



**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL APPEAL NO.51 OF 2010**

(Appeal arising from original WBY PM Cr. No.678 of 2010)

ROBERT WANJALA MULONGO

.....

APPELLANT

~VRS~

REPUBLIC

.....

RESPONDENT

JUDGMENT

The Appellant Robert Wanjala Mulongo was convicted on his own plea of guilty by Webuye Principal Magistrate of the offence of defilement contrary to section 8(1) of the Sexual Offences Act and sentenced to life imprisonment. In his petition of appeal the Appellant relies on four grounds.

Mr. Athunga argued the grounds of appeal. He argued that the trial court convicted the Appellant before it received the exhibits which was unprocedural. Secondly, that the constitutional rights of the Appellant were infringed in that he was over detained in police custody. The Appellant also complains that he was misled by police to plead guilty. The treatment notes were not produced in evidence.

The appeal was opposed by the state. The state counsel Mrs. Leting argued that the Appellant failed to raise the issue of producing medical records during the trial. There was adequate medical evidence to support the charge and that the sentence was within the provisions of the law.

On the issue of the contents of the P.3 form, I note that part II of the form which is filled by the medical officer before examination is nothing more than the history of the patient. This will depend on what the parent of the minor or the police tell the doctor. The doctor examines the patient after taking the history. This history may be limited to the knowledge of the person escorting the victim. In a criminal trial, what is relevant is the outcome of the examination by the medical officer. In the P.3 form before me, it is indicated in the history that there were no blood stains in the clothing of the patient while the examination showed presence of some bloody discharge in the genitalia. I see no contradiction in the two statements. The examination showed that the patient had bruises on the labia majora and hymenal tears and a bloody discharge in the genitalia. This is evidence of penetration and section 8(1) of the Sexual Offences Act requires no more medical evidence than what is contained in the P.3 form.

The age of the complainant was assessed by Doctor Muchoki of Webuye District Hospital and found to be four (4) years.

The Appellant was arrested on 6/05/2010 and taken to court on 10/05/2010. This is a period of three to four days in police custody. The law limits the period in police custody to only twenty four (24) hours. The issue of the delay was not raised during the trial in order for the prosecution to give an explanation. The court also failed to inquire into it. The excess time in custody was about two days which in my opinion is not much in excess of the time allowed by the law. However, the Appellant is entitled to pursue the compensation remedy provided for under section 72 (6) of the Constitution. The Court of Appeal has ruled that such over-detention does not affect the criminal charges: **JULIUS KAMAU MBUGUA –V- REPUBLIC 2010 e KLR W.W.W.KENYA LAW. ORG) COURT OF APPEAL AT NAIROBI.**

On the procedure complained of, I have perused the proceedings of the lower court. The charge was

read over and explained to the accused in Kiswahili which language he said he understood. It is after understanding the charge that he replied "**it is true**". The prosecutor presented the facts of the case which were recorded by the court. The prosecutor informed the court that he would avail the P.3 form and the age assessment report at 2.00 p.m the same day. Before the documents were produced, the magistrate asked the accused whether the facts were true to which he replied that they were correct. He was then convicted of the offence accordingly. The court then adjourned the case to receive the medical records at 2.00 p.m.

The documents were produced and the court proceeded to take mitigation of the accused and then sentenced him. The Appellant contends that he ought to have been convicted after the medical records were produced. This argument is correct. The trial court's action of convicting before the medical records were produced was an irregularity. The question which arises herein is whether this irregularity caused a miscarriage of justice in the trial. The accused admitted the facts regarding how the incident occurred. He was given his right to give his response as required by the law. As for the medical records, these were opinions of experts to which any response by the accused would not have changed the situation. The court takes that evidence as it is. Even if the evidence had been received before conviction which is the correct procedure, the accused in answer to the correctness or otherwise of the facts would not have anything to say on the medical evidence. The facts and the medical records put together constituted the ingredients of the offence of defilement. The court therefore rightly convicted the Appellant despite the minor irregularity. It is my finding that such an irregularity did not cause any miscarriage of justice or any prejudice to the Appellant.

The allegation that the Appellant was persuaded to plead guilty by the police was not convincing. He did not complain of any torture while in police custody. The plea was unequivocal and this is what matters in this respect.

The sentence of life imprisonment was in accordance with the law.

It is my finding that the appeal has no merit and I dismiss it accordingly. I uphold the conviction and sentence.

F. N. MUCHEMI
JUDGE

Dated, Delivered and Signed at Bungoma this 23rd day of November, 2010 in the presence of Mr. Murunga for Athunga for the Appellant, The Appellant and Mrs. Leting for State.

J. N. MUCHEMI
JUDGE