REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Criminal Appeal 128 of 2007

STEPHEN MAINA NJUI ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Appeal from original Conviction and Sentence in the Senior Resident Magistrate's

Court at Kigumo in Criminal Case No. 2510 of 2006 dated 16th April 2007 by S. M. Mokua –S.R.M.)

J U D G M E N T

The appellant **Stephen Maina Njui** was charged with defilement contrary to section 8(1) of the sexual offences act. The particulars thereof were that on 18th November 2006 at about 5.30 p.m. in Nginda village in Maragua District, the appellant committed an act which causes penetration with *[particulars with held pursuant to section 76 (5) of the Children Act ,2001]* a child aged between 9 and 10 years.

The appellant also faced a second count of indecent assault contrary to section 11(1) of the sexual offences act. The particulars thereof being that on 18th November 2006 at about 5.30 p.m. in Maragua District the appellant committed indecent assault with *[particulars with held pursuant to section 76 (5) of the Children Act ,2001]* by touching her private parts.

The prosecution case in brief was that PW1 who is the mother to the complainant (PW2) on 18th November 2006 left the complainant at the home of her sister in-law as she proceeded with her sister in-law to look for grass for her cows. On coming back she learned from the complainant that the appellant had sexually assaulted her. She checked the complainant's private parts and saw blood stains therefrom.

She reported the matter to the police and took the complainant to hospital and who on being examined, was found infected with a sexually transmitted disease.

The complainant gave unsworn statement. She told the court that she was aged 9 about years. That on 18th November 2006 she was at her aunt's place. Both her aunt and mother left her behind as they went to look for grass for their cows. It was then that the appellant got into the house, held her and took her to her aunt's bed removed her pant and pulled her skirt up. He subsequently sexually assaulted her. She tried to scream but the appellant held her by the neck. She stated that she felt pain and bled from her private parts. When her mother (PW1) came back she informed her about the incident. They then proceeded to hospital after the matter had been reported to the police.

PW3 was a doctor based at Maragua District Hospital. He testified that on 18th November 2006 he attended to the complainant who was then aged 9 years. Upon examining her labia minora he noted that it was torn. The hymen was broken. The laboratory examination showed an infection. He filled a P3 from which was tendered in evidence.

PW4 was a police officer based at Maragua police station. He testified that on 18th November 2006 he received a report that the complainant had been sexually assaulted. He organised for the complainant to be taken to hospital. He later learnt that the incident took place at PW2's aunt's place. The appellant was availed to him at the police station by PW2 whom he re-arrested and subsequently preferred he instant charges.

The appellant was placed on his defence after the prosecution closed its case. According to the appellant in his unsworn statement of defence he had not known the complainant for long and that he did not know why he had been charged.

The trial court having analysed the evidence tendered was convinced that the appellant had committed the offence. It proceeded to convict him and thereafter sentenced him to 30 years imprisonment. Aggrieved by the conviction and sentence, the appellant preferred this appeal. In the petition of appeal, the appellant laments in a nutshell that the learned magistrate convicted him on insufficient and unreliable evidence.

At the hearing of the appeal, the appellant with the permission of the court tendered written submissions which I have carefully read and considered. The state however opposed the appeal. **Mr. Orinda**, learned Senior Principal State Counsel in opposing the appeal submitted that there was sufficient evidence from PW3. That the complainant's evidence was formidable. She knew the appellant. The incident occurred during the day. There is no reason for a frame up. Accordingly the conviction of the appellant was safe. On sentence, however, the learned Senior Principal state counsel was of the opinion that the sentence imposed was harsh and excessive.

As a first appellate court, it is my duty to submit the evidence tendered during the trial to fresh and exhaustive evaluation bearing in mind of course the injunctions alluded to in the case of **Okeno v/s Republic (1972) E.A. 32**.

However I am of the considered view that this appal may very well be determined on the issue of the constitutionality or otherwise of the appellant's trial in the subordinate court. The appellant was arrested for the offence on 19th November 2006 and was detained in custody until 27th November 2006 when he was arraigned before court to face the charges. The offence that the appellant was charged with was not a capital offence. Accordingly and pursuant to section 72(3) (b) of the constitution of Kenya, the appellant should have been presented before court within 24 hours on his arrest. Failure to present an accused person to court within 24 hours of his arrest and with no reasons proffered for the delay has always led this court to find that his constitutional rights have been violated and consequently the conviction by the lower court would be quashed. The court of appeal in the case of Paul Mwangi Murungu v/s Republic NKR Criminal Appeal No. 35 of 2006 (UR) reiterated on the issue in these terms:-

"We do not accept the proposition that the burden is upon an accused person to complain to a magistrate or a judge about the unlawful detention in custody of the police. The prosecuting authorities themselves know the time and date when an accused was arrested. They also know when the arrested person has been in custody for more than the twenty four hours allowed in the case of ordinary offences and fourteen days in the case of capital offences. Under Section 72(3) of the Constitution, the burden to explain the delay is on the prosecution, and we reject any proposition that the burden can only be discharged by the prosecution if the person accused raises a complaint. But in case the

prosecution does not offer any explanation then the court, as the ultimate enforcer of the provisions of the constitution must raise the issue.

That is what this court said way back in the case of NDEDE V REPUBLIC already cited herein. Of course the Magistrate before whom most of the accused persons first appear do not normally have the jurisdiction to deal with the matters touching on the Constitution, but that is no reason for not asking relevant questions regarding where the accused person has been since the date of arrest and then recording what explanation has been offered by the prosecution. That will help either the High Court or this court to see if the explanation offered by the prosecution was reasonable in all the circumstances of the case."

In the case of Albanus Mwasia Mutua v/s Republic Criminal Appeal No. 120 of 2004 (unreported), the Court

of Appeal had the following to say in respect of such violation:-

"At the end of the day it is the duty of the courts to enforce the provisions of the Constitution, otherwise there would be no reason for having those provisions in the first place. The Jurisprudence which emerges from the cases we have cited in the judgment appears to be that an unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced to support the charge. In this appeal, the police violated the constitutional rights of the appellant by detaining him in their custody for a whole eight months and that, apart from violating his rights under section 72(3) (b) of the constitution also amounted to a violation of his rights under Section 77 (1) of the constitution which guarantees to him a fair hearing within a reasonable time. The deprivation by the police of his right to liberty for a whole eight months before bringing him to court so that his trial could begin obviously resulted in his trial not being held within a reasonable time. The appellant's appeal must succeed on that ground alone".

Similarly in the case of Gerald Macharia Githuku v/s Republic Criminal Appeal No. 119 of 2004, the Court of Appeal in deciding the appeal found that the appellant had been detained for a total of 17 days from the date of his arrest to the date

of being taken before court. The court of appeal in upholding his appeal had the following to say:-

"……. although the delay of three days in bringing the appellant to court 17 days after his arrest instead of within 14 days in accordance with section 72 (3) of the Constitution did not give rise to any substantial prejudice to the appellant and although, on the evidence, we are satisfied that he was guilty as charged, we nevertheless do not consider that the failure by the prosecution to abide by the requirements of section 72(3) of the constitution should be disregarded. Although the offence for which he was to be charged was a capital offence, no attempt was made by the Republic, upon whom the burden rested to satisfy the court that the appellant had been brought before the court as soon as was reasonably practicable."

I note though that this issue was raised by the appellant in his written submissions. However Mr. Orinda, in his wisdom chose not to respond to the same. Accordingly there is no explanation proffered by the state as to the delay of 9 or so days in arraigning the appellant before court.

In the end and in view of the appellant's detention in police custody for 9 or so days following his arrest for the offence he faced in the lower court, I find that the conviction against him must be quashed. I do therefore quash the conviction of the appellant and do set aside his sentence and order that he be released from custody forthwith unless otherwise lawfully held.

Dated and delivered this at Nyeri 29th day of January 2009.

M. S. A. MAKHANDIA

JUDGE