REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 154 OF 2009

(FROM ORIGINAL CONVICTION AND IN CRIMINAL CASE NO.70 OF 2009 OF THE SENIOR RESIDENT MAGISTRATE COURT AT LAMU BEFORE HON KITHINJI A.R SRM)

REPUBLIC.....PROSECUTOR

-VRS-

EMMANUEL JILLO OMARA.....ACCUSED

JUDGEMENT

EMMANUEL JILLO OMARA(the appellant) was convicted on a charge of defilement of a child under eleven (11) years contrary to section 8 (20 of the Sexual Offences Act 2006 and sentenced to serve 21 years imprisonment. The prosecution`s case was that on 1st day of January 2009, at, M[...] Location in Lamu District within Coast Province, appellant caused his penis to penetrate the vagina of Z.C.B (a child under eleven years of age). He was charged with an alternative charge of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act. Appellant denied the charge, and after due trial in which prosecution called a total of four witnesses while appellant was the only defence witness, he was convicted.

Z.C (PW 1) was a pupil at Z nursery school and she knew the appellant. On a date that she could not recall, the appellant took her to his home to collect coconuts, as her mother had sent her for coconuts and cashewnuts. Pw 1 had been to the appellants home three times. Upon arrival at the home, appellant took her to the bush and pushed her onto the ground. He then removed her clothes and placed his penis “in my place of urinating”. This was after appellant had unzipped his trouser. After finishing his act, appellant ordered her to wear her clothes, promising to buy her shoes. This scenario repeated itself thrice that is each occasion that Pw 1 went to collect nuts from appellant`s home. On the second occasion, appellant told Pw 1`s mother that he was going to buy Pw 1 a Christmas present. Thereafter Pw 1 informed her mother what was going on and she was taken to Baharini hospital, then to the police station.

D.C.K (Pw 2) the girl`s mother told the trial court that on 15/1/09 while she was at home, the appellant approached her with a request for her to allow Pw 1 to accompany him to go and harvest sukuma wiki and he would give her some sukuma wiki. When they returned at 10.00am appellant announced that he was going to buy Pw 1 shoes. Pw 1 returned to her parents home at 1.00Pm and told her mother that she

had returned earlier. Pw 2 became suspicious so she took Pw 1 to her room and upon examining her genitalia, found some mucous and injuries on the vagina – that is when Pw 1 disclosed to her what had happened. It was her evidence that accused used to go to her home to bring fish. On cross-examination Pw 2 stated that Z'S **s** elder sister also saw the semen which was deposited on Pw 1`s genitalia, and that she had known the appellant for about 1½ months. She denied suggestion by the appellant of having sexual relations with him and told the Trial Magistrate that appellant had taken away the young girl on three occasions. A report was made to **PC JOAN ATIENO**(Pw 3) and she issued the girl with a p3 form. She wrote a letter to a Kenya Police Reservist (KPR) requesting for help in apprehending the appellant and upon his arrest, he was also taken to hospital for examination.

DOCTOR SAID MARIAM ABEID(Pw 4) who worked at M[...] sub-district hospital says upon examination of the girl – her age was assessed at 9 years but there were no visible injury. Of significance though, was that her hymen had tears and she had a whitish discharge from the vagina. There were also pus cells seen. The appellant was also examined but no injury was noted and he was found to be HIV negative. The p3 forms in respect of both appellant and complainant were produced as exhibit.

On cross-examination the Doctor stated;-

"It is normal to have pus cells in the vagina"

In his sworn testimony appellant told the trial court that **CHENGO** had borrowed Kshs.1050/- from him on 8th January 2009. On 16th January 2009 at 4.00Pm, he found C at his rental house. **C** became abusive and appellant reported the matter to the village elder. The village elder visited **C**`s home accompanied by village guards who found D with 18 litres of mnazi without a licence. **C** then agreed to pay appellant his money and the landlord ordered **C**`s family to vacate the premises. Three days later, **C** and his wife made claims that appellant had defiled their daughter. On cross-examination he denied that complainant had ever been to his home to buy vegetables, saying she did not even know his name.

The Trial Magistrate in his judgment found that from the evidence of Pw 1, her mother and findings by the Doctor, he had no doubt that Pw 1 had been defiled. He also observed that appellant had the opportunity to commit the offence when Pw 1 accompanied him to his house. The Trial Magistrate`s observation of Pw 1`s demeanour led him to conclude that she was truthful as she was consistent. Appellant`s defence was regarded by the Trial Magistrate, but his finding was that there was nothing to show that complainant was lying.

Appellant has challenged these findings on the following grounds;-

(a) He was held in police custody for five days thus violating his fundamental rights under Article 49 (1) f of the 2010 Constitution.

(b) The charge sheet was defective as the same did not indicate the time the offence took place.

(c) Pw 1 and Pw 2`s evidence was contradicting.

(d) Some of the persons mentioned by prosecution witnesses were not called to testify – specifically the KPR officer, and the elder sister to Pw 1 who was alleged to have seen the semen on Pw 1.

(e) Appellant was not subjected to a medical examination as contemplated by section 36(1) of the Sexual Offences Act.

Appellant filed written submissions in which he pointed out that he was arrested on 19/1/09 and taken to

court on 23/1/09 which exceeded the 24 hours period recognized by the Constitution and no explanation has been given for such delay. Although the State Counsel **MR KEMO** opposed the appeal both on conviction and sentence, he did not address the issue of delay in presenting the appellant to court. From the record of the lower court, the charge sheet shows that appellant was indeed arrested on 19/1/09 and taken to court for plea on 23/1/09. From the 2009 calendar, 19/1/09 was a Monday, and 23/1/09 was a Friday – so there can be no excuse of it being a weekend or failing on some public holiday. Certainly the appellant`s rights were violated and I so declare. This does not however entitle him to an acquittal, it empowers him to sue the State for compensation because I think what Article 49 (1) (g) contemplates is that had trial not begun or not been concluded, then it would entitle appellant to be released on bond – that is why the phrase used in that article is "released" and not "acquit". Infact were the appellant to pursue the same issue under section 72 (3) (b) of the former constitution as he has attempted to do in his written submissions, then the answer lay under section 72 (6) of that constitution which is **NOT** an acquittal but a right to sue the state for compensation by way of damages.

The other aspect he challenges is with regard to time of the offence not being indicated and he seeks to invoke the provisions of section 137 of the Criminal Procedure Code. I am keenly aware that section 137 (f) provides that it shall be sufficient to describe a place, time, thing, matter, act, omission to which it is necessary to refer to in a charge sheet with reasonable clarity and that the charge sheet here does not mention the time. Yet my view is that such omission alone is not fatal, I think what is desired in a charge sheet is that is should contain sufficient information to enable the person charged to be aware of the claim against him and be able to prepare his defence. This omission finds refuge in the consistent evidence of the prosecution witnesses regarding the time appellant encountered the young girl and I find no prejudice in that omission as to warrant interfering with the proceedings on that account.

As regards the appellant`s identity Pw 1 on cross-examination stated;-

"You told me your name is **EMMANUEL OMARA** alias **RAMA**"

It was not just identification by name, she knew the accused physically as he had been to their home and this physical identity was confirmed by her mother Pw 2. It is true that there appears to be a contradiction as regards what Pw 1 had gone to do at the appellant`s home – she says it was to collect cashewnuts and coconuts while her mother says it was to help accused harvest sukuma wiki and came home with some. My view is that the contradiction does not affect the material particulars of the case which would still go to demonstrate that appellant got an opportunity to be alone with the young girl – which I think, was the Trial Magistrate primary consideration.

Failure to indicate the OB number in the charge sheet really had no consequence on the nature of evidence adduced nor is there anything to demonstrate that appellant suffered prejudice as a result of that omission. As regards the voire dire examination, I think from the record of the trial court, the answers given by Pw 1 met the minimum objective as is anticipated by the decision of **KINYUA V R.** i.e. she was intelligent and understood duty to be truthful and I detect no wrong doing on the part of the Trial Magistrate – indeed Pw 1 was honest enough to admit that she once lied – which shows she is not a saint, but is genuine enough to acknowledge her wrong doing. This alone cannot be reason to treat her as a witness who cannot be believed.

As regards the failure to call the KPR officer – surely what evidence would he have given that would lead to a dramatic departure from the evidence so far on record – when his role was simply to arrest appellant upon request by police? Even failure Pw 1 elder sister who is said to have observed semen on Pw 1 is not fatal because there is medical evidence which confirm that Pw 1 had been defiled.

In this instance the case of **BUKENYA and 5 OTHERS V UGANDA No.68 of 1972 EACA pg 549** does not support the appellant`s contention. Of course appellant was subjected to medical examination – but that was almost ten days after the incident – from the p3 form, he was taken to hospital on 26/1/09 – surely what significant findings could there be awaiting detection? Certainly none – the lapse of time made it impossible to make any significant findings in relation to appellant.

The Trial Magistrate duly analysed the evidence and considered the appellant`s defence which was properly rejected. I find no reason whatsoever to interfere with the findings of the lower court – the conviction was safe and I uphold it. The sentence was legal as provided under section 8 (2) of the Sexual Offences Act and I confirm it. The appeal is dismissed.

Delivered and dated this 28th day of September 2011 at Malindi

H A OMONDI

JUDGE