



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 68 of 2008

JULIUS MULWA KIMANI APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal from original Conviction and Sentence of the Senior Principal Magistrate's Court at Murang'a in Criminal Case No. 1500 of 2006 dated 10th April 2008 by T. W. Muriqi – S.R.M.)

J U D G M E N T

The appellant, **Julius Mulwa Kimani** was arraigned before the Senior Principal Magistrate's Court, Murang'a to answer to the charge of defilement of a girl contrary to Section 8(2) of the sexual offences Act. Particulars of the offence being that on the 13th day of May 2006 in Murang'a District within Central Province intentionally and unlawfully had carnal knowledge of **DWE** a girl of 6 years. He also faced an alternative charge of indecent Act with a child contrary to Section 11(1) of the sexual offences Act. Particulars thereof were that on 13th day of May 2006 in Murang'a District within Central Province, intentionally and unlawfully did indecent Act to **DWE** by touching her private parts. The appellant pleaded not guilty to the charges and he was tried.

In short the prosecution case was that the complainant **DWE** (PW1) knew the appellant as a neighbour previously when she was living with her grandmother **AW** (PW4). That on the material day PW4 sent her to go and get kales from **Mugo's** home nearby. She was in the company of **CM** (PW2). As they passed the home of the appellant, he told PW2 to go for the kales alone and leave PW1 behind so that he could pick guavas for her. It was then that the appellant took her to his house removed her pant, his trouser, underwear and then slept on top of her. He put his penis in her vagina and she felt pain. When PW2 came back they ate the guavas and took the rest home. PW1 reported the matter to PW4 who in turn reported the incident at K police station to **P.C. John Kamau** (PW5) and the appellant was then arrested. Thereafter PW1 was examined by **Kamau Nyota Mathews** (PW3) a clinical officer based at M sub-district hospital. He noted that PW1's had no physical injuries and the labia was normal. The hymen was intact and vaginal canal was normal too. No medical evidence of penetration or rape was seen in his conclusion.

Put on his defence, the appellant in his sworn evidence testified that he was a mechanic from Mugoiri and recalled that on 20th May 2006 while looking for cattle feed, he was arrested by two men armed with sticks who assaulted him and escorted him to K police station. He was subsequently charged with this offence which he denied.

The learned magistrate having carefully evaluated the evidence tendered by the prosecution as well as the defence, found for the prosecution not for the offence initially charged but for attempted defilement contrary to section 9(1) of the sexual offences Act, convicted the appellant and thereafter sentenced him to 20 years imprisonment.

The appellant was aggrieved by the conviction and sentence. He thus preferred this appeal. Through **Messrs Gacheru J. & Co. Advocates** he faulted his conviction and sentence by the learned magistrate aforesaid on the grounds that:-

“1. The learned trial magistrate erred in law when she

failed to hold and inform the appellant that his constitutional rights as provided by Section 72(2) (3) of the constitution were breached.

2. The learned trial magistrate erred in law and fact in

convicting the appellant while there was no enough evidence to convict him with the offence charged.

3. The learned trial magistrate erred in law in failing to

hold that the evidence of PW1 did not disclose any attempted rape to warrant a conviction.

4. The learned trial magistrate erred in law in holding

that PW1 was a child capable of testifying on oath without her as provided by Oaths and statutory Act.

5. The learned trial magistrate netted a very stiff

sentence in the circumstances.

6. The learned trial magistrate erred in law and fact in

holding that there was attempted rape while the evidence of PW1 and the doctor PW3 disclosed no offence of any nature.

7. The learned trial magistrate erred in law in failing to

given reasons as to why she arrived to convict the

appellant with the offence of attempted rape”.

The appeal came up for hearing before me on 8th October 2009. However, since **Gacheru J** learned advocate for the appellant had been bereaved, **Mr. Gori**, learned counsel sought an adjournment on his behalf. However the appellant could not countenance an adjournment. Accordingly he decided to dispense with counsel's services and opted to prosecute the appeal in person instead. May be this was a very wise move considering the conclusion I have come to in this appeal which shall be apparent shortly.

The appellant submitted that his constitutional rights were violated since he was detained in police custody in excess of 24 hours permitted by our laws. He also submitted that this court should evaluate the evidence tendered during the trial afresh. Finally he complained that the sentence imposed was harsh and excessive.

In response, **Mr. Orinda**, learned Senior State Counsel submitted that a delay of 3 days in police custody was in the circumstances of this case not inordinate. The appellant had not raised the issue of delay during the trial. To raise it now was clearly an afterthought. The appellant was known to the victim. The evidence against him was thus watertight. On sentence counsel submitted that the sentence imposed was the lowest conceivable in the circumstances.

The fate of this appeal will turn on whether the charge upon which the appellant was convicted can stand the test of law. The appellant was convicted for the offence of attempted defilement contrary to section 9(1) of the sexual offences Act. The offence was alleged to have been committed on 13th May 2006. At that time the sexual offences Act had not come into force. Indeed the said act was assented to on 14th July 2006 and date of commencement was on 21st July 2006. Accordingly as at 13th May 2006, there was no offence in law known as attempted defilement contrary to section 9(1) of the sexual offences Act. At that time such offence could only have been committed under the penal code. However the appellant was not charged pursuant to the provisions of the Penal Code. Rather it was under the provisions of the sexual offences Act which came into force long after the appellant was alleged to have committed the offence. Our criminal justice system does not allow for a statute to operate retrospectively. The appellant could not be charged with an offence which did not exist in our statute books at the time he is alleged to have committed it. For the learned magistrate to have convicted the appellant under the sexual

offences Act, which act was not in force when the appellant is alleged to have committed the offence was tantamount to applying the sexual offences act retrospectively, something which is immensely frowned upon by our criminal justice system.

It was perhaps out of this realisation that the sexual offences act had transitional provisions. One of those provisions was to the effect that “..... **Any proceedings commenced under any written law or part thereof repealed by this Act shall continue to their logical conclusion under those written laws.....**” By analogy, the appellant could only have been charged and prosecuted for the offences under the penal code and not the sexual offences Act.

I am aware that this is not a matter raised in the petition of appeal nor canvassed during the hearing of the appeal. However it is a matter of law and goes to jurisdiction. Accordingly this court cannot overlook the same.

That being the case, the appeal is allowed, conviction quashed and sentence imposed set aside. The appellant shall forthwith be set at liberty unless otherwise lawfully held.

Dated and delivered at Nyeri this 30th day of November 2009

M. S. A. MAKHANDIA

JUDGE