particulars as may be necessary for giving reasonable information as to the nature of the offence."

The particulars of the charge in this matter clearly refer to the night of 25th and 26th December 2006 and this clearly mean that the appellant committed the offence on Counts I and Count II on both the 25th and 26th December 2006, while all evidence point to the offence having been committed on the night of 25th/26th December 2006.

I think this one of those cases where the provisions of Section 382 of the Criminal Procedure Code, may rightly be invoked that-

"…. no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any injury or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice."

The proviso to Section 382 *(supra)* provides that in considering whether the error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

In this case the appellant was represented by counsel during the trial, and did not raise the issue throughout the trial. I do not see that the error in referring to the dates of commission of the offence 25th and 26th December 2006 occasioned any prejudice to the appellant.

Having examined all the relevant evidence, I am persuaded beyond peradventure that the offences were committed on the night of 25th/26th December 2006 *(and not 25th and 26th December 2006).* If it were not so, counsel who represented the appellant at the trial would certainly have raised the issue as a preliminary point of law, and not now on appeal. I find and hold that the irregularity did not cause any failure of justice.

This first ground of appeal therefore fails.

The next grounds of appeal were whether the learned trial magistrate shifted the burden of proof from the prosecution to the accused *(ground 2),* and whether the evidence by the prosecution revealed an offence under Section 8(2) of the Sexual Offences Act and if it was proved beyond reasonable doubt, *(ground 3)* and whether the trial court took into account the appellant's evidence, or disregarded it without given any reason *(ground 4).*

To answer these questions, it is necessary for this court as the first appellate court to not only review, but also to evaluate the evidence of both the prosecution and the appellant in order to make its own findings and draw its own conclusions.

The evidence of PW1, the mother, is that they are a Christian family. They had celebrated Christmas together. They had dinner together with the children, and the appellant after dinner, offered a thanksgiving prayer and the children retired to bed. The appellant remained with PW1 and her husband then left at about 8.00 p.m. to go asleep in one of the two rooms which were separated by the kitchen but had no locks or bolts to lock from within.

It was the evidence of PW1 that about 9.00 p.m. they heard loud screams from the complainant PW4 *(the victim),* that his uncle had gone into her bed. PW1 and her husband went to check, and found the girl by the door, shaking with fright. The girl explained to them what the appellant had done. He had gone into their room removed his trouser, removed the girl's pant and lay on top of her. She tried to scream but the appellant gagged her mouth with his hand.

PW1 also testified that when she and her husband went into the room where the appellant slept, they found him lying in bed and that he mumbled a denial that the girl had lied. Thereafter PW1 removed her children and made a bed for them in her room with the husband, and everyone retired into bed again.

PW5, the husband of PW1 and father of PW4 *(the victim)* reiterated the evidence of PW1 that the appellant could get into children's room easily as the room had no bolts or latches from inside. He heard his daughter say that the man in the room had strangled her, the girl said the appellant had done evil to her. She said in Kisii *(language)* that he had sex with her *(defiled)* her. When roused from his purported slumber the appellant feigned ignorance, and said he had never heard the girl scream.

The next morning *(26th December 2006)* PW5, the father of the victim, questioned the appellant who replied that he had taken beer and was very drunk and that is why he did what was *"dirty"* to the child and did not know what he did and although they had no beer in the house, but had been out with PW5 on the morning of 25th December 2006. Thereafter the appellant ran away into the house of Mukonyo, a Maasai allegedly in search of employment.

PW1 also testified that upon calling aunt R.K *(sister to PW5)*, they examined the child and found the genitalia on one side were reddish and decided that the girl should be taken to Narok District Hospital, after failing to get treatment at Nairagie Enkare Clinic where the Doctor said the girl was defiled but not infected.

PW3 testified that he examined the victim on 30th December 2006. He found the external genitalia were normal but the hymen was broken, had a tear on the labia minora, with a whitish discharge from the vagina. They carried out a higher vaginal swab, and examination revealed infection with gonorrhea. He formed the opinion that the girl was penetrated. He prepared P3 Form to that effect.

Following a ***voire dire***examination, PW4, the victim gave an unsworn statement - PW4 narrated the events of the evening of 25th December 2006. They had a meal together with her 4 siblings, her parents and the appellant, whom they called *"uncle"*, later they retired to their room near kitchen to sleep where she shared a bed with her sister, E.N, and before she fell asleep the appellant came to her room, lit the kerosene lamp, he removed his trouser, went to their bed, held her mouth tightly with the hand, turned her to face up, he removed her pant, he got into knee level on one leg, one leg was free *(girl cries as she demonstrates to the court).* He inserted his urinating organ *(penis)* into my urinating organ *(vagina)* I felt pain. I screamed and my mother came."

When cross-examined PW4 reiterated her evidence, and added that when her mother came, the appellant rushed to his bed and slept as if nothing had happened. The girl confirmed that she was treated at Narok District Hospital, some 5 days after the incident.

PW6 a Police Officer attached to Enengetia Police Patrol Base testified that the appellant was brought by Police from Kojonga Police Patrol Base as a defilement suspect. He issued the girl with a P3 form and after recording with witness statement charged the appellant.

Upon being put on his defence, the appellant admitted he was living in the home of PW5, where he was hired to uproot three stumps, but claims he was not paid Shs 9,000/= for his services, that he asked PW5 for his wages and the promises made to him on 27th December 2006 for payment on 28th December 2006 did not materialize, and that he was arrested by the Police on that date at 4.00 p.m. while he was roasting maize with PW5's wife and children when he was arrested. He denied committing the offence, and stated he was framed up by PW5 to avoid paying him his wages of Shs 9,000/=.

Contrary to the appellant's claims on appeal that the trial court did not take into account his defence, the trial magistrate at p. 2 of his judgment *(p. 24 of the record)*, reviewed the Appellants evidence and concluded that the Appellant's evidence was a made up story not worth of credence. I entirely agree with the learned trial Magistrate's conclusion, and the claim by the Appellant that his defence evidence was not taken into account is simply not correct.

Reverting to the overall question whether there was evidence upon which to convict the appellant, I must conclude that there was such evidence. There was the evidence of the victim, PW4, corroborated by that of PW3, the Clinical Officer. I have already set out at length the evidence of PW4, that the

appellant went to his room let a tin lamp, probably to be sure where the victim lay, took off his trouser, went over to the child's bed, removed the child's pants turned her over face upwards, snuffed off the tin lamp light, lay on her and defiled her - as graphically described by the child. The child's screams attracted the parents, and the child immediately explained to both her mother and father that the appellant had done ***"evil"*** and ***"dirty"*** things to her. The appellant himself, whether deliberately or overcome by remorse at his abuse of the hospitality of his cousin, pleaded that he was drunk and that is why he did those "dirty" things to the child.

The evidence of PW3 showed that the child was defiled, there was penetration, an important ingredient for proof of the offence of defilement under Section 8(1) and 8(2) of the Sexual Offences Act, 2006.

The learned trial magistrate concluded that the main count was proved by the prosecution beyond reasonable doubt, and convicted the appellant accordingly. I entirely agree with the learned trial magistrate's conclusion.

On the question of sentence, Section 8(2) of the Act provides -

"8 (1)
(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

The learned trial magistrate upon listening to the Appellant's mitigation that he is a married man with three children, and that he had recently lost his mother, sentenced the appellant to 18 years imprisonment. That sentence is illegal.

In exercise therefore of the jurisdiction conferred upon this court by Section 354 (3)(a)(iii) of the Criminal Procedure Code, the conviction here is hereby confirmed, and a sentence of life imprisonment is hereby substituted instead of the sentence of 18 years imprisonment.

Save as aforesaid, the appeal herein has no merit, and is dismissed.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 3rd day of June 2011

M. J. ANYARA EMUKULE
JUDGE