



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Criminal Appeal 29 of 2008

DENIS KABEMBE MZINGA..... APPELLANT
VERSUS
REPUBLIC..... RESPONDENT

JUDGEMENT

The appellant herein **DENNIS KABEMBE MZINGA**, has filed this appeal against his conviction and sentence rendered by the learned senior Resident Magistrate, Kaloleni Law Courts. The appellant had on 28.12.2006 been charged with the offence of **DEFILEMENT OF A GIRL CONTRARY TO SECTION 8 (3) OF THE SEXUAL OFFENCES ACT 2006**.

The particulars of the charge read as follows

“On the 20th day of December 2006 at P Village, K location in Kilifi District, within the Coast Province, had carnal knowledge of **JK**, a girl under the age of fifteen (15) years.”

The trial commenced on 9.5.2007 and the prosecution led by **INSPECTOR BAKARI** called a total of six (6) witnesses in support of their case. The brief facts of the prosecution case were that on 20/12/2006 the complainant **JK**, who was by then fifteen (15) years of age was on her way to the shops. She met the appellant who called her to him. She declined and proceeded on her way. The complainant pulled her to the bushes and lifted her lessso (loincloth) to cover her mouth and prevent her calling out for help. In the bushes the appellant ripped off her under – pants and raped her. She struggled and freed herself sufficiently to call out for help. Her two brothers **GM P.W.3** and **T** heard her muffled cries for help and came to her rescue. They found the appellant lying on top of the complainant. The appellant tried to escape but was apprehended by the two youths. They took him to the assistant chief then later to the police station where he was placed in cells. The complainant was examined by **DR. MESHACK MWANGALA P.W.6** who filled and signed her P3 form which he produced in court as an exhibit **Pexb 1**.

At the close of the prosecution case the trial court ruled that the appellant had a case to answer and he was placed on his defence. The appellant gave an unsworn defence in which he denied the charges. He called no witness in defence. On 20.12.2007 the learned trial magistrate delivered his judgement in which he convicted the appellant and after hearing his mitigation sentenced him to twenty (20) years imprisonment. It is against this conviction and sentence that the appellant now appeals.

At the hearing of the appeal the appellant appeared in person and relied on his written submissions filed in court. **MR. MONDA** learned State Counsel opposed the appeal on behalf of the Respondent State. I have carefully perused the appellant’s written submissions and note that he raised several grounds of appeal which included the Breach of his fundamental rights under **S. 72 (3)** constitution of Kenya. **S. 72 (3)** of the Constitution provides.

“(3) *A person who is arrested or detained*

(a).....

(b).....

and who is not released, shall be brought before a court as soon as it is reasonably practicable, and where he is not

brought before a court within twenty – four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion or his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest on upon any person alleging that the provisions of this sub-section have been complied with.”

The appellant herein has been charged with the offence of Defilement under the sexual offences Act No. 3 of 2006. This is not an offence punishable by death or in other words it is a non – capital offence. As such **S. 77(2)** of the Constitution provides that he ought to have been arraigned before a court within 24 hours of his arrest. In his written submissions the appellant claims that he was not brought to court until eight (8) days after his arrest. I have examined the record of the lower court and find that this contention is indeed correct. The appellant was arrested by police on 20.12.2006. His first appearance in court was on 28.12.2006 a full eight (8) days after his arrest. This fact is not disputed by the learned State Counsel.

Section 72(3) provides that the onus of proving that a suspect has been brought to court “as soon as was reasonably practicable” rests with the person so alleging. In these circumstances the onus lay on the prosecution to explain this delay and/or satisfy the court that despite the 8 – day delay the appellant was actually arraigned before court as soon as it was reasonably practicable to do so. No such explanation was offered either before the lower court or to myself. In challenging this ground of Appeal Mr. Monda, for the State relies on the decision of the Court of Appeal in the case of **DOMINIC MUTIE MWALIMU – VS – REPUBLIC CRIMINAL APPEAL NO. 270/2005**, and submits that having not raised the issue of breach of S. 72 (3) at the time of his trial, the appellant cannot now raise the issue as a ground for his appeal, in the High Court. In the **DOMINIC MUTIE** case the Court of Appeal held as follows

“The appellant did not complain in the trial court that he was not brought to court as soon as was reasonably practicable. Needless to say the prosecution was not called upon to show that the appellant was brought to court as soon as was reasonably practicable. There is no merit in this ground.”

At first glance this ruling would appear to support the contention by the state that having failed to raise these issues at his trial the appellant herein cannot now rely on this breach as a ground of appeal. However subsequent to the ruling in the **DOMINIC MUTIE** case, the Court of Appeal had occasion to address this ground of the breach of fundamental rights of an appellant , contrary to S.77(2) Constitution in the case of **JOSEPH AMOS OWINO – VS – REPUBLIC CRIMINAL APPEAL NO. 450 OF 2007**. In this later case their lordships drew a distinction between the situation where an appellant was represented by an advocate at his trial before the lower court, and the case of an appellant who did not have the benefit of legal counsel. In this **JOSEPH AMOS OWINO** case the Court of Appeal sitting in Kisumu held at page 16 as follows:-

“In short whereas we agree that in cases where an accused person was represented by an advocate in both or either of the courts below, he through his advocate was expected to have raised the question of his constitutional rights before the court and if he did not do so through his advocates then he would be deemed to have waived that right and cannot raise it here with success; however [my emphasis] in cases where he is not represented as was the case here and particularly where the matter started by way of a charge sheet as was the case in the case before a magistrate, the trial court and the first appellate court in its exercise of jurisdiction should have on its own ensured that the constitutional rights of the appellant were fully complied with notwithstanding that the appellant did not raise the same. This is in acceptance that being illiterate in law, the appellant may not have been aware of his constitutional rights as an advocate would have been aware and therefore he relied wholly on the court to ensure compliance with such rights by the prosecution.”

A clear reading of this decision is that where, as in this case the appellant was unrepresented by legal Counsel at his trial he is deemed to be “illiterate” in law and may be totally oblivious of his fundamental rights, the duty then is upon the court to demand and obtain from the prosecution an explanation for their delay in bringing the suspect to court. The trial magistrate failed to make such an enquiry, despite the fact that the date of arrest was clearly evident from the charge sheet. In view of this decision by the Court of Appeal the submission by Mr. Monda based on the **DOMINIC MUTIE** case, that this ground is no longer available to the appellant, has no merit and cannot stand. It is clear that a distinction is to be made between suspects who have legal Counsel and those lay persons who face the courts without the benefit of legal Counsel in the former case the advocate being “literate” in law would be expected to raise the issue of any breach at the earliest possible opportunity which would ordinarily be at the trial stage before the lower court. However where a suspect is not represented by an advocate, he is deemed “illiterate” in law and may well be totally oblivious of his rights under the constitution and may not know to raise the issue of any breach. In such a situation the court, as the defender of justice would be expected to step forward and demand from the prosecution an explanation for any delay in bringing the suspect to court. It is not enough to simply sit back and wait for the suspect to raise the issue. In the **JOSEPH OWINO** case the Court of Appeal held that despite not having raised the issue of breach of fundamental rights

earlier, this ground would still remain available to an appellant who was unrepresented by Counsel upon appeal. The present case is on all fours with the **JOSEPH OWINO** case. The delay in bringing the appellant before a court is glaringly obvious. No explanation for this delay has been tendered either by the prosecution before the lower court or by the State Counsel before me. This delay therefore remain unexplained. As such it amounts to a blatant violation of the appellant rights as guaranteed by S.77 (2) of the Constitution. Such a violation cannot and will not be countenanced by the courts. On account of this violation the trial before the lower court was a nullity. It follows that any conviction which is based on an unjust trial cannot stand.

On this basis alone this appeal succeeds. I do hereby quash the conviction of the appellant rendered by the lower court and set aside his twenty (20) years sentence. The appellant to be released forthwith unless he is otherwise lawfully held.

Dated and Delivered in Mombasa this 22nd day of March 2010

M. ODERO

JUDGE

Read in open court in the presence of:

Appellant in person

Mr. Onserio for State

M. ODERO

JUDGE

22.3.2010