Solomon v Republic (Criminal Appeal 187 of 2008)
[2010] KEHC 4095 (KLR) (22 April 2010) (Judgment)

JOSPHAT NJUE SOLOMON v REPUBLIC [2010]eKLR

Neutral citation: [2010] KEHC 4095 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL APPEAL 187 OF 2008

W KARANJA, J

APRIL 22, 2010

BETWEEN

JOSEPHAT NJUE SOLOMON ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

Minors are incapable of giving consent for sexual intercourse.

The appellant was charged with the offence of defilement of a girl contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act. He was convicted and sentenced to life imprisonment on his own plea of guilty. Being aggrieved with the conviction and sentence he filed an appeal against it in the High Court. The appellant submitted that the words used in the particulars of the charge, that is, "unlawful carnal knowledge", were not envisaged in the Sexual Offences Act, arguing that they were words in the repealed sections of the Penal Code and therefore rendered the charge defective. It was also submitted that the plea was unequivocal because the appellant admitted to the facts but added the statement, "The girl was agreeable to what I did to her". The court held that "Causing penetration with a child" and "carnal knowledge" described the same act. It was just a question of semantics. The court also held that defilement was a statutory offence and the issue of consent or agreeability would not arise.

Reported by John Ribia

Statutes *- interpretation of statutes - defilement - definition of defilement under the Sexual Offences Act vis-a-vis the definition of defilement under the Penal Code - difference between the phrase "unlawful carnal knowledge" (Sexual Offences Act) and "causing penetration with a child" (Penal Code) - whether the phrase "causing penetration with a child" and "unlawful carnal knowledge" described the same act - whether was a difference in the description of the charge of defilement under the Sexual Offences Act that used the phrase "causing penetration with a child" vis-a-vis the description under the Penal Code that used the phrase "unlawful carnal knowledge"- section 8 (1),(2); section 145 (repealed)*

Criminal Law *- defilement - defilement of a girl under the age of 18 years - appellant raising defence of retraction by admission, by stating that "the girl was agreeable to what I did to her"- circumstances under which a retraction*

would arise - whether a minor can have consensual sex - whether the evidence adduced was sufficient to sustain a conviction.

***Law of Evidence** - documentary evidence - P3 form - court's discretion to call the maker of a document to adduce evidence - whether the court could presume that the signature of documents presented under section 77 of the Evidence Act (eg medical p3 forms) were genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it - section 8 (1),(2); section 145 (repealed); section 77.*

Brief facts

The appellant was charged before the Runyenjes Senior Resident Magistrate's Court with the offence of defilement of a girl contrary to section 8(1) as read with section 8(2) of the . He was convicted and sentenced to life imprisonment on his own plea of guilty. Being aggrieved with the conviction and sentence he filed an appeal against it in the High Court. The appellant submitted that the words used in the particulars of the charge, that is, "unlawful carnal knowledge", were not envisaged in the , arguing that they were words in the repealed sections of the and therefore rendered the charge defective. It was also submitted that the plea was unequivocal because the appellant admitted to the facts but added the statement, "The girl was agreeable to what I did to her."

However, the state called it an attempt at justification and not a retraction of the admission. The appellant further submitted that the trial court erred by admitting the P3 form without calling the maker and without giving the appellant a chance to object or admit to it.

It was also the appellant's submission that the language used during the trial and whether or not it was understood by the appellant was not on record. Counsel for the state in objecting to the appeal, submitted that there was no defect in the charge and that the use of the words "unlawful carnal knowledge" did not make it defective.

Issues

i. Whether in defilement cases, the court would consider whether the minor gave consent.

ii. Whether was a difference in the description of the charge of defilement under the Sexual Offences Act that used the phrase "causing penetration with a child" vis-a-vis the description under the Penal Code that used the phrase "unlawful carnal knowledge".

iii. Whether the phrase "causing penetration with a child" and "unlawful carnal knowledge" described the same act.

iv. Whether the court could presume that the signature of documents presented under section 77 of the Evidence Act (eg medical p3 forms) were genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.

Held

1. The language used at the trial did not have to be the accused person's mother tongue, nor the language of his choice. All it needed to be was a language clearly understood by the accused.
2. "Causing penetration with a child" and "carnal knowledge" described the same act. It was just a question of semantics. 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 the offence. The use of the said words was not prejudicial to the appellant at all.
3. A retraction would only have arisen if an accused person raised a defence admitting the facts. For an 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 have completely negated a plea in that case. However, in a case of defilement it mattered not whether the child gave its consent or whether she was agreeable to the sexual intercourse. This was a statutory offence and the issue of consent or agreeability would not arise. Saying that the girl was agreeable did not therefore negate the plea. It did not make it equivocal.
4. Section 77 of the provided that in criminal proceedings, any document that purported to be a report under the hand of a Government analyst, medical practitioner or any ballistics expert, document

examiner or geologist upon any person, matter or thing submitted to him for examination or analysis could be used in evidence. The court could presume that the signature to any such document was genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it. When any report was so used, the court could, if it thought fit, summon the maker and examine him as to the subject matter thereof. Therefore the P3 form was admissible and since it was not 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.

Appeal dismissed

Citations

None Reffered

Statutes

East Africa

1. Evidence Act (cap 80) section 77
2. Sexual Offences Act, 2006 (No 3 of 2006) sections 8(1), (2)

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 8/10/2008, the record shows clearly that 3 languages were used ie 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 lang 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.

   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.

5. His counsel argued out these grounds and submitted that the words used in th particulars of the charge ie "unlawful carnal knowledge" are not envisaged in *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, especially with an underage girl"

6. 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.

7. 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."

8. 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 a '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."

9. 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 P3 form, the same was admissible under section 77 of the *Evidence Act* and this not having been a hearing where *viva voce* evidence was being adduced, there could not have been any X-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. 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.

DATED AND DELIVERED ON 22ND APRIL 2010

W KARANJA

JUDGE