



PATRICK MWACHANJE KISHEGO APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGEMENT

The Appellant herein **PATRICK MWACHANJE KISHEGO**, has filed this appeal against his conviction and sentence by the learned Senior Resident Magistrate sitting at Voi Law Courts. The Appellant had been charged before the lower court with the offence of **DEFILEMENT CONTRARY TO SECTION 8(1) AS READ WITH SECTION 8(3) OF THE SEXUAL OFFENCES ACT 2006**. The particulars were that

“On the 17th day of April 2007 in Taita Taveta District within the Coast Province, had carnal knowledge of D.S a girl under the age of 16 years”

In addition the Appellant faced an alternative charge of **INDECENT ACT WITH A CHILD CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCES ACT 2006**. The prosecution called a total of six (6) witnesses in support of their case. The brief facts of the case were that on 17th April 2007 the complainant was on her way home in the afternoon hours. She was returning from the farm with her nephew **M.D PW5**. They walked home together but **PW5** at some point broke away from the complainant and went to greet his uncle **N.Z**. The complainant continued walking alone. The Appellant then appeared and grabbed her. He pulled her into the bushes and defiled her. As soon as she was released the complainant went home and reported the incident to her mother. The complainant named her attacker as **MWACHANJE** who is the Appellant. He was later arrested and charged.

At the close of the prosecution case the Appellant was ruled to have a case to answer and was placed on his defence. He gave an unsworn defence in which he denied the charges. The Appellant called one witness in his defence.

On 28th May 2008 the learned trial magistrate delivered her judgement in which she convicted the Appellant of the offence of Defilement and sentenced him to serve ten (10) years in prison. It is against this conviction and sentence that the Appellant now appeals. The Appellant chose to rely entirely upon his written submissions which he had duly filed before me. **MR. MUTETI**, the learned State Counsel who appeared for the State gave oral submissions opposing this appeal.

This being a court of first appeal I am mindful of my obligation to re-examine and re-evaluate the evidence adduced before the lower court. In the case of **OKENO -VS- REPUBLIC [1972] E.A.L.R.32**, it was held

“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 presented by the Appellant and I note that he raised the following grounds of appeal

- § Identification
- § Denial of his constitutional right to be arraigned in court within twenty-four hours of arrest
- § Insufficiency and/or contradictions in the prosecution case.

This is a case which involves defilement of a child. In such cases it is pertinent that the age of the child victim be properly established. The complainant in her evidence states that she is 9 years old. However as pointed out by the trial magistrate in her judgement, that she may have been confused about her age due to her epileptic condition **PW3 H.M** who is the complainant's mother told the court that her daughter was born in 1973 making her 14 years old in 2007 when this incident occurred. An age assessment report produced by the doctor **Pexb2** shows that the complainant was assessed by medical personnel and her age was found to be approximately 15 years. I am satisfied from this evidence that the complainant falls within the 12 - 15 year age bracket provided for by S. 8(3) of the Sexual Offences Act.

The complainant tells the court that on the material day as she was walking home a man whom she knew pulled her into the bushes and defiled her. At page 5 line 16 she states

“I was alone. He pulled me into the bushes. He then removed my panty and made me to lie down. He did bad things to me. He lay on top of me. He then took his thing for urinating and put it into my thing for urinating”

The complainant though young and mentally challenged did explain in very graphic terms what happened to her. **PW3** the complainant's mother confirms that as soon as her child got home she reported that she had been defiled. **PW3** herself examined her child and her evidence is that she was

“dirty and had grass on her head”

Further on page 7 under cross-examination by the Appellant **PW3** says that of the complainant

“She looked unkept (sic) and her hair had grass”

This is evidence of the physical state of the complainant and which corroborates her story that she was dragged into the bushes and forced to lie down in the dirt.

Further corroboration is provided by the evidence of **PW5 Z.M** the complainant's brother. He states that on the material date he was sent by his mother **PW3** to go out and search for the complainant. He states that he went to the farm that he noticed foot-prints which he recognized as belonging to the complainant who has a deformed foot. He found complainant in the bushes crying. The complainant told him that she had been raped.

Finally on this point **PW1 DR. GEOFFREY WAHOME** is the doctor who examined the complainant and he produced her P3 form **Pexb1**. He found her to have bruises on the vulva and vagina. This is proof of forcible penetration. He also found that her hymen was torn. This again is proof of penetration. I am in complete agreement with the trial magistrate who stated at page J3 line 20

“My finding is that it is apparent that the complainant was defiled”

The evidence on record provides clear evidence that indeed the complainant was defiled as she alleged.

The second key question is the identity of her attacker. Was the Appellant properly identified as the man who defiled the complainant? The incident occurred at about 2.00 p.m. It was broad daylight and conditions were favourable for a positive identification. The complainant told the court that she was defiled by a man whom she knew well. She names him as **“Mwachanje”**. She even goes on to state at page 5 line 11

“I know his home. I know his fathers name is Kisigho”

There can be no doubt that the Appellant saw and recognized the Appellant whom she knew well. The Appellant made no effort to hide his face from her. **PW3** told the court that when the complainant arrived home after the incident she told her that it was Mwachanje the accused who defiled her. **PW4** who is the complainant’s brother tells the court that he had been sent out to search for her. He followed her foot-prints and found her in a bush crying. **PW4** clearly said that he saw the accused **‘Patrick’** running away from the scene. **PW4** states at page 9 line 19

“The accused here is the one I saw running away from samba. I know the accused’s home. He stays in our village. I have known him all my life”

As I have stated earlier this incident occurred in broad daylight and conditions were favourable for a positive identification. Aside from that both complainant and **PW4** have told the court that they recognized the Appellant whom both had known for a long time before this incident. It has been severally held that evidence of recognition is more reliable than that of visual identification alone. In the case of **ANJONONI -VS- REPUBLIC [1980] KLR 59** it was held that

“..... recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or another”

In his defence the Appellant denied the charge claiming that the complainant’s family had a grudge against his family. As the learned trial magistrate noted in her judgement the Appellant never raised this issue whilst cross-examining the prosecution witness – this is clearly an after thought and a fabrication. **DW2 RIGHA MANYASI**, who testified for the Appellant claimed that he and the Appellant were together the whole day. The learned trial magistrate effectively disposed of this defence at page 30 line J4 when she states

“From the defence case, the second defence witness, Righa Manyasi said he was with the accused the whole day on the day it is alleged that the accused defiled the complainant. I noted that the accused here never bothered to explain his movements of the day in issue and more particularly he never said he had been with Righa DW2. I do not believe it at all. I reject it outrightly”

I am in total agreement with the sentiments of the trial magistrate. The defence does not pass muster and more importantly does nothing to dislodge the evidence of the prosecution witnesses. I am quite satisfied from the evidence on record that there was clear positive and reliable identification of the Appellant which identification was in my view free from error. This ground of the appeal fails.

The Appellant claims that his trial was rendered a nullity ab initio due to the failure by police to produce him in court within twenty four hours of his arrest as required by S. 72(3) (b) of the Constitution of Kenya. A

look at the record reveals that the Appellant was arrested on 18th April 2007. His first appearance in court was on 25th April 2007 six (6) days after his arrest. The Appellant had been arrested for a non-capital offence thus the Constitution clearly provides that he ought to have been brought to court within 24 hours of his arrest. Does this delay in bringing the Appellant to court entitle him to an automatic acquittal? There have been several divergent decisions on this issue. The key issue to consider is whether the delay in bringing a suspect to court was so long as to be held inordinate. In the case of **ELIUD NJERU NYAGA -VS- REPUBLIC Crim App. 182 of 2006**, the Court of Appeal sitting in Nyeri held at thus

“While we would reiterate the position that under fair trial provisions of the constitution, an accused person must be brought to court within twenty-four hours for non-capital offences and within fourteen days for capital offences, yet it would be unreasonable to hold that any delay must amount to a constitutional breach and must result in an automatic acquittal”

Taking into account the remoteness of the area where the offence occurred and also taking into account the very real constraints the police in rural Kenya have to work under and the need to have the complainant examined in a hospital I find this delay not to have been inordinate. In any event such delay does not entitle the Appellant to an acquittal. He however remains at liberty to pursue action against the State in a civil suit. I hereby reject this ground of the appeal.

Lastly the Appellant claims that the evidence adduced was insufficient and/or contradictory. I have anxiously perused the lower court record. In my view the evidence adduced was cogent, consistent and reliable. I did not come across any instances of these contradictions of which the accused speaks. On the contrary I find this to be one case where the evidence adduced was water tight and the case against the accused was proved beyond a reasonable doubt as required by law. I am satisfied that his conviction on a charge of Defilement was both safe and sound and I have no hesitation in confirming the same.

The Appellant was allowed an opportunity to mitigate after which the trial magistrate sentenced him to serve ten (10) years imprisonment. The Appellant was charged of Defilement under S. 8(1) as read with Section 8(3) of the Sexual Offences Act 2006. S. 8(3) provides

“A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years” (my emphasis)

It is clear that the ten (10) year sentence imposed by the trial magistrate was unlawful. The provisions of S. 8(3) are clear. The minimum sentence provided for upon conviction under this section is twenty years imprisonment. The complainant was proved to fall within the 12 - 15 year age bracket. At page J5 the trial magistrate observed that

“the accused here defiled a disabled epileptic minor. He deserves no mercy from this court”

I am in agreement that given the vulnerability of the complainant this indeed was a heinous crime. The 20 year sentence provided for by the law is in my view an appropriate punishment for the Appellant's dastardly deed. I therefore set aside the ten (10) year sentence imposed by the trial court and (which was unlawful) and I hereby substitute the minimum lawful sentence of twenty (20) years imprisonment. This appeal fails in its entirety.

Dated and Delivered at Mombasa this 29th day of June 2010.

M. ODERO
JUDGE

Read in open court
Mr. Onserio for State
Appellant in person

M. ODERO
JUDGE
29/06/2010