REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HCCRA NO. 73 OF 2008

LESIIT J.

ADAM MEEME KITHINJI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

From the original conviction and sentence of MAUA SPM Court Cr. Case No. 48 of 2007 Hon. Mr. D Morara.

JUDGEMENT

The appellant ADAM MEEME KITHINJI was chaged with one count of Defilement of a girl contrary to section 8(1) as read with s.8(3) of the Sexual Offences Act (herein after SOA). He was convicted of the offence and sentenced to 20 years imprisonment. The appellant was aggrieved by the conviction and sentence and therefore filed this appeal. A petition of appeal was filed for the appellant by counsel. It cites five grounds of appeal thus:-

1. That the trial magistrate erred in law by not complying with the mandatory provisions of section 211 of the Criminal Procedure Code and hence there was miscarriage of justice.

2. That the learned trial magistrate erred in law and fact by convicting the appellant in an offence that was not proved beyond reasonable doubt as required by law.

3. That the learned trial magistrate erred in law in trying a matter which he did not have the requisite jurisdiction to so hear.

4. That the learned magistrate erred in law in sentencing an accused person in a matter that he had no opportunity to hear and therefore lead to gross miscarriage of justice.

5. That the sentence imposed against the Appellant was too harsh and excessive and the court did not consider the mitigation by the Appellant.

The facts of the case are that the complainant was walking alone at a shamba when at 3 pm the appellant pounced on her, knocked her down, stripped her, removed his trousers and defiled her. He then ran away. The complainant informed her mother and both went to the chief but could not get him. The following day they reported to police. The complainant was taken to a doctor who examined her and completed the P3 form and treatment notes. They are exhibits in the case. The doctor confirmed that the appellant had been defiled, and was bruised in her vaginal walls, hymen torn and broken, and intra introtal bruising noted. She had a foul smelling discharge and tested positive with pus cells.

I have carefully considered this appeal and as guided in the case of **OKENO V. REPUBLIC [1972] EA 32**. where the role of a first appellate Court is given as follows:

"**An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [**Pandya vs. Republic (1957) EA 336] **and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion** (Shantilal M. Ruwala v. Republic [1957] EA 570.) **It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (**SeePeters v. Sunday Post, [1958] EA 424.)"

As a first appellant court, I have analyzed and evaluated a fresh all the evidence adduced before the trial court, while giving due consideration to fact. I neither saw nor heard the witnesses.

Mr. Mwanzia urged the appeal on behalf of the appellant. He submitted that the learned trial magistrate did not comply with s.211 of the CPC and therefore accassioned a miscarriage of justice.

Mr. Kimathi, learned state counsel conceded that s.211 of the CPC was not complied with. Counsel urged the court to order a retrial.
S.211 of the Criminal Procedure Code Provides:-

211. (1) At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused, and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any). (2) If the accused person states that he has witnesses to call but that they are not present in court, and the court is satisfied that the absence of those witnesses is not due to any fault or neglect of the accused person, and that there is a likelihood that they could, if present, give material evidence on behalf of the accused person, the court may adjourn the trial and issue process, or take other steps, to compel the attendance of the witnesses.

I have perused the proceedings of the lower court. On 13th August 2007, the learned trial magistrate recorded as follows:

RULING:

The accused has a case to answer.

Mr. Omayo:

The accused will give sworn evidence and will not tell any witness.

Court: Defence hearing on 18.10.2007
B. Ochoi (RM)

Subsequently on 10th April 2001 the court record indicates:

Mr. Inoti present for the accused. Ready to proceed with one Witness.
B. Ochoi (RM)"

The trial court proceeded to take sworn defence of the appellant and the evidence of one defence witness.

The appellant was represented by counsel. The counsel informed the trial court immediately the ruling in the case was read that the accused would give sworn evidence.

The appellant eventually gave his defence under oath and called one witness. Even though the learned trial magistrate did not record compliance with s.211 of the CPC, the appellant enjoyed the rights of an accused person as provided under that section. I am satisfied that no prejudice was occasioned to the appellant due to the said omission. Nothing turns on that ground.

Mr. Mwanzia urged that the age of the child complainant was not proved and that it was paramount it be proved. The learned counsel for the appellant urged that throughout the proceedings, no age assessment of the complainant was produced to prove her age was 12 years as she alleged. Mr. Kimathi did not submit on this point.

The complainant was examined by a medical personnel and a P3 form and treatment notes produced in court by the officer who examined her. The findings of this officer as to a age are recorded in black and white both on the P3 form Exhibit and the annexed treatment notes dated 20th November 2006.

The learned counsel for the appellant was ill advised. There was medical corroboration to the complainant's evidence that she was 12 years old at the time the offence was committed. In that regard, the appellant was concurrently charged of defilement contrary section 8(3) of the SOA.

The final ground urged was that the magistrate who sentenced the appellant in this case was not the one who tried him for the offence, and that therefore s.200 of CPC was flouted.

I have perused the record of the court and have confirmed that Mr. B. Ochoi who heard the case, wrote and delivered the judgment on 20th May, 2008. The learned trial magistrate then referred the file to the Senior Principal Magistrate Mr. J. Nyaga to pass sentence which he did.

Section 200(2) of the CPC provides.

"200(2) Where a magistrate who has delivered judgment in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercises that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment."

In the instant case the trial magistrate wrote and delivered judgment and then sent to his senior to pass sentence. There was no "flouting" of s.200 of CPC in terms urged by the appellants counsel.

I must comment here about jurisdiction as I believe that Mr. B. Ochoi was under a false impression that he did not have jurisdiction to pass sentence in the case.

The jurisdiction of a Resident Magistrate is provided under the Magistrates Court Act.

Sec 4 there of which provides:

"4. The Resident Magistrate's Court shall have and exercise such jurisdiction and powers in proceedings of a criminal nature as are for the time being conferred on it by

(*a*) the Criminal Procedure Code; or

(*b*) any other written law."

That law refers us to the Criminal Procedure Code. On the question of Criminal Jurisdiction, under S.7 of the CPC sentences which subordinate courts may pass are set out therein. Sec7(1) (b) of CPC gives the sentence a resident magistrate may pass as follows.

7(b) a resident magistrate may pass any sentence authorized by law for an offence under section 278, 308 (1) or 322 of the Penal Code or under the Sexual Offences Act, 2006.

That section gives a court held by a Resident Magistrate the power to pass any sentence under the Sexual Offences Act. That means as far as a Resident Magistrate's Jurisdiction under the SOA is concerned, he has the power to pass any sentence therein. That includes a sentence which a Resident Magistrate cannot pass under the Penal Code and other laws. As s.7(2) of the CPC spells out, a Resident Magistrates jurisdiction, which is similar to that of Magistrate of the First Class, (now defunct) is limited to a imprisonment for a period not exceeding 7 years. S.8 of CPC gives the Judicial Service Ccommission power to extend the jurisdiction of any particular magistrate under S.7 of CPC. It provides thus:-

"8. The Judicial Service Commission may, by notice in the Gazette, extend the jurisdiction of any particular magistrate under section 7 either generally or in relation to particular offences triable by a court of a class which may be held by that magistrate, and a magistrate whose jurisdiction has been so extended may pass sentences thus authorized in cases where they are authorized by law."

I understand the provisions of S.7(1) (b) and s7(2) (a) and (b) of CPC to mean that a Resident magistrate's Court is limited to pass sentence of not more than 7 years imprisonment generally, except when dealing with offences under the SOA. In which case he has jurisdiction to pass any sentence provided there under, even if it exceeds his maximum jurisdiction as per s 7(2) of the CPC. Or if the JSC extends his jurisdiction he may pass the sentence thus authorized. Mr. B. Ochoi had jurisdiction to hear, determine and pass sentence in all cases under the SOA. He should have passed the sentence in this case.

I must hasten to add that the trial magistrate's decision to give his senior the case to pass sentence on the appellant did not occasion any prejudice to the appellant. The Senior Magistrate passed the minimum sentence provided for under s.8(3) of the SOA, under which the appellant was charged.

The fifth ground of appeal was that the sentence imposed in this case was harsh and excessive and was passed in total disregard to the appellant's mitigation. As I stated earlier S8(3) SOA provides that a person convicted under that sub section shall be liable to imprisonment for a term not less than twenty years. The appellant was sentenced to the minimum sentence provided. A minimum sentence cannot be harsh and neither can it be excessive. It is a legal and lawful sentence. The courts discretion is removed in so far as passing a sentence less than the minimum prescribed is concerned. The only discretion the court can exercise is to pass sentence above the minimum provided, of course within safeguard provided. In case of the High Court, it should be guided by Regulations 3(1) of the Sexual Offences Regulations, 2008.

I have perused the judgment of the learned trial magistrate and I am satisfied that he carefully analysed and evaluated the evidence adduced before him, exercised his mind to the issues in the case and arrived at the right conclusion. He cannot be faulted in his conclusion.

Having carefully considered this appeal, I find that the same lacks in merit. I confirm the conviction and uphold the sentence. The appeal is accordingly dismissed.

Dated signed and delivered this 28th day of July 2011

LESIIT, J

JUDGE