



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Criminal Appeal 234 of 2009
CHARLES MUGAMBI MWENDIAAPPELLANT
Versus
REPUBLIC.....RESPONDENT
JUDGMENT

Charles Mugambi Mwendia, the appellant herein, was tried on a charge of defilement of a girl contrary to section 8(1)(2) OF Sexual Offences Act. No. 3 of 2006. He also faced an alternative charge of indecent act with a girl contrary to section 11(1) of the Sexual Offences Act. No. 3 of 2006. After undergoing a full trial the appellant was acquitted on the main count but was convicted on the alternative count. He was then sentenced to ten years imprisonment. Being unhappy with the decision, the appellant preferred this appeal.

On appeal the appellant put forward the following grounds in his petition of appeal:

1. *I pleaded not guilty to the charge.*
2. *The learned magistrate erred in law and facts, with regard to the right of the appellant guaranteed under section 72/3 of the Constitution, and find that the trial was unfair and not within the meaning as soon as practicable under section 71 and 77 (10 of the constitution, as prosecution did not abide to the provisions in bringing the appellant to court after 24 hours of his arrest.*
3. *The learned magistrate erred in law and facts, in finding the evidence by P.W.1 and P.W.2 corroborating that, whose gist raised doubts whether P.W.1 was getting parental care or was being tortured by P.W.2 (Mother) who claimed was washing P.W.1 normally, but P.W.1 complained over the act P.W.2 was doing to P.W.1 relating and /or implicating or rather mentioning the appellant, to have been doing the same to her, while P.W.1 testified that appellant licked her lips and did bad manners against her, an act that could have been reported earlier to either P.W.2, the father or any other neighbour by P.W.1, had it been true and not a fabrication.*
4. *The learned magistrate erred in law and facts, in not considering the demeanor of P.W.1 of keeping silent on two hearings, making 1st and 2nd hearing to be adjourned, and on the third hearing, could be after being coached of what to say, and for P.W.2 could not come to testify until an order was given by the court, bringing doubt, either the prosecution was fetching evidence or was tactically delaying the trial, but were trying the appellant to be sentenced.*
5. *The learned magistrate erred in law and facts, by not considering that though witnesses may have had memory failure, in respect of the exact date the crime was committed the mother ought to have stated between the alleged dates, that P.W.1 was having suspicious movements i.e. may have had pains following the findings of the doctor, that penetration by fingers was likely to P.W.1 who was a minor age of juvenile of 4 years.*
6. *The Learned magistrate erred in law and facts, not considering the defence of the appellant along side reasonable doubts eliminating from prosecution case, doubts ought to have resolved in favour of the defence.*
7. *Since I have obtained these grounds and submitted through memory, I pray to be furnished with the trial proceedings and the judgment to enable me raise more reasonable grounds during the hearing of this appeal.*

When the appeal came up for hearing, Mr. Makura, learned State Counsel conceded the appeal on two grounds: First, that the appellant was held beyond the period set by the constitution. Secondly, that there was no conclusive

evidence to connect the appellant with the offence he was convicted for.

This is the first appellate court hence I am enjoined to reconsider the case that was before the trial court. The prosecution's case was supported by the evidence of five witnesses. TM K (P.W.1) the complainant told the trial court that the appellant whom she fondly called teacher touched her virginal organ while she was at his house. P.W.1 further said that the appellant licked her mouth. J WK (P.W.2), P.W.1's mother told the trial court that P.W.1 used to visit the appellant's house to watch T.V. and to play computer games. P.W.2 confirmed that on the material day the complainant (P.W.1) visited the appellant's house after which she (P.W.1) told her that the appellant had touched her private parts and had licked her mouth. Dr. Irene Njeri (P.W.5) produced a medical report she had filled. In the P3 form the doctor merely stated that assault was likely. On his part, the appellant gave an unsworn statement in which he denied ever committing the offence. The appellant claimed that P.W.2 whom he lived together had a crush on him. He claimed she became malicious when he refused her advances.

I have carefully considered the evidence tendered and I am convinced that there was no cogent evidence tendered by the prosecution to sustain a conviction. The medical evidence tendered were inconclusive hence it did not corroborate the evidence of the complainant who was a child of tender age. It is on record that the child's mother (P.W.2) said that her child told her to stop doing naughty things on her, the way her teacher (appellant) does to her. It is on the basis of that information that P.W.2 reported the appellant as having defiled her daughter. The medical examination was inconclusive. I am not convinced that the evidence tendered proved the alternative count beyond reasonable doubt. I am satisfied that Mr. Makura properly conceded the appeal on this ground.

There is no doubt that the appellant was held in police custody beyond 24 hours. There was no explanation to justify the delay both at the trial court and on appeal. In such a case the consequence is an acquittal irrespective of the strength of the case against the accused.

In the end I allow the appeal. The conviction is quashed and the sentence is set aside. The appellant is set free forthwith unless lawfully held.

Dated and delivered this 13th day of January 2010.

J.K. SERGON
JUDGE

In open court in the presence of Mr. Makura Learned State Counsel and the appellant in person.

J.K. SERGON
JUDGE