REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Review 189 of 2008

DANIEL MARABA…….APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

JUDGMENT

The appellant Daniel Marapa was charged with the offence of **defilement of a girl** contrary to **section 8(1)(2) of the Sexual Offences Act of 2006.** The particulars of offence state that on the 1st day of November 2006 at N [particulars withheld]area Narok District of the Rift Valley Province, unlawfully had carnal knowledge of N Na girl under the age of 12 years. The Principal Magistrate's Court at Narok tried the appellant after he pleaded not guilty to the charge. He was found guilty and on conviction he was sentenced to life imprisonment.

Being aggrieved by the conviction and sentence, the appellant appealed and in the petition of appeal, the judgment by the trial court was challenged on the grounds that the offence was not proved to the required standard considering the defence that was offered by the appellant. The decision by the trial magistrate was also faulted for failure to take into account that there was a grudge between the appellant and the family of the complainant. Moreover the court failed to consider that the offence was allegedly committed on a path near a forest, which is used by many people who could have testified against the appellant.

The evidence of the complainant was corroborated by that of her aunt and her mother both were not independent witnesses. On the evidence before the court, counsel for the appellant submitted that the medical evidence produced confirmed that no spermatozoa were found and the complainant was still a virgin. The doctor confirmed that spermatozoa could stay in the body for three days. There was therefore no explanation why spermatozoa were not found after two days.

The appellant was also arrested on the 2nd November 2006, was not taken to court until 6th November 2006, which in itself was a breach of his Constitutional rights to a fair trial. The appellant should have been taken to court within 24 hours of his arrest. The prosecution for detaining the appellant beyond the statutory period offered no reasons. Counsel urged the court to acquit or discharge the appellant. Finally the sentence of life imprisonment is excessive. Counsel urged the court to set it aside or consider reducing it.

This appeal was opposed by the State; the learned State Counsel Mr. Njogu submitted that there was overwhelming evidence against the appellant. The complainant testified that the appellant accosted her on her way from the posho mill; the appellant pushed her from behind away from the path towards the

forest. In the cause of defiling the complainant, he was caught red-handed by PW2. There is no legal bar for relatives to give evidence in a matter. The clinical officer who examined the complainant confirmed the act of defilement. The fact that there were no spermatozoa is no prove that the complainant was not sexually assaulted because not every act of sex leads to ejaculation or breakage of hymen. The slightest assault confirms the offence took place. It was confirmed that the complainant had swollen genitalia.

On the issue of delay, the appellant was arrested on a Thursday which is not computed according to the Court of Appeal decision in Criminal Appeal No. 217 of 2005 Dominic Mutie Mwalimu vs. Republic at Machakos where the Court of Appeal held:

"***By section 57(a) of the Interpretation and General Provisions Act, the day on which the appellant was arrested has to be excluded from computation time. It follows therefore, that the appellant should, have been brought before the court on 18th February 2004 when the 14 days expired. He was brought to court 2 days later on 20th February 2004. The appellant did not complain in the trial court that he was not brought to court as soon as was reasonably practicable. Needless to say the prosecution was not called upon to show that the appellant was brought to court as soon as was reasonably practicable. There is no merit in this ground."***

Counsel therefore urged the court to consider that the 24 hours time, which is envisaged in the Constitution started to run from Friday and the appellant was taken to court on Monday thus there was no delay. In any event this issue should have been raised at the earliest opportunity during the trial so that the prosecution could have offered an explanation. The issue is now being raised as an afterthought and should be disregarded.

This being a first appeal it is the duty of this court to reconsider and weigh the evidence before the trial court and arrive at my own independent determination on whether or not to uphold the conviction. In so doing I have to bear in mind that it is the trial court that saw and heard the witnesses give evidence and give due allowance for that. See the case of **Njoroge vs. Republic [1987] KLR page 19**. I now wish to set out briefly the evidence that was before the trial court, which led to the conviction and sentence of the appellant.

After a voire dire examination, NN a girl aged 10 years testified that on 1st November 2006, after she came from school her mother sent her to grind flour at a posho mill in the boma of Kakash. On her way back, the appellant who caught up with her before entering a forested area of the path followed her. The appellant held her from behind. He pulled her despite her pleas to let her go. He slapped her on the face. As she was trying to run away the appellant slapped her again and she fell down. She dropped the basket that contained the flour. When the complainant fell down the appellant removed her bikers and pants, he unzipped his trousers while holding the complainant on the mouth. The appellant told the complainant that she would be his girlfriend and should not dare to scream because he would cut her up. He then inserted his penis into her vagina.

N N[PW2] an aunt of the complainant was walking along the same path when she heard a child screaming from the forest. She went to check and found the appellant defiling the complainant. PW2 asked the appellant what he was doing. He answered that he found the complainant urinating; the complainant immediately pulled his trousers and escaped. The complainant explained to PW2 what had happened, PW2 escorted the complainant to her mother. The matter was reported to the parents of the complainant.

NN2 [PW3] the mother of the complainant gave evidence of how she sent the complainant to the posh mill. The complainant was brought home by PW2 and narrated how the appellant had defiled her. At the time the complainant was bleeding from her private parts and the biker and underpants were torn. The complainant said that Daniel who was well known had attacked her. The appellant was arrested the following day and taken to Nkaleta Police Station.

Daniel Cherop [PW5] a Clinical Officer based at Narok District Hospital on 3rd June 2006 examined the complainant. On examination he found that the complainant had swollen external

genitalia. She had whitish vagina discharge. She was taken to the laboratory for high vaginal swap. Pus cells were noted but no spermatozoa and the injuries were about 2 days old, the hymen was intact. PW5 concluded that the complainant was defiled. He filled the P3 form. PC Joseph Makokha PW4 arrested the appellant**;** Administrative Police from Nkaleta chief's camp had arrested him. He issued the complainant with a P3 form, recorded statements from the witnesses and charged the appellant with the present offence.

Put on his defence, the appellant gave unsworn statement of defence. He gave a detailed account of his background and family circumstances of how he was offered by his grandmother to be adopted in the family of the complainant. When his grandmother passed away, the family of the complainant tried to chase him away. He unsuccessfully tried to lay a claim on a cow and a piece of land that belonged to his grandmother. He claimed that on 20th October 2006 he went to pick the cow by force. A quarrel ensued but there was reconciliation. He away to attend to a tractor he used to drive for repair in Narok afterward he went to his home. His mother sent him to skeletal town to buy some provisions that is when he saw the complainant with Administration Police. He was arrested and taken to the Chief's camp and later escorted to Narok. He claimed that he learnt about the charges when it was read to him in court.

After considering the above evidence, the learned trial magistrate was satisfied that the prosecution proved the charge against the appellant to the required standard. The trial magistrate was satisfied that the complainant was truthful in her evidence and gave a true account of what transpired. She knew that of PW2 and the clinical officer corroborated the appellant and her evidence. The defence by the appellant was disregarded. It did not dent the prosecution's evidence especially the details contained in the evidence of PW1.

This appeal now challenges the entire judgment by the trial court. I have re-evaluated the evidence, just like the trial magistrate, I find the testimony by the complainant candid. She was merely 10 years old. She gave graphic and grotesque details of how the appellant accosted her, slapped her. She was trying to run away but fell down, that is when the appellant removed her pants and defiled her. The clinical officer examined her two days later and the medical report confirms that her private parts were swollen. This medical evidence is consistent with the evidence by PW3 who testified that the complainant was bleeding from the private parts when she was brought home by PW2 and she narrated to her parents what had happened. The trial magistrate who heard the evidence believed that the complainant testimony was truthful. According to the provisions of **Section 124 of the Evidence Act Cap 80**, it is provided that: –

"***Provided that wherein a criminal case involving a sexual offence the only evidence is that a child of tender years who is the alleged victim of the offence, the court shall receive the evidence of the child and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the child is telling the truth."***

Based on the above provisions of the law the trial court can receive the evidence of a minor and proceed to convict if satisfied that the child is telling the truth. The judgment by the learned trial magistrate gave reasons why he believed the complainant was telling the truth. It is indicated that the complainant knew the appellant well. The appellant was also found at the scene by PW2 whose evidence corroborated that of the complainant and the medical report after the complainant was examined showed that she was defiled.

The other issue raised in this appeal touches on the Constitutional right of the appellant as guaranteed by the Constitution. This issue was well responded to by counsel for the State, in that the best forum to raise the issue was during the trial so that the prosecution could have been afforded an opportunity to explain if there was any delay of one day. Decisions by the Court of Appeal have tended to settle this matter of delay, by directing that every case where there is an allegation of delay and infringement of the provisions of section 72(3) of the Constitution each matter should be looked into according to its own peculiar circumstances and the allegation must be raised at the earliest opportunity.

In this case the accused person was arrested on 2nd November 2006 and taken to court on the 6th

November 2006. It was submitted that 2nd November was a Thursday. It has been settled in the Court of Appeal decision in the case of **Dominic Mutie Mwalimu (supra)** that the day of arrest is not to be computed. Furthermore the Police Officer who arrested the appellant and compiled the information testified in this matter. He was cross-examined by the appellant; no explanation was sought as to why the appellant was not arraigned in court on Friday instead of Monday. If this explanation was sought, the investigating officer could have offered an explanation.

Taking the totality of the evidence herein I am not satisfied that the Police inordinately detained the appellant and infringed on his fundamental rights to a fair trial. This submission is without merit.

The last issue to consider in this appeal is the defence rose by the appellant that there existed a grudge between him and the family of the complainant regarding issues of land inheritance and a cow, which the appellant was demanding. The charge against the appellant and the allegations of defilement has far reaching implications especially on the life of the victim. The victim is traumatised and stigmatised, she might suffer irreparable psychological trauma for the rest of her life. It is inconceivable that the family of the complainant would frame up the appellant by making up such a heinous allegation that may also traumatise and stigmatise their 10 year old daughter. Moreover the complainant gave very candid evidence in court. She was put under intense cross-examination and maintained her story.

It is not possible for a child of such tender age to be coached and maintain a line of lies all the way from the Police Station to examination and cross-examination in court. It is for those reasons that I would disregard the defence by the appellant, which was also not pursued by way of cross-examination on PW2 and PW3, who are adult members of the family that is said to have been having a grudge with the complainant.

The last issue is on sentence, going by the evidence of the Clinical Officer, there was no penetration but the private parts of the complainant were injured and the hymen was not broken. For this reason the appellant should have been convicted of the offence of indecent assault or attempted defilement, which carries a minimum sentence of not less than ten years. The appellant is also a first offender which factor must have been taken into account when sentencing. The appellant was given the maximum sentence. For this reason alone, I will interfere with the sentence imposed by the trial court and substitute it with a sentence of 15 years imprisonment. The appellant's appeal will succeed only to that extent.

Judgment read and signed on 14th day of May 2009

M. KOOME

JUDGE