REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 259 of 2009

JAMES MAINA MANENE……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

JUDGMENT

The Appellant, James Maina Manene was charged with two counts, defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act, 2006 (No. 3 of 2006) and an alternative charge, indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. The Appellant denied both offences, and the matter proceeded to full trial. The prosecution called 5 witnesses and after considering the prosecution's evidence, the trial court put the appellant to his defence. The Appellant elected to give unsworn statement and thereafter the court retired, to consider the prosecution's evidence, and Appellant's unsworn statement. The trial court found the Appellant guilty of the offence of defilement of a child of 17 years of age. The Appellant was convicted and sentenced to 15 years imprisonment.

The Appellant has appealed against his conviction on five grounds. The five grounds were amended by a Supplementary Grounds of Appeal submitted to court on 22nd February 2010 in the course of the hearing of the appeal the subject of this judgment. The original Petition of Appeal dated 7th September 2009 and filed on 9th September 2009, and the Supplementary Grounds of Appeal raise the issues whether -

(a) the Appellant understood the language used during the proceedings; (ground 7),

(b) there was sufficient evidence to convict the Appellant (grounds 2, 3, 4 and 5),

(c) the Appellant's defence was considered and rejected,

(d) the Appellant's rights to a speedy trial were violated.

The Appellant's made written submissions, and stated that he relied on them, and even after State Counsel had made his submissions in opposition to the appeal the Appellant reiterated his stated position that he relied on his written submissions. So I will commence with the Appellant's submission that his rights to a hearing within a reasonable time were violated.

Of whether the Appellant's Constitution rights to a hearing within a reasonable time were violated

The Appellant contends that he was arrested on 18th March 2009 but was not arraigned in court until on 20th March 2009, that is to say some 2 days later. The Appellant contends that this was in violation of his fundamental rights to be brought before a court within 24

hours of his arrest, and that there was no explanation given by the prosecution for the delay. The Appellant relied on the decision of the Court of Appeal in the case of ALBANUS MWANZIA MUTUA -vs- REPUBLIC where the court held inter alia-

> *".. that upon the determination that the constitutional right of the appellant had been violated any prosecution against them on basis of the events for which attempted charge were being made on 2nd August 2007 would be null and void, and that is so and will remain so irrespective of the weight of the evidence that the Police might have in support of their case …"*

In answer to this ground Mr. Nyakundi, learned State Counsel, submitted that the issue had not been raised earlier, and he had not had opportunity to contact the investigation officer. It ought to have been raised in terms of the Constitution of Kenya (Supervisory Jurisdiction, Fundamental Rights and Freedom of the Individual) *High Court Practice and Procedure Rules 2006 (LN No. 6 of 2006).* If this procedure had been followed, the prosecution authority would have provided a comprehensive response to the question raised by the Appellant.

In addition, Mr. Nyakundi submitted that any person whose rights are violated under Section 72(3)(b) of the Constitution may bring an action for damages under Section 72(6) of the Constitution.

I agree with the submissions by Mr. Nyakundi. Firstly it is the Appellant who must raise a complaint at the earliest possible opportunity. The court may take note of it, but the court has neither the jurisdiction to terminate the prosecution, nor to acquit the accused. The prosecution may apply to terminate the prosecution under Section 26 of the Constitution, but not the court. Whether or not an accused person is convicted or acquitted on the evidence, he retains his right under Section 72(6) of the Constitution where he can show that he was unlawfully detained beyond the prescribed period. He is not entitled to an automatic acquittal. It would be unconstitutional to acquit an accused person who has not been brought to court either within the period of 24 hours or 14 days. A suggestion that such prosecution would be null and void was made per incuriam, in my very humble opinion.

This ground of the Supplementary Petition of Appeal fails.

On the question of language, the court record of 20th March 2009 shows that the charge and substance thereof was explained to the accused in a language which understood, and the accused replied in Kiswahili - *"It is not true"* There is a similar record on 13th May 2009 when the charges were substituted, the Appellant pleaded not guilty in Kiswahili. That is the language recorded by the court and in which the charges, and substance thereof were explained to the Appellant.

In addition, the Appellant cross-examined PW1, PW2, PW3, PW4 but did not cross examine PW5 who booked the Appellant following his arrest by two people who delivered him to the police station.

In my humble view again, an Appellant who has taken part in proceedings by cross-examination of prosecution witnesses is estopped by his conduct and participation in the proceedings from denying that he understood the proceedings. This ground of appeal also fails.

On whether there was evidence to convict the Appellant and whether the court considered the Appellant's defence, the record of the prosecution witnesses, the Appellant's unsworn statement, and judgment of the lower court is clear. The prosecution called five witnesses.

PW2, the complainant testified that she had gone to fetch water when the Appellant accosted her, held her hand, and threatened her when she resisted, and led her to his house where he removed her clothes penetrated and thereby defiled her and when she screamed in pain he told her to persevere. After his deed was done he locked her up in his granary *(store),* till 6.00 p.m. PW2 reiterated this evidence when cross-examined by the Appellant.

PW1, was Doctor Charles Njenga Musyo, the Medical Officer of Health at Nyahururu District Hospital. He examined PW2, the

complainant. He found a freshly perforated hymen, marked redness of the vagina, and whitish discharge therefrom, although there was no spermatozoa, and the victim being 17 years of age he concluded that the offence was defilement. PW1 confirmed in cross-examination by the Appellant that there was no spermatozoa.

The evidence of PW1 is corroborated by that of PW2, PW4 and PW3 who found the complainant locked up in the granary and when PW2 raised an alarm, the Appellant ran away. He was however apprehended by neighbours at about 9.00 p.m. and was locked up in PW3's home until the next morning when he was delivered to Mairo Inya Police Station.

The Appellant did not challenge or controvert the prosecution evidence. The Appellant gave an unsworn statement, gave his name, his residence, his occupation and recalled the charges against him and in answer thereto said - *"What I can say is that the witnesses lied."* That is all.

In its judgment, the lower court took into account, the appellant's defence - *"Accused simply stated in his defence - the witnesses lied."* The Court then considered the evidence of the prosecution witnesses and concluded - "*There is no doubt that the accused committed an act of penetration against the complainant herein - That is proved by medical evidence."* The court then analysed the evidence, the age of the complainant, and concluded that the Appellant committed the offence of defilement; convicted and sentenced the Appellant to 15 years imprisonment.

That is the sentence prescribed by section 8(4) of the Sexual Offences Act, a person who commits an offence of defilement with a child between the age of 16 and 18 years is liable upon conviction to imprisonment for a term of not less than fifteen years.

The court arrived at a proper decision on the evidence, convicted and sentenced the Appellant accordingly. I have no reason to interfere with that decision. The appeal has no merit at all, and the same is dismissed.

There shall be orders accordingly.

Dated, delivered and signed at Nakuru this 26th day of February 2010

M. J. ANYARA EMUKULE
JUDGE