



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 44 OF 2009

(From Original Conviction and Sentence in Criminal Case No.806 of 2008 of the Senior Resident Magistrate's Court at Taveta: J.M. Githaiga – S.R.M.)

IDD MOHAMED KAGIA APPELLANT
VERSUS
REPUBLIC RESPONDENT

JUDGEMENT

The Appellant herein **IDD MOHAMED KAGIA**, has filed this appeal against his conviction and sentence by the learned Senior Resident Magistrate sitting at Taveta Law Courts. The Appellant was arraigned before the lower court on 17th November 2008 on a charge of **DEFILEMENT OF A GIRL CONTRARY TO SECTION 8(2) OF THE SEXUAL OFFENCES ACT 2006**. The particulars of the charge were that

“On the 13th day of November 2008 at around 10.00 A.M. in Taveta District within Coast Province had carnal knowledge of E.M.J a girl under the age of eleven years.”

The Appellant pleaded **‘not guilty’** to the charge and his trial commenced on 13th January 2009. The prosecution led by **CHIEF INSPECTOR ONGERI** called a total of six (6) witnesses in support of their case. The brief facts of the case as narrated by the complainant a 10 year old minor girl, were that on 13th November 2008 at about 10.00 A.M. she was at her homestead. The Appellant who was their herdsman came to their home. He entered the bed-room where the complainant was and lay her on the floor. He removed her panty and proceeded to defile her. A neighbour **S.K PW2** came visiting and caught the Appellant in the very act of defiling the child. She berated him and held his hand to prevent his escape. **PW3** called the complaint's brother **D.M.M PW3**. The matter was reported to the complainant's mother, who took her to hospital for treatment. Police arrested the Appellant who was later 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 opted to give an unsworn defence in which he denied the charges. On 5th March 2009 the learned trial magistrate delivered his judgement in which he convicted the Appellant on the charge of Defilement and sentenced him to serve twenty (20) years imprisonment. The Appellant being dissatisfied with both his conviction and sentence filed this appeal.

The Appellant who was not represented by counsel at the hearing of his appeal chose to rely entirely upon his written submissions which with the leave of the court had been duly filed. **MR. ONSERIO** learned State Counsel made oral submissions in which he urged the court to uphold both the conviction and sentence of the lower court.

Being a court of first appeal I am obliged to re-evaluate and re-examine all the evidence adduced in the lower court and to draw my own conclusions on the same [see **OKENO –VS- REPUBLIC [1972] E.A.L.R. 31**]. I have carefully perused the written submissions filed by the Appellant and I note that he raised the following grounds for his appeal.

- § Violation of his fundamental rights guaranteed by S. 72(3) (b) of the (old) Constitution
- § Insufficiency of Evidence

On the first ground the Appellant submits that he was not arraigned before a court within 24 hours as required by the Constitution of Kenya. I have no doubt that the Appellant is referring to the old Constitution which contained this stipulation. I have perused the record and I note that the Appellant was arrested on 13th November 2008 and was not taken to court until 17th November 2008 which was 4 days later clearly the provisions of S. 72(3) (b) were breached in that the Appellant was not taken to court within 24 hours. The Appellant submits that this delay nullified his subsequent trial and entitles him to an acquittal. However I do not agree with this submission. As courts we have to balance on the one side the preservation of a suspect's pre-trial rights and on the other hand the public interest in having all reported crimes tried to their logical conclusion. This was the gist of the ruling of the Court of Appeal in the case of **ELUID NJERU NYAGA –VS-REPUBLIC** Criminal Appeal 182/2006, where it was held at p.2

“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.”

The test is whether the delay complained of was so inordinate as to result in a denial to a fair trial. A look at the calendar reveals that 13th November 2008 fell on a Friday whilst 17th November 2008 fell on a Monday. Therefore part of this 4 day period of delay consisted of the intervening week-end. It is common knowledge that courts in Kenya do not hold sessions on either Saturday or Sunday. The actual period of delay was therefore only one day. The Appellant was taken to court on the first Monday following the week-end. In my view a delay of a single day cannot be termed inordinate. I therefore dismiss this first ground of the Appeal.

The complainant narrated to court how she was defiled. Being a child of tender years the trial magistrate took the precaution of conducting a **‘voire dire’** examination before taking her evidence. His finding was that the child understood the nature of an oath and she therefore gave sworn testimony. She told the court that on the material date at 10.00 A.M. she was alone at their home, her mother having gone out to the farm. The Appellant who was their herdsman came in. He went right into the bedroom where the Appellant was. In her own words at page 3 line 13

“I went to the bedroom. The accused who takes care of our goats entered the bed-room. He lay me on the floor. He removed the panties I was wearing. The accused then started having sexual intercourse with me. The accused had just unzipped the pair of long trousers he was wearing. He removed his penis and inserted it in my vagina. I felt pain. The accused told me not to scream or he would beat me.”

The complainant here gives a very vivid account of her ordeal. Such a detailed account can only be the truth. A ten (10) year old child is too young to be able to fabricate such a tale. The complainant's evidence is corroborated by **PW2**. She told the court that she had gone to see the complainant's mother. The door was open and **PW2** walked right into the house. She found the Appellant in the very act of defiling the child. Indeed this is one of those very rare occasions when a sexual offence is witnessed by a third party. **PW2** says when she walked in

“The accused was on top of the girl. The accused had unzipped his pair of long trousers. His penis was visible the girl was not wearing panties”

This is a very incriminating scenario. Why would an adult man be lying on top of a ten year old girl with his trouser unzipped and his penis exposed? The only logical conclusion is that he was raping the girl. **PW2** called the complainant's brother **PW3** and told him what she had seen. They also reported the matter to the complainant's mother **V.J**, when she came home. Conclusive corroboration of the complainant's claim of having been raped is provided by the evidence of the doctor **PW6 DR. MIKE SANGOLO** from Taveta District Hospital. He gave evidence that he examined the complainant and filled out her P3 form which he produced as an exhibit before the lower court **Pexb1**. He noted **‘fresh bruises’**

on both her labia and her hymen had been '**freshly broken**'. The bruises on the labia are proof of forcible penetration whilst the broken hymen is proof that penetration did actually take place. At page 8 line 1 **PW6** concludes his evidence thus

“I concluded penetration of the girl’s genitalia had occurred.”

This is professional medical evidence and confirms that the complainant was indeed defiled as she stated.

On the identity of her assailant the complainant identified the Appellant as the man who raped her. The incident occurred at 10.00 A.M. in broad daylight and the two were together in the bed-room for a fair amount of time. The complainant had ample time and opportunity to see the Appellant. **PW2** who caught the Appellant '**pants down**' so to speak also identified him in court. **PW2** held onto the Appellant’s hand to prevent him running away. She called out to **PW3** who came and found the Appellant being detained in the room by **PW2**. He too identified the Appellant in the lower court. All the prosecution witnesses **PW1**, **PW2**, **PW3** and **PW4** knew the Appellant before this incident as he was a herdsman in the village. In the case of **ANJONONI & OTHERS –VS-REPUBLIC 1980 KLR** the Court of Appeal 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 other.”

Similarly I find that in this case the identification of the Appellant was made on the basis of recognition, thus there was no possibility of mistaken identity. I find that there was clear positive and reliable identification of the Appellant as the man who raped the complainant. I am satisfied that the prosecution did prove their case beyond a reasonable doubt. The Appellant’s defence that the charge was fabricated by the villagers because they owed him money for herding their livestock is just not credible. Why would **PW1** a mere child be involved in payment disputes with the Appellant? Likewise **PW2** was not related to **PW1**. She was merely a visitor to the home. She had no possible motive to fabricate evidence against the Appellant. This conviction was sound both on facts and in law and I do hereby confirm the same.

The Appellant was accorded an opportunity to mitigate. Thereafter the trial court sentenced him to serve twenty (20) years imprisonment. The Appellant submits that this sentence was excessive given his advanced age. However the learned trial magistrate did take into account the Appellant’s age when sentencing and stated at pg. 2 line 27

“Court: Accused is liable to life imprisonment but due to his advanced age, he is sentenced to serve twenty years imprisonment.”

Given the tender age of the victim and the heinous nature of the crime committed against her I find this sentence to be both lawful and appropriate. I therefore uphold the same. Finally this appeal fails in its entirety. The conviction and sentence of the lower court are hereby confirmed and upheld.

Dated and Delivered in Mombasa this 21st day of October 2010.

**M. ODERO
JUDGE**

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

**M. ODERO
JUDGE
21/10/2010**