



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 351 of 2007

GABRIEL MUCHOKI GITAU..... APPELLANT

Versus

REPUBLIC.....RESPONDENT

JUDGMENT

Gabriel Muchoki Gitau, the appellant herein, was tried and convicted for the offence of defilement contrary to section 8(1) of the Sexual Offences Act No. 3 of 2006. He was sentenced to serve 20 years imprisonment. The appellant is now before this court to seek for the judgment to be upset on appeal.

When the appeal came up for hearing, Miss Ngalyuka, learned State Counsel conceded the appeal on the basis that the entire trial was muddled up to the extent that the appellant's trial was prejudiced. The appellant put forward the following grounds on appeal:

1. The learned magistrate erred in finding that;

a. Prosecution didn't sign the complaint, the appellant was charged with on the charge sheet neither did L. Nyambura (S.R.M) signed the same before or after plea was taken. c/s 89 CPC Cap. 75, that provides a complaint should be signed by the officer – police officer (officer in charge) and or the magistrate. for proceeding of trial to continue, by calling witnesses. Suggesting that, appellant was convicted, not in a well or properly investigation or investigation completed. From police.

2. The learned magistrate erred not finding that appellant was brought before court not within 24 hours but after 24 hours of his arrest c/s 72/3 of the constitution.

3. The learned magistrate erred not finding that, P.W.1 had no reasonable suggestion to have failed to report immediately not after 3 days as though was unwell, could inform the neighbours for consistent to effect immediate arrest as even private person is lawfully to arrest on a reasonable arrest c/s 77(1) of constitution the enhanced “as soon as practicable” doubting the P.W.1.

4. The learned magistrate erred not finding that, the delay to report, was meant to prejudice, as appellant could ask to be examined by the doctor, in rebut of prosecution allegations.

5. The learned magistrate erred, not considering all the above and find that the doubts, therein and the prejudice therein as portrayed, in the a foregoing grounds, was meant to delay to manufacture incriminating evidence against the appellant and find 20 years sentence, excessive and harsh following:

a. appellant was 1st offender as no records shown

b. was the only bread winner of his family.

c. reasonable doubts reducing the weight of evidence by the prosecution.

It would appear this appeal will be disposed of by two main grounds raised by both the appellant and the learned State Counsel. Let me start with the ground argued by Miss Ngalyuka. It is the submission of the learned State Counsel that the entire trial was not properly conducted hence the appellant's defence was prejudiced. I have carefully examined the record. The record shows that the appellant pleaded not guilty to the main charge of defilement contrary to section 145(1) of the Penal Code and the alternative charge of indecent assault on a female contrary to S. 144(1) of the Penal code. The record also indicates that on 25th April 2007, the prosecution successfully applied to amend and substitute the charge sheet to be in line with the Sexual Offences Act No. 3 of 2006. The new charge sheet was read to the appellant on 26/6/2007 whereupon he pleaded not guilty. The particulars of the offence in the main charge is that on the 2nd day of January 2006 in Maragua District within Central Province the appellant committed an act which caused penetration with P.W.K a child aged between 16 and 18 years. By the time of amendment and or substitution, a total of four prosecution witnesses had testified. In fact one witness i.e. Dr. Mugo (P.W.5) testified only in support of the new charge. Two issues have arisen from the sequence of the aforesaid proceedings. First, is that the newly amended or substituted charge was not supported by the evidence of four (4) witnesses. It is therefore doubtful whether the evidence of P.W.5 could have sustained a conviction. The learned trial Senior Resident Magistrate should have recalled the four witnesses ie. P.W.1 – P.W.4 to give evidence to prove the new offence under S. 8(1) of the Sexual Offences Act. In this regard, with respect, I agree with the arguments of Miss Ngalyuka that the appellant's defence was prejudiced. He had no chance to cross-examine the four witnesses on the substituted charge which in any case the learned trial Senior Resident Magistrate did not sign under s. 89(3) and (4) of the Criminal Procedure code. Secondly, the particulars clearly indicate that the offence took place on 2nd January 2006. The Sexual Offences Act No. 3 of 2006 was assented to on 14th July 2006 and its commencement date was 21/7/2006. There is no provision making the Sexual Offences Act to operate retrospectively. Under Section 48 of the Sexual Offences Act and regulation 3 of the First Schedule of the Transitional Provisions of the aforesaid Act, it is clearly stated that any proceedings commenced under any written law or part thereof repealed shall continue to their logical conclusion under those written laws. The learned Senior Resident Magistrate did not therefore appreciate the aforesaid provisions hence he fell into error.

In ground 1 of his petition of appeal, the appellant complained that he was held beyond the period of 24 hours. Miss Ngalyuka did not address me on this issue. The record shows that the appellant was arrested on 17th January 2006 and was taken to court on 19th January 2006. It is obvious he was held in police custody in breach of section 72(3)(b) of the Constitution. In such a case the appellant is entitled to an acquittal. I would have ordered for the restoration of the original charge but due to the unexplained constitutional breach I decline to do so.

For the above reasons I allow the appeal. The conviction is quashed and the sentence set aside. The appellant is hereby 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 the appellant and Mr. Makura learned State Counsel.

J.K. SERGON

JUDGE