REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 166 of 2008

CLEOPHAS OCHIENG OTIENO ---------- APPELLANT

-VERSUS-

REPUBLIC ---------- RESPONDENT

Coram:

Mwera Judge

Ms. Oundo for State

Appellant in person present

CC. Diang'a.

JUDGMENT

The appellant was charged under S. 8 (2) of the Sexual Offences Act, the Act, in that on 6.5.2007 at N[....]sub-location, Siaya, he caused penetration with a child P A J, a girl under the age of 11 years. After trial the lower court at Bondo convicted the appellant and ordered him to serve a term of life imprisonment.

On appeal it was contended that vital witnesses were not called to testify and there was a breach of fundamental rights under S. 77 (3), the Constitution of Kenya when the appellant was not brought to court in 24 hours after his arrest. That the prosecution evidence exonerated the appellant and any specimens taken from the complainant were not subjected to DNA tests. And that the case in the lower court was not proved beyond a reasonable doubt.

When the appeal came up for hearing the appellant opted to respond to the reply by the learned Senior State Counsel, Ms. Oundo.

Counsel submitted that the appellant took the complainant to his house and defiled her. She knew him. The complaint's evidence was corroborated by that of her mother who observed that the child was shaken, crying and unable to walk properly. And the first report of the incident was that the appellant defiled the child. She was treated and a P3 form produced.

In response the appellant claimed that he was a student at Ramba Secondary School, whose studies the prison term would ruin. He was aged 17 years and in Form II.

On 15.4.2009 the appellant's age was assessed and put at over 20 yrs age at the time of the offence. And the lower court record had it on 18.11.2008 that the appellant had been assessed as an adult.

Turning to the evidence adduced to enable this court to arrive at its own findings, MAJ (PW1) the mother of P the child herein, told the learned trial magistrate that on 6.5.2007 at 7 am she went to the river to wash clothes. She left p at home with other children. PW1 returned at 10 am andp told her that "daddy" had taken her from their home. One T O was there with the children and P who was crying was limping. It transpired that the appellant who was known as "daddy" is the one who had taken the child to Nyanja house, locked the door and put her on the bed. He then slept on her. On examining P's private parts PW1 noticed that she was not having an under-pant on, her genitals were swollen and with a cut. There was a bit of blood too. The witness took the child to Akala Dispensary, after reporting at Akala Police Station who issued a P3 form that was before court. The appellant was then arrested at Ramba Secondary School.

PW1 did not witness the incident. Nor did anybody else. Apparently process to take evidence of a child was not followed as per the Oaths & Statutory Declarations Act S. 19 (*See* Kabangeny Arap Kilol – VS- R. [1959] EA 92) butp gave unsworn statement when she simply answered the learned trial magistrate that she was seven years old. The process of a kind of interview conducted by the court recording the answers of the child was not adopted ending with the finding as to whether the child understood the meaning of saying the truth and if she was to testify one way or the other.

P ((PW2) said that on the material day she had been at home playing with other siblings. The mother had gone to wash clothes. Then Cleophas Ochieng whom they called "Daddy," a neighbour, took her away to his house. He put her on a bed and slept on her. She did not have a pant. The appellant "did bad things" top and she felt pain in her genitals. She did not cry. The appellant told her to go home. She went and when her mother (PW1) returned, she told her of the incident. PW2 was taken to Akala for treatment and also to report to the police there. "Daddy", the appellant, did not use force to make PW2 go with him.

Redempta Asuka (PW3) a registered Clinical Officer at Akala Health Centre examined P on 9.5.2007 – 3 days later, with history of defilement by a known person. p had sustained a first degree perineal tare towards the anus and some foul discharge came from her genitalia. There had been forceful penetration – an injury that was classified as harm (Exh P1). That closed the prosecution case.

In a short unsworn statement the appellant denied the charge. Nobody saw the alleged defilement and he was arrested after a week at Ramba Secondary School when the complainant's mother went there and alleged that he had defiled P Nobody witnessed the incident. The trial closed. The learned trial magistrate wrote the judgment now appealed against.

From the evidence on record, this court like the lower one finds that the appellant did defile P. It was during daytime. She knew him as "Daddy", a neighbour. She clearly narrated how he took her to his house and defiled her on a bed. She felt pain in her genitals. Then when her mother (PW1) returned home she narrated the ordeal to her. PW1 checked her female organ and noticed a swelling and some blood. A clinical officer (PW3) examined Pand established that there had been forceful penetration in her (Exh P1). The arresting officer did not testify but the evidence tendered was sufficient to convict. The child's unsworn statement was corroborated by her mother on the spot and later by medical examination. The child knew the appellant well and so there could be no question of mistaken identity. He did it and he was properly convicted. Non-compliance with S. 19 Cap. 15 did not prejudice the appellant. Evidence of the child was corroborated.

As to rights having been breached, the petition spoke of S. 77 (3) of the Constitution. The correct provision however is S. 72 (3) (b) regarding being brought before court within 24 hours for ordinary offences or in 14 days for capital offences or as soon as it is reasonably possible to do so, the burden to so demonstrate being on the detaining authority. It was said in Albanus Mutua -VS- R. CR. A. 120/2004 (C. A) that where no satisfactory explanation is given as to why an accused person was not taken to court as soon as it was reasonably practicable to do so, that person would be entitled to an acquittal irrespective of

the strength of the case against him.

In the present case the only facts before this court are as per the charge sheet which shows that the appellant was arrested on 11.5.2007 and appeared in court on 15.5.2007. In the grounds of appeal the appellant did not enlighten this court whether there was a weekend or public holiday in between. True, a claim of alleged breaches of fundamental rights can be raised at any stage, be it during trial proceedings or on appeal. The better course would be to raise such a claim at the earliest opportunity, say at the trial stage so that the police can quickly and easily go back to the mother station and collect material to be used to explain, or not, whether the accused was brought to court as soon as it was reasonably practicable. Raising the issue at the appellate stage, although still maintainable on principle, amounts to an ambush to the Attorney General conducting the appeal on behalf of the State. It does not give him a fair opportunity to enquire into the alleged delay. A party required to explain a matter should get the complaint and then be accorded adequate and fair opportunity to answer. Doing so at the hearing of the appeal cannot be termed fair. So if an answer is not given because of the ambush, one would not comfortably conclude that the Attorney – General had no explanation to give. Tenets and interests of justice surely demand that the other side be heard and be accorded fair opportunity to be heard. Assuming that, for instance here, the date of arrest and appearing in court is self-evident on record, it could be fallacious to assume that it must be noticed, allowing for human error not to notice everything including clear ones. So it is in this court's view that an assumption be not made. But a complaint should be brought up, fair enough if it manifests itself, and the detaining agency be accorded a fair opportunity to respond to the complaint.

In the present case this court is minded to hold and it holds that that Attorney General was not given a fair opportunity to consider and go all the way to Akala Police Station, in rural Siaya, to gather material that would explain the 3 day delay. If 12.5.2007 was a working day, the accused should have been arraigned in court then, from the arrest on 11.5.2007. His appearance in court was on 15.5.2007.

In the alternative this court is prepared to consider that in the circumstances of this case the 3 – day delay was not inordinate *(See* Paul Mwangi –VS- R. CR. A. 35/06 C. A.) and the matter remains at that. The conviction herein stands.

As to the sentence, life imprisonment is what S. 8 (2) of the Act provides as the minimum. This court cannot do anything about that, despite the view of the undersigned on minimum sentences.

Accordingly, this appeal is dismissed.

Judgment accordingly. Delivered on 25.5.2009.

J. W. MWERA

JUDGE

JWM/hao