Solomon v Republic (Criminal Appeal 187 of 2008)
[2010] KEHC 3211 (KLR) (22 April 2010) (Judgment)

Josphat Njue Solomon v Republic [2010] eKLR

Neutral citation: [2010] KEHC 3211 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL APPEAL 187 OF 2008

W KARANJA, J

APRIL 22, 2010

BETWEEN

JOSPHAT NJUE SOLOMON ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

Existence of the words carnal knowledge in the Penal Code and not in the Sexual Offences Act did not outlaw its use in the particulars of an offence in the Sexual Offences Act

The appellant was charged and convicted for the offence of defilement of a girl contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act at the trial court. The court held that the fact that carnal knowledge appeared in the Penal Code and not in the Sexual Offences Act did not outlaw its use in the particulars of an offence. The particulars of the charge disclosed an offence and the charge was not therefore defective. The court further held that it did not matter in a charge of defilement if the child gave consent or not. That was a statutory offence and the issue of consent of agreeability did not arise. Further, saying that the girl was agreeable did not therefore negate the plea.

Reported by Kakai Toili

Criminal Law *- sexual offences - defilement - elements of defilement - causing penetration with a child and unlawful carnal knowledge - whether the phrase "causing penetration with a child" and "unlawful carnal knowledge" describe the same act - whether the fact that carnal knowledge appeared in the Penal Code and not in the Sexual Offences Act outlawed its use in the particulars of an offence in the Sexual Offences Act.*

Criminal Law *- sexual offences - defilement - claim that a child consented - What was the effect of a child giving consent in a charge of defilement.*

Brief facts

The appellant was charged before the trial court with the offence of defilement of a girl contrary to section 8(1) as read with section 8(2) of the . He was charged with an alternative charge of indecent Act on a child. He was convicted on the main count and thus file the instant appeal. When the charge was read over and explained

to appellant on October 8, 2008, the record showed that three languages were used; English, Kiembu and Kiswahili. The record also showed that the charge was read in a language that the appellant understood. The trial court found that the appellant had admitted the facts and proceeded to convict him and sentenced him to life imprisonment. The appeal was against that conviction and sentence.

Issues

i. Whether the fact that carnal knowledge appeared in the and not in the outlawed its use in the particulars of an offence in the .

ii. Whether the phrase “causing penetration with a child" and "unlawful carnal knowledge" describe the same act.

iii. What was the effect of a child giving consent in a charge of defilement?

Held

1. The talked of 'causing penetration with a child' instead of carnal knowledge. The word ‘penetration’ was defined under the Sexual Offences Act as partial or complete insertion of the genital organs of a person into the genital organs of another person. Carnal knowledge was defined under the Black’s Law Dictionary simply as sexual intercourse, especially with an underage girl. The two definitions therefore described the same act. It was just a question of semantics.
2. Penetration was actually a detail of the act but both terms simply meant having sexual intercourse. The fact that carnal knowledge appeared in the and not in the did not outlaw its use in the particulars of an offence. The use of those words were not prejudicial to the appellant at all. The particulars of the charge disclosed an offence and the charge was not therefore defective.
3. The record was clear on the three languages (English, Kiembu and Kiswahili) used and also on the fact that the appellant understood the language used.
4. A retraction would only arise if an accused person raised a defence admitting the facts for example if an accused’s answer to a charge of murder was; 'it is true, I admit the fact but I did not intend to kill him.' That would completely negate a plea in that case, it did not matter in a charge of defilement if the child gave consent or not. That was a statutory offence and the issue of consent of agreeability did not arise. Saying that the girl was agreeable did not therefore negate the plea. It did not make it equivocal. The plea was unequivocal and the appellant was properly convicted.
5. The P3 form was admissible under section 77 of the and that not having been a hearing where *viva voce* evidence was being adduced, there could not have been any cross-examination or need to call the maker of the document. The appellant did not object to its production nor did he raise any issues about it when asked if he admitted the facts; that ground was untenable.
6. Section 8(2) provided for a mandatory life sentence where the victim was aged 11 years or less. The P3 form clearly indicated that the child was aged 11 years of age, and her age was therefore not in issue. The appellant was convicted on his own unequivocal plea which he entered after the charge and particulars were read to him in a language which he understood well. The appellant was properly convicted and sentenced.

Appeal dismissed.

Citations

Texts

1. Garner, BA., (Ed) (2009), *Black’s Law Dictionary* St Paul Minnesota: West Group 9th Edn

Statutes

Kenya

1. Evidence Act (cap 80) section 77 - (Interpreted)
2. Penal Code (cap 63) In general - (Cited)
3. Sexual Offences Act, 2006 (Act No 3 of 2006) - (Interpreted)

JUDGMENT

1. The appellant was charged before the Runyenjes Senior Resident Court with the offence of defilement of a girl contrary to section 8 (1) as read with sub-section 2 of the *Sexual Offences Act*. He was charged with an alternative charge of indecent Act on a child. He was convicted on the main count and that is what this appeal is all about.

2. When the charge was read over and explained to appellant on October 8, 2008, the record shows clearly that 3 languages were used i.e English, Kiembu and Kiswahili. The record also shows that the charge was read in a language that the appellant understood. He must therefore have understood Kiembu language otherwise if he did not, there would have been no need to interprete the proceedings into that language. The law on use of language is very clear. The language used need not be the accused person's mother tongue, it needs to not to be the language of his choice either. All it needs to be is a language clearly understood by the accused. The record shows clearly that he understood language used. He pleaded guilty to the charge and the prosecutor proceeded to give the fact of the case. On being asked if he admitted the facts, the appellant is said to have responded that the fact were 'true and correct'. He nonetheless added that 'The girl was agreeable to what I did to her.'

3. The learned magistrate found that the appellant had admitted the facts and proceeded to convict him. He sentenced him to life imprisonment as mandated by section 8 (1) and (2) of the *Sexual Offences Act*.

4. This now is the appeal against that conviction and sentence.

5. He has proffered 5 grounds of appeal as hereunder:-

    1. That the learned magistrate misdirected herself in law and fact in convicting and sentencing the appellant in an equivocal plea of guilty.

    2. That the learned magistrate erred in law by failing to record the language used and whether the accused understood it.

    3. That the learned magistrate erred in law by admitting the P3 form without calling the maker and without giving the appellant a chance to object or admit the same.

    4. That the learned magistrate erred in law and fact by convicting and sentencing the appellant on a defective charge sheet which did not disclose particulars of the offence facing the appellant and or particulars which were inconsistent with the charge.

    5. That the learned magistrate erred in law by failing to give reasons and to justify the excessive sentence meted on the appellant.

6. His counsel argued out these grounds and submitted that the words used in the particulars of the charge i.e 'unlawful carnal knowledge' are not envisaged in the Sexual Offences Act and appeared in the repealed sections of the Penal Code. For this reason, he submitted that the said charge was defective and the appeal ought to be allowed. I will deal with this ground first. Learned counsel for the state submitted that there was no defect in the charge and the use of the words 'Carnal knowledge' did not make it defective. I agree that the Sexual Offences Act take of 'causing penetration with a child' instead of carnal knowledge. The word ' penetration' is defined under sexual Offences Act as 'partial or complete insertion of the genital organs of a person into the genital organs of another person' 'Carnal Knowledge' is defined under the *Black's Law Dictionary* simply as 'sexual intercourse, especial with an underage girl'

7. These 2 definitions therefore describe the same'act'. It is just a question of semantics.'penetration'is actually a detailed of the act but both terms simply mean having sexual intercourse. For me, the fact that 'carnal knowledge' appeared in the *Penal Code* and not in the Sexual Offences Act does not outlaw its use in the particulars of an offence. I agree with the state counsel that the use of the said words were no prejudicial to the appellant at all. My finding is that the particulars of the charge did disclose an offence and the charge was not therefore defective. That ground must therefore fail.

8. I have dealt with the issue of the language used earlier on but I wish to restate that the record is clear on the 3 languages used and also on the fact that the appellant did understand the language used. That ground must also fail. On ground 1, learned counsel for the defence submitted that the plea was unequivocal because the appellant while admitting the facts as correct added that;

> 'The girl was agreeable to what I did to her.'

9. Learned counsel for the state calls this an attempt at justification and not a retraction of the admission. In my considered view, a retraction would only arise if an accused person raises 'defence admitting the facts. e.g if an accused's answer to a charge of murder is; 'It is true, I admit the fact but I did not intend to kill him.' That would completely negate a plea in this case, it matters not in a charge of defilement if the child gave its consent or not. So whether she was agreable to the sexual intercourse or not is neither here nor there. This is a statutory offence and the issue of consent of 'agreeability'. does not arise. Saying that the girl was agreeable did not therefore negate the plea. It did not make it equivocal. My finding is that the plea was unequivocal and the appellant was properly convicted. That ground therefore fails. On the issue of the P 3 form, the same was admissible under section 77 of the *Evidence Act* and this not having been a hearing where vive voce evidence was being adduced, there could not have been any X-Examination or need to call the maker of he document. The appellant did not object to its production nor did he raise any issues about it when asked if he admitted the facts. I find that ground also untenable.

10. As to ground 5, the learned trial magistrate clearly indicated that his hands were tied. Under Section 8 (2) provides for a mandatory life sentence where the victim is aged 11 years or less. I would also mention that the P3 form clearly indicated that the child was aged 11 years of age, and her age was therefore not in issue.

11. In sum therefore, I find that the appellant was convicted on his own unequivocal plea which he entered after the charge and particulars were read to him in a language which he understood well. My finding is that he was properly convicted and sentenced. This appeal lacks merit and the same is hereby dismissed.

W. KARANJA

JUDGE

DELIVERED, SIGNED AND DATED AT EMBU THIS 22ND DAY OF APRIL 2010.