REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 347 OF 2003

(From Original Conviction and Sentence in Criminal Case No.1105 of 2003 of the Chief Magistrate's Court at Mombasa: L. Achode – P.M.]

DICKSON LAWRENCE OCHIENG ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGEMENT

The Appellant DICKSON LAWRENCE OCHIENG has filed this appeal against his conviction and sentence by the learned Principal Magistrate sitting at Mombasa Law Courts. The Appellant was arraigned in court on 23rd April 2003 and charged with the offence of DEFILEMENT CONTRARY TO SECTION 145(1) OF THE PENAL CODE. The Appellant denied the charges and his trial commenced on 9th July 2003 during which trial the prosecution called a total of five (5) witnesses in support of their case. The brief facts were that on 12th April 2003 PW1 B.J left her two young children playing outside in the corridor of their Swahili type house while she was cooking in the kitchen. One of the children was H.A, the complainant was by then a toddler aged 1½ years. Later when PW1 checked on her children she found the complainant missing. She began to search for the child. An hour later the Appellant came carrying the child on his shoulder. He laid her down in the veranda and moved off. PW1 checked the child and found the rear of her dress soaked in blood. She asked the Appellant where the blood had come from and he began to run away. PW1 alerted neighbours who helped to rush the child to Shalom Hospital where first-aid was administered. The child was then rushed to Coast General Hospital where she was admitted for eleven (11) days. The doctors found that the child had been defiled. The matter was reported to police and the Appellant was arrested and charged.

At the close of the prosecution case the Appellant was ruled to have a case to answer and was placed onto his defence. He gave an unsworn defence in which he denied the charge. On 16th October 2003, the learned trial magistrate delivered her judgement in which she convicted the Appellant and after listening to his mitigation sentenced him to serve twenty (20) years in prison. Being dissatisfied with both his conviction and sentence the Appellant filed this present appeal.

The Appellant who was unrepresented at the hearing of his appeal chose to rely entirely upon his written submissions which had been duly filed in court. MR. ONSERIO learned State Counsel appeared for the Respondent State and gave oral submissions opposing the appeal. Being a court of first appeal I am mindful of my obligation to re-examine and re-evaluate the evidence adduced in the lower court. In the case of OKENO –VS- REPUBLIC [1972] E.A.L.R. 32, it was held by the Court of Appeal that

"It is the duty of a first appellate court to reconsider the evidence itself and draw its own conclusions in deciding whether the judgement of the trial court should be upheld"

I have carefully perused the written submissions of the appellant and I note that that he has raised the following grounds of appeal:-

? Violation of his fundamental rights as guaranteed by S. 72(3) of the Constitution of Kenya
? Insufficiency of evidence on the first ground

The Appellant has informed the court that having been arrested and detained on 13th April 2003, he was not arraigned in court until 22nd April 2003 a period of nine (9) days after his arrest. I have examined the original copy of the charge sheet and I note that this assertion by the Appellant is infact incorrect and misleading. The truth is that he was arrested on 13th April 2003 and was taken to court on 17th April 2003 which is a delay of three (3) days beyond the twenty-four (24) hour period provided for by S. 72(3)

of the Constitution of Kenya. Does this three (3) day delay nullify the trial of the Appellant in the lower court? I think not. The question of the legal effect of a delay in arraigning a suspect in court has been pronounced on severally by the courts. The general consensus now is that if the day is not inordinate in the circumstances, then the trial will not be nullified. The courts must draw a fine balance between the pre-trial rights of a suspect on the one hand, and the public interest in having all reported cases heard and determined on their merits. Each situation must be looked at individually. In ELIUD NJERU NYAGA –VS- REPUBLIC [2007] e KLR 1, the Court of Appeal held as follows

"While we would reiterate the position that under the 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"

From this decision it is quite clear that a delay in arraigning a suspect in court cannot and will not amount to a ground for an automatic acquittal. I am mindful of the fact that in this present case the child victim was admitted in hospital for a period of nine (9) days. There was necessity to have her medical report prepared. All this must of necessity have taken some time. I find the 3 days beyond the 24 hour constitutional period did not amount to an inordinate delay. This ground of the appeal has no merit and the same is hereby dismissed.

The complainant who is alleged to have been defiled was a very young child aged only 1½ years. She was not in a position to testify and give evidence on her own behalf. She was only produced before the court as an exhibit. PW1 the child's mother told the court that she noticed blood oozing from the back of the child and onto her clothes. PW2 J O who is the child's father confirms that he too saw blood on the child's clothes at the rear. The blood-stained clothes were produced in court and identified by both PW1 and PW2. PW5 DR. GEORGE WANDERA OGUTU, is a consultant who specializes in Gynaecology and Obstrectrics at Coast General Hospital. He gave evidence that he examined the complainant on 13th April 2004. His evidence was that page 12 line 10

"I saw the child, she was bleeding in her genitals. She had vaginal tears and tears to her rectum. The child was taken to theatre for repairs. It was in the theatre where I saw the extent of the damage. The vaginal canal and the rectum were torn and merged into one ..."

PW5 formed an opinion that the complainant had been sexually defiled. He filled and signed the P3 form which he produced in court at an exhibit Pexb1. There can be no doubt even to a lay person that this child had been horribly molested. There is no way a child of such a tender age could have sustained such terrible injuries to her genitals and rectum other than that another person interfering with her private parts. I therefore find as a fact that indeed this child had been defiled.

The crucial question then is whether the Appellant has been properly identified as the one who defiled the child. PW1 told the court that she left her children playing in the corridor as she cooked in the kitchen. When she went to check on them, she found the complainant missing. She searched for the child for one hour. Later she saw the Appellant carrying the child. He brought her and laid her down in the corridor. PW1 has identified the Appellant whom she knew well as he used to visit her neighbour. At page 4 line 8 PW1 states

"I knew Lawrence because he was my neighbours visitor"

PW1 even knew the Appellant by name. PW2 the complainant's father on his part told the court that on the material day as he was going home he met the Appellant carrying his child over his shoulder. PW2 asked the Appellant why he was carrying the child and went as if to take her from him. The Appellant resisted and declined to hand over the child. Instead he went and laid down the child in the corridor. PW2 also positively identifies the Appellant as the man whom he saw carrying the complainant. He too knew the Appellant very well as a neighbour. This therefore is not mere evidence of visual identification. This was evidence of recognition which has been held to be more reliable. In the case of ANJONONI & OTHERS –VS- REPUBLIC [1980] KLR 59, it was held

"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"

Aside from the evidence of PW1 and PW2, PW3 F O, testified that on that material night PW1 who is his sister woke him up and told him that Lawrence Ochieng – the Appellant herein had defiled her child. PW3 also identifies the Appellant as the man being referred to. From this evidence there can be no doubt that there has been a clear positive and reliable identification of the Appellant as the man who was seen carrying the child immediately after she went missing.
There mere fact that the Appellant was spotted holding this child with blood oozing from her private parts is not in and off itself proof that it was the Appellant who defiled the child. However, other circumstances led the trial court to conclude that this was actually the case. PW2 at page 6 line 8 stated in his testimony

"I asked loudly what blood was on the childs clothes at the rear. On hearing that Ochieng [Appellant] pushed me aside and ran out without further ado. I chased after him shouting 'thief' 'thief' to attract attention"

Why would the Appellant take to his heels when being asked about the blood on the child's clothes? This is clear evidence that he had a 'guilty mind' with respect to the source of that blood. Earlier on the Appellant had declined to hand over the child to PW2 the father. He insisted on bringing the child into the house and laying her down in the corridor. It is quite possible that the reason was that the Appellant hoped nobody would notice the blood on the child's clothes until he got away. This again is evidence of a guilty mind. The Appellant in his defence claimed that came across the child wandering around outside the house so he picked her up and took her back home. The learned trial magistrate did consider this defence in her judgement at page J3 line 16

"If the accused had run into the baby at a kiosk why would he not hand her over to the father when he came upon them on the way home. He did in his own words admit that he knew the child belonged to his friend's neighbour. There can be no other explanation other than that he did not want the father to notice the state the child was in"

The court dismissed this defence.

The child was returned by the Appellant in an unresponsive state, blood oozing from her private parts and severely damaged internally. The injuries to the child were in my view consistent with penetration by a human penis. The circumstantial evidence clearly points at the Appellant as the one who perpetrated this heinous crime. His behaviour at the time he returned the child to her parent's house makes this quite clear. I am satisfied that the prosecution did prove the guilt of the Appellant beyond a reasonable doubt. His conviction was sound and I do hereby uphold the same. With respect to the sentence the trial magistrate did listen to the Appellant's mitigation and thereafter sentenced him to serve twenty (20) years in prison. I do agree with the trial magistrate that this being a particularly savage attack on a helpless baby a severe deterrent sentence was called for. In my view the sentence imposed was neither harsh nor excessive in the circumstances and I do hereby uphold the same. Finally this appeal fails in its entirety. The conviction and sentence imposed by the subordinate court are confirmed and upheld.

Dated and Delivered in Mombasa this 28th day of July 2010.

M. ODERO
JUDGE

Read in open court in the presence of:
Mr. Onserio for State
Appellant in person

M. ODERO
JUDGE
28/07/2010