REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 72 OF 2010

(FROM ORIGINAL CONVICTION AND IN CRIMINAL CASE NO.71 OF 2009 OF THE

SENIOR RESIDENT MAGISTRATE COURT AT LAMU BEFORE HON KITHINJI A.R SRM)

REPUBLIC.....PROSECUTOR

-VRS-

PETER MUCHIRI KIROGO.....ACCUSED

JUDGEMENT

PETER MUCHIRI KIROGO(the appellant) was convicted on a charge of defilement of a child under 11 years contrary to section 8 (2) of the Sexual Offences Act No.3 of 2006. After the trial in which five witnesses testified for the prosecution, he was sentenced to serve 21 years imprisonment. The appellant denied the charge whose particulars stated that on the night of 16th and 17th January 2009 at in Lamu District, the appellant caused his penis to penetrate the vagina of p.w , a girl under the age of eleven years **P (PW 1)** was a minor aged 6 years told the trial court that she knew the appellant because he used to visit their home and sleep there. He used to fish in the Lake in the mornings and she recalled a day when appellant went to their two roomed house and slept in Kinyua`s bed, whiIe Pw 1 slept on her mother`s bed with one **S** and **N**

At some point, **S** left the bed, and appellant removed Pw1`s underpants and placed his penis inside her vagina. She felt a lot of pain and was injured. She reported the incident to her aunt w , who then informed her mother she was taken to hospital and was treated. Ever since that incident she keeps bleeding from the genitalia.

On cross-examination she clarified that she was in bed with **S** and the appellant, and appellant told her he would have sex with her in the morning and she stated;-

"The things you did to me were bad things. **S** said I was defiled. He wanted to beat me. **S** said I had bad manners"

She explained that when the incident took place, her mother was away, having gone to hospital. P.m alias **S** (Pw 2) told the trial court that on 16/1/09, the appellant who is their relative, went to their home and they all slept in one bed appellant and PW 2 on each side of the bed, while Pw 1(the child) slept in the middle. He explained that he slept with the child because her mother was in hospital. In the course of the night appellant begun smoking tobacco and since PW 2 could not tolerate the smoke, he left the room and went to sleep in another room. The next day both Pw 2 and appellant left for work, leaving Pw 1 alone and upon return they did not find her – he later learnt that the child had been defiled.

p.k (PW 3) was on his way home when he found PW 1 being interviewed by some women. He inquired from the young girl what had happened and she said appellant had done very bad things to her and she was running away to look for her mother. Pw 3 later relayed this information to the girl`s mother and appellant was arrested. **PC JOAN OTIENO**(Pw 4), confirms that while on duty at **MPEKETONI POLICE STATION**, a young girl was brought to her by her brother with complaints of defilement. She interrogated the child then took her for treatment and after investigations, she charged the appellant. On cross-examination Pw 4 stated that the child`s mother is not mentally stable and there were claims that appellant had defiled the child several times in the past.

The child was examined and **DOCTOR SAID MARIAM ABEID**(Pw 5) who produced the P3 form on behalf of **DOCTOR WAKI** testified that the findings by the **DOCTOR** showed there was no evidence of any injury, no sperm and all tests carried out were negative. However the child had a mild whitish discharge and there was evidence of sexual assault. The appellant was examined but no notable injury or discharge was found and the VCT(?) negative. However his urine had pus cells. On cross-examination **DOCTOR ABEID** stated that the child urine had infection as had the appellant and that it was not normal for an eight year old girl to have pus cells.

In his sworn defence, appellant told the trial court that he had left home and gone to **ZEBRA** area to look for work. Later after six days two people approached him and begun beating him, then he was taken to the police station and charged. He confirmed on cross-examination that Pw 1 knew him.

The Trial Magistrate in his judgement held that appellant had an opportunity to be alone with the child when pw 2 left the bed and that he used to visit the home where the child lived as it was rumoured that he was a boyfriend to the child`s mentally unstable mother. He described both pw 1 and Pw 2 as honest and believed their evidence, saying they had no reason to lie against appellant.

Appellant challenged the conviction on ground that;-

1. Voire dire examination was not properly conducted

2. He was detained in police custody beyond the legal period allowed under Article 49 (1) of the Constitution of Kenya

3. The Charge Sheet was defective as it did not show the OB number nor did the Trial Magistrate make a finding on the alternative charge.

4. Some persons who were mentioned were not called to testify as prosecution witnesses

5. The evidence of prosecution witnesses was real and should not have been relied on to convict her

The appellant filed written submissions arguing that no proper voire dire examination was carried out and

appellant relied on the decision of **SAKILA V R 1967 EA page 403** – it is his contention that the Trial Magistrate ought to have set out the question put to the child and reasons for accepting that she was intelligent enough and that she understood the nature and significance of an oath. A brief examination was carried out by the Trial Magistrate to determine whether the child could give evidence on oath. I do not think voire dire examination has to be lengthy – it is simply intended to test that the child is of sufficient intelligence and understands the duty of telling the truth. This position was clearly discussed in the decision of **KINYUA V R(2002) 1 KLR pg 256** that the investigation need not be long but is to be directed to the question whether the child understands the nature of an oath. If she/he does not, the court may still receive evidence if satisfied that the child is possessed of sufficient intelligence and understands the duty of speaking the truth.

I find no ground on which to fault the Trial Magistrate on the examination carried out. It is correct that appellant was arrested on 19/01/09 – I confirm that the same exceeded the 24 hours stipulated by the Constitution as the period within which an individual can be held in police custody before being charged. Indeed no explanation has been offered by prosecution for the delay in taking appellant to court and to that extent his rights were violated and I so declare. My reading of Article 49 (1) (g) is that upon there being no reasonable explanation for such delay, an individual so arrested is entitled to being released – not being acquitted – I think that contemplates a situation where one has not undergone trial and that is why the drafters of the Constitution were careful not to use the term acquittal – which implies one undergoing due process and being absolved. I am persuaded that appellant is entitled to sue the State for damages for such violation.

Appellant also submits that the charge sheet is defective but I`ll confess I am totally unable to comprehend his line of submission regards the defect or how the defect caused him prejudice. If I understand it, appellant`s complaint is that the time when the offence took place is not indicated in the charge sheet. That is correct, yet I think there is some redemption offered by section 137 Criminal Procedure Code to the extent that the information in the charge sheet sufficiently disclosed to the appellant the nature of the offence, date and place and the prosecution witnesses consistently referred to the incident taking place when they had gone to sleep. Really I find no prejudice occasioned by the failure to state the time on the charge sheet and indeed appellant was able to present a proper defence to the trial court. Appellant also complains of persons who were mentioned yet not called as prosecution witness – these were **KINYUA** - infact from the evidence of Pw 1 one can infer that **KINYUA** was absent and his failure to testify would not have added any value to the matter. **AUNT w,** who was mentioned did not witness anything but is said to have received a report from Pw 1 about the incident – it would have been useful to confirm from her whether she observed the child`s genitalia. And as for Pw 1`s mother (a) there is no evidence that she is mentally unwell(b)even if she was well, she was absent during the date in question, so her evidence would not have tilted the prosecution case in whichever direction.

My major concern is with the findings of the **DOCTOR** visa vis what **DOCTOR MARIAM** stated in cross-examination. I have read through the P3 form – the findings are that there was no notable tension or trauma to the genitalia, and the hymen was **INTACT**. There was no mention in that P3 form about any pus cells in the girl`s genitalia or any bleeding as alleged by the child(she claimed that when taken to hospital for examination, **DOCTOR** washed the blood from her vagina) yet that is not indicated in the P3 forms nor did the **DOCTOR** note any continuous bleeding. If the incident took place on the mother`s bed, wouldn't the bedding naturally be stained with blood? Yet Pw 2 did not seem to have noticed anything nor did the police officer make any attempt during her investigations to find out the state of the beddings which may have been on the bed on that date. That medical report makes no reference to pus in the girl`s urine and I wonder where **DOCTOR MARIAM** got such information from. Infact that medical report does not suggest that there had been any penetration of the young girl. Then there is the medical report in respect of the appellant – again, there was no significant finding, and no mention at all about urine tests disclosing presence of pus, and I again wonder where **DOCTOR MARIAM** (who by the way had not examined the child), got such information from. Did she deliberately make up such information so as to have the appellant convicted. I think the Trial Magistrate erred in accepting this **DOCTOR`S** evidence, I find her to be completely dishonest, and it is unfortunate that on the strength of her evidence the appellant earned 21 years incarceration.

If really Pw 1 had been penetrated by the appellant as she described, saying she was injured and felt a lot of pain, then how is it that the **DOCTOR`S** finding was quite the opposite. It would therefore have been important to have **AUNT W** testify to confirm whether she made any observations on the child and upon such report – such observation would have included any lesions, redness, bleeding, presence of semen – without this then I think Pw 1`s evidence stood on very shaky ground and it was unsafe to convict appellant on that evidence. Consequently I find that the appeal has merit and is allowed. The conviction is quashed and sentences set aside. Appellant shall be set at liberty forthwith unless otherwise lawfully held.

Delivered and dated this 6th day of October 2011 at Malindi

H A OMONDI
JUDGE