



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Appeal 224 of 2008

PATRICK MENGICH KIPRONO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Patrick Mengich Kiprono was charged with the offence of defilement contrary to **section 8(2) of the Sexual Offences Act, (No. 3 of 2006)**. He was convicted and sentenced to life imprisonment.

The appellant has appealed in this court against both conviction and sentence, on five (5) grounds. The appellant has raised one constitutional issue, namely that he was not brought to court within 24 hours as prescribed by **section 72(3)(b) of the Constitution**. The other grounds may be summarized as a contention that there was no evidence to sustain a conviction, and that there was no basis for his conviction, and the judgment lacked the ingredients required under **Section 169(1) of the Criminal Procedure Code**.

The appellant reiterated these grounds in Supplementary Grounds of Appeal which the court allowed under **Section 350(1) of the Criminal Procedure Code**, at the hearing on 25th January 2010. The appellant also gave written submissions upon which he relied and added that - there was no adequate investigation that vital witnesses were not called, and there was consequently inadequate evidence upon which to convict.

On his part, Mr. Gumo learned Assistant Deputy Public Prosecutor supported both the conviction and sentence. The complainant was 6 years of age. She knew the Appellant, she explained in graphic detail the ordeal she was subjected to by the appellant. She suffered serious injuries as observed by PW2, and confirmed as consistent with the offence of defilement, and concluded that the conviction was safe.

The Court of Appeal has stated in many cases, the duty of this court as the first appellate court, is to examine and re-evaluate the evidence before the lower court and draw our own conclusions and findings.

Before embarking on evaluation of evidence, I wish to dispose the appellant's contention that he was not brought to court within 24 hours, contrary to Section 72(3) (b) of the Constitution, and that the record of the court does not show the language in which the proceedings were conducted contrary to Section 77(2)(b) and (f) of the Constitution, and thus that the prosecution was carried out in violation of his rights under the Constitution.

It is of course correct that, to bring a suspect to court after 24 hours prescribed under **Section 72(3)(b) of the Constitution** is a violation of the rights of the accused as it was indeed held by the Court of Appeal in that such misunderstood case - **ALBANUS MWAI MWASYA MUTUA v. REPUBLIC** upon which the appellant relied. If such delay is explained satisfactorily then the violation will be excused. If the accused, or as in this case the appellant feels otherwise, he is at liberty to sue the person who has occasioned his detention beyond the 24 hours. That is the requirement of Section 72(6) of the same Constitution. The accused or the appellant is not entitled to an automatic acquittal. He will be entitled to an acquittal if there is no evidence to support his conviction.

The appeal fails on this point.

I think the appeal also fails on the ground that the language in which the plea was taken was not recorded. First as a statement of fact, it is not correct that the language in which the charge was explained, and the appellant understood was not recorded. It is the law under **Section 198 (2) of the Criminal Procedure Code**, that the language of the subordinate court is either English or Kiswahili. That is the language in which the charge was explained to the appellant and to which the appellant pleaded in the negative - "**it is not true**" and a plea of not guilty was entered.

As the accused obviously understood the charge to which he pleaded in the Kiswahili language, it follows that he was indeed provided with an interpreter as prescribed under **Section 77(2) (b) and (f) of the Constitution**. It is a matter for judicial notice that among other duties, the duty of explaining to the accused the charge as read by the judicial officer, is the function of the court clerk. The appellant cannot in my respectful opinion take part in proceedings and later turn round on appeal that this or that constitutional right was violated without any basis at all.

In my view, such contentions are liable to be struck out **pronto** as Section 84 of the Constitution lays down a whole regime of procedure for enforcement of constitutional rights under Chapter V of the Constitution (Fundamental Rights and Freedoms of the Individual), and should be raised at the earliest possible opportunity - whether fiction or not, all are presumed to know the law, both the Constitution, the Supreme Law and ordinary legislation. If the law were otherwise, ignorance of the law would be a universal defence to all and whatever charges.

I therefore find and hold that none of the provisions of **Section 77 (2) (b) and (f)** of the Constitution were violated and grounds one and two of the appeal must therefore fail.

The appellant argued in grounds three and four of his appeal that there was insufficient evidence to found a conviction and sentence against him. The basis of the appellant's contention is that he was not himself examined to find out whether he was suffering from Sexually Transmitted Disease (STD), gonorrhoea. Indeed he was not so examined. But

this does not prove that he did not commit the offence of defilement for which he was charged.

FC, the 6 year old child and victim of the appellant's disorderly and heinous act was very clear in her unsworn statement. She was a nursery school child and was graphic in her testimony. She knew the appellant as Patrick. In the child's language -

"He did a bad thing to me. He put me on the bed, removed his clothes and put his thing here (child points to her vagina).

The child repeated the incident in the same graphic detail to her mother (PW2) who later took the child to the local dispensary, then health centre, and eventually the Police who had the appellant arrested and eventually charged by **PW3 - P. C. Boniface Otieno. PW4 Robinson Kipsut** a Clinical Officer at Keringet Medical Clinic testified that he examined PW1 and found reddening of the walls of the vagina and lacerations of the vaginal walls and formed the opinion that the child had been defiled. He completed and signed the P3 form.

Against that evidence, the appellant gave sworn statement relating to the manner of his arrest by members of the public including the child's father and merely denied the offence. He could not explain why PW1 only mentioned him and pointed at him as the person who had done bad things to her.

In light of the evidence of the child, who had been subjected to a *voir dire* by the trial court; I am persuaded that the trial court came to the right finding that the appellant was the person who had defiled the child, and found him guilty as charged and sentenced him accordingly.

I affirm the judgment, the conviction and sentence in the lower court and dismiss the appellant's appeal dated and filed on 26th September, 2008. There shall be orders accordingly.

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

M. J. ANYARA EMUKULE

JUDGE