REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA
Criminal Appeal 187 of 2008

M W…….....……..…APPELLANT

VERSUS

REPUBLIC……RESPONDENT

JUDGMENT

Before me is the appeal of one M W (hereinafter referred to as 'the appellant' against his conviction and sentence by the learned Senior Resident Magistrate, Voi Law Courts. The appellant had been charged with the offence of INCEST BY MALE CONTRARY TO SECTION 20 (1) OF THE SEXUAL OFFENCES ACT NO. 30, 2006. The particulars of the offence were as follows:-

> *"On diverse dates between the month of September 2006 and 3rd of February 2007 at S VILLAGE Taita Taveta District within Coast Province, being a male person, had carnal knowledge of S W a girl aged 10 years a female person who was to his knowledge his daughter."*

The hearing proceeded before the lower court on 12th June 2007 and the prosecution led by INSPECTOR GITHOGE called a total of four (4) witnesses in support of their case. The brief facts were that the complainant child S W a ten (10) year old girl was the biological daughter to the appellant, and she lived with the appellant and her step-mother M M PW4 in the family home at S Village in Taita Taveta District. The complainant told the court that on a date she does not recall she came home from school at 2.00 p.m. She bathed and as she prepared to leave to join her step-mother at the Scripture Mission, the appellant intercepted her. He took her back into the house, laid her on the bed and removed her pants. He then defiled her. The complainant revealed that the appellant defiled her several times on various other occasions. She finally reported the matter to one W who informed PW4. They then informed the complainant's teachers as well as the Childrens Officer. The matter was finally reported to Voi Police Station. The appellant was arrested. The complainant was examined by a doctor. Her P3 form was filled and signed and was produced in court as an exhibit PExb1.

Upon the close of the prosecution case the learned trial magistrate ruled that the appellant had a case to answer and he was placed on his defence in compliance with Section 211 Criminal Procedure Code. The appellant gave a sworn defence in which he denied the charge claiming that it had been fabricated against him. On 11th June 2008 the learned trial magistrate delivered her judgment in which she convicted the appellant of the offence of Incest and sentenced him to serve fifteen (15) years imprisonment. It is against this conviction and sentence that the appellant now appeals.

At the hearing of this appeal the appellant appeared in person and relied on his written submissions filed in court. MR. MONDA, learned state counsel appeared for the respondent state and opposed the appeal.

In determining the appeal I will be guided by the ruling in the case of OKENO – VS – REPUBLIC [1972] E.A. L.R.33, where it was held inter alia, that:

> *"It is the duty of the first appellate court to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld."*

I have carefully perused the written submissions filed by the appellant and I note that he raised four (4) main grounds of appeal (i) Failure by the prosecution to call crucial witnesses (ii) Contradictions and inconsistencies in the prosecution case (iii) Failure by the trial magistrate to consider the appellant's defence (iv) Violation of the appellant's rights as guaranteed by Section 72 Constitution of Kenya. I will now proceed to consider the merit of each individual ground.

At the outset it is important to state that the relationship between the complainant and the appellant is not in any doubt. The complainant in her evidence told the court that the appellant is her biological father with whom she lived in S village. The appellant in his defence states at page 26 line 3:

"S [the complainant] is my daughter"

Therefore there is no doubt at all that this was a father and daughter relationship.

The prosecution has alleged that the appellant had sexual intercourse with the complainant who was his daughter. PW1 first appeared in court to testify on 12th June 2007. On that day she was examined by the court, and the learned trial magistrate ruled that she give unsworn evidence. On that occasion the complainant stated clearly at pages line 15 thus:

"I know why I have come to court. My father has [not] done anything to me but I was once taken to Moi Hospital. My step-mother had been beaten by my father so she told me to go and tell my teacher that my father wanted to have sexual intercourse with me. She told me that if I do not do so she would cut me with a panga. I told the police what my mother had told me to say."

At her first court appearance this witness tells the court that she has been effectively coached to come and lie to the court. The trial magistrate adjourned the case to enable the prosecution conduct further "investigations". On 18th September 2007 three (3) months later the complainant was back in court and proceeded now to testify that her father had defiled her. In view of this sudden shift of position, this is a witness whose evidence should have been received with a great deal of caution. The witness clearly was one who was easily influenced. She first says one thing and then three months later comes to court and states the exact opposite. At page 31 line 2 of her judgment the learned trial magistrate finds as follows:-

"As stated above, when the complainant first came to court, she tried to exonerate the accused. However, later when she was recalled she boldly told the court that she was going to tell the truth."

What exactly was "truth" where the complainant was concerned. Even at her first appearance she assured court that she would tell the truth. She next comes on the 18th September 2007 and asserts the total opposite as the truth. Despite this the trial magistrate goes on at page 31 line 22 to state:-

"In my opinion, I found the complainant to be a truthful witness."

In my view nothing could be more misdirected bearing in mind the contradictions in the complainant's evidence. This was a witness who could only be considered unreliable at best or an outright liar at worst. I find that the trial magistrate erred in relying on her evidence as truthful.

Be that as it may the complainant did in her evidence state that she told one W about the repeated sexual assaults on her by her father. W in turn informed her step-mother. At page 11 line 2 she states:-

"Later I informed one W, who works at Homeboys hotel and is our neighbour. W informed my mother. My mother M [PW4] asked me about the issue and I told her all that had happened."

This W was a crucial witness to corroborate the complainant's testimony that these sexual assaults actually occurred. She was allegedly the first person the complainant told about it. To my surprise and consternation the prosecution did not call W to testify. Her failure to give evidence is a serious omission which greatly weakens the prosecution case.

Aside from W there were several other people who were informed about the defilement but who were not called to testify. In her evidence at page 11 line 6 the complainant continues:-

"In school I told my class teacher E K who then reported to our headmistress Madam K. The Headmistress reported to the school chairman. The chairman gave me a letter to take to my mother. My mother came to school the following day. She and the chairman went to the childrens officer's office……"

The complainant has here named at least four persons in authority to whom she reported first hand about the defilements. Not a single one of these people were called to testify to corroborate her evidence. All the witnesses lived the same village with the complainant and ought to heave been easily accessible. In the case of the childrens officer she was a public servant who had an obligation to attend court to testify. The prosecution did not indicate to the lower court that they faced any difficulty in obtaining the presence of these witnesses. There is no evidence that any one of them was bonded and failed/refused to attend court. The position is that the prosecution simply failed to produce these four (4) crucial witnesses in court. The blatant refusal by the prosecution to call any of these key witnesses can only lead to the presumption that failure to call them was based only on the very real fear that their testimony would be adverse to the prosecution case. The trial magistrate failed to consider the failure of these crucial witnesses to testify at all. In this I find that she erred. I do hereby allow this first ground of appeal.

In his second ground the appellant alleges numerous inconsistencies and contradictions in the prosecution case. Having carefully examined the record I do find myself in agreement. PW2 DR. WILSON CHARO produced the complainant's P3 form PExb.1. A perforation to her hymen indicated that sexual activity had occurred. I have carefully examined this P3 form. Firstly, I do note that what was produced in court was a photocopy and not the original copy. No explanation is given as to where the original copy was and why it was not availed as an exhibit. Secondly, the learned trial magistrate did not indicate why she accepted a photocopy in place of the original copy. From the P3 I note that the offence is alleged to have occurred on 5th February 2007. In here evidence the complainant did not specify the date of any of the sexual assaults on her thus it is not clear how the police came up with this date. The date when the complainant was sent to Moi District MOH was 7th February 2007. My problem is with the date the complainant was sent to hospital which is indicated as 16th February 2007. However, upon close examination it is clear even to the naked eye that this date has been altered. It is not clear who made the alteration or why. This unsigned alteration in my view renders t his P3 form less than reliable.

PW4 M M the complainant's step-mother told the court that the complainant reported to her that apart from sexually defiling her, the appellant had on one occasion inserted his fingers into her vagina. At page 21 line 2, PW4 states:-

> *"So when S told me about the finger insertion in February 2007, I got very fed up about the issue so I took S to her teacher's at M Primary School to seek advice on what to do."*

It is curious that PW4 chooses to go to the teachers rather than to the police and as I have observed earlier no single teacher was called as a witness in this case. More suspicious that upon cross-examination by the appellant at page 22 line 21 PW4 says:-

> *"I believed S what she said. I have even once caught you red-handed inserting your fingers in S's vagina. When I asked you why you were doing so you said S is ill-mannered."*

If as she claims she actually witnessed the sexual molestation of the complainant by the appellant why did PW4 not mention this in her evidence in chief. Did it require prodding by the appellant to remember such an incident. In my view PW4 is being less than truthful. In her evidence in chief she says it was the complainant who told her of this incident but under cross-examination she suddenly remembers that she witnessed the incident herself. The witness PW4 is contradictory in her evidence and cannot be held to be a reliable witness of truth. Based on the inconsistencies mentioned I do find that the appellant's second ground of appeal has merit and I do allow it.

Thirdly, the appellant claims that the learned magistrate failed to properly consider his defence. In defence the appellant told the lower court that these allegations of incest had been fabricated against him by PW4 due to bad blood between them. He claimed that PW4 had used and manipulated the child to testify against him. In view of what I observed earlier, the lack of veracity on the part of the complainant, her complete turn about in her evidence to court, this defence cannot be discounted. PW4 herself as I have stated above was a less than reliable witness based on the contradictions in her own evidence at page 32 line 10 of the judgment the learned trial magistrate states:-

> *"The defence by the accused was mostly irrelevant as he explains incidents which were not even relevant to the case. His defence was full of falsehoods which cannot be believed."*

I find that the learned trial magistrate erred in coming to such a conclusion. The appellant in his defence sought to explain why PW4 had a grudge against him. PW1 was not a reliable witness. The trial magistrate ought not to have dismissed his defence as she did. In the case of CHEMAGONG – VS – REPUBLIC [1984] KLR 612, the Court of Appeal held:-

> *"A court on appeal will not normally interfere with a finding of fact by the trial court, whether in a civil or criminal case, unless it is based on no evidence, or on a misapprehension of the evidence, or the judge [or magistrate] is shown demonstrably to have acted on wrong principles in reaching the findings he did."*

This is exactly the position here. Based on what is on record, the shift in position by the complainant, the anomalies in the P3 form and the contradictions in the evidence of PW4, the learned trial Judge erred in dismissing the appellant's defence as she did. She failed to accord this defence due consideration in light of all that was before her. At the very least the defence placed a grave doubt on the prosecution case and the benefit of that doubt ought to have been accorded to the appellant. I therefore do allow this ground of the appeal.

Last but not least the appellant claims that his trial was rendered a nullity due to the violation of his rights as guaranteed by section 72 of the Constitution of Kenya. Section 72 (3) of the Constitution provides that where a suspect is arrested or detained on suspicion of his having committed a non-capital offence, he is required to be arraigned in court within twenty-four (24) hours of such arrest. The offence the appellant faced was that of incest, which not being punishable by death was a non-capital offence. The record shows that the appellant was arrested on 9th February 2007 and he was arraigned before court on 15th February 2007 a full seven (7) days later. Section 72 (3) (b) goes on to provide that:-

> *"……the burden of providing that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this sub-section have been complied*

with."

No explanation was forth coming from the prosecution for the 7 day delay in arraigning the appellant before court. Neither did the learned trial magistrate seek such an explanation. It may be argued that having not raised this issue during the trial, the appellant cannot now raise it as a ground of appeal. In the case of JOSEPH AMOS OWINO – VS – REPUBLIC Criminal Appeal 450 of 2007, the Court of Appeal made a distinction between cases where an accused is represented by legal counsel in the lower court, and cases where the accused appears in person. In the former it is presumed that the advocate being knowledgeable in law would raise the issue of violation of section 72 at the trial, therefore it would not be available as a grounds of appeal. However, where an accused is unrepresented the position the court held at page 16:-

> "*however in cases where he [the accused] 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 of such rights by the prosecution."*

This decision places the onus on trial courts to ensure that Section 72 of the constitution is complied with in the case of any suspect appearing before them and more so when that suspect, like the appellant herein, is not represented by legal counsel. The learned trial magistrate sought no explanation for the extended stay of the appellant in police custody and none was given. As such the 7 day detention did amount to a violation of the appellant's constitutional rights thus the trial was a nullity and on this ground alone the appeal would succeed.

Based on the foregoing, I am satisfied that this present appeal is meritorious the same is hereby allowed. I do quash the conviction of the appellant by the lower court and further set aside the fifteen (15) year sentence imposed on him. The appellant is to be released forthwith unless he is otherwise lawfully held.

Dated and Delivered at 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