



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT ELDORET**

**Criminal Appeal 83 of 2007**

J.K..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

**R U L I N G**

The appellant J.K was charged with defilement of a girl contrary to Section 145 (1) of the Penal Code. The particulars of the charge state that on 27<sup>th</sup> May, 2006 in Baringo District within Rift Valley Province had carnal knowledge of a girl under the age of sixteen years.

The appellant from the recorded evidence was arrested on 30<sup>th</sup> May, 2006 three days after the commission of the offence and was taken to Court on the 5<sup>th</sup> June, 2006. He appeared before P. M. Muriuki Senior Resident Magistrate for plea.

The substance of the charge and every element thereof was stated by the Court to the accused person in Kiswahili a language he understood who being asked whether he admitted or denied the truth of the charge replied: “It is not true” and the Magistrate entered “a plea of not guilty”. This was followed by the Court ordering that the accused might be released on Shs. 50,000/= bond plus one surety or cash bail of Shs. 15,000/=. The case was stood over to 20<sup>th</sup> June, 2006 for mention to take a hearing date. On 20<sup>th</sup> June, 2006 the case was mentioned and was fixed for hearing on 26<sup>th</sup> July, 2006. On 26<sup>th</sup> July, 2006 the hearing proceeded. The prosecution called five (5) witnesses who testified and were subjected to cross-examination by the accused.

At the close of the evidence in support of the charge, and after hearing such submissions or argument put forward the Court was satisfied that a case had been made out against the accused sufficiently to require him to make a defence. The Court again explained the substance of the charge to the accused and informed him that he had a right to give defence on oath from the witness box and that if he did so, he would be liable to cross-examination, or to make a statement not on oath from the dock, and was asked if he had any witnesses to examine or other evidence to adduce in his defence and in reply the accused answered that he would give unsworn statement and call one witness. The case was adjourned to 20<sup>th</sup> September, 2006 for defence hearing. But on 20<sup>th</sup> September, 2006 the hearing did not proceed and was adjourned to 5<sup>th</sup> October, 2006 when the accused gave unsworn statement and called his witness who also testified and was subjected to cross-examination. In a reserved Judgment delivered on 25<sup>th</sup> September, 2007 the learned trial Magistrate found the accused guilty of the charge of defilement, convicted him and duly sentenced him to thirty (30) years imprisonment.

The accused was dissatisfied with both conviction and sentence and preferred an appeal to this Court. The appeal was filed in person on 8<sup>th</sup> October, 2007. His home made appeal contained seven (7) grounds as stated below:-

1. That my Lords I pleaded not guilty at the trial.
2. That my Lords I was ignorant of the Court proceedings and did not adequately examine witness.
3. That my Lords the learned trial Magistrate erred in both law and facts by upholding that the prosecution had proved its case beyond reasonable doubt without considering that this case was poorly investigated.
4. That my Lords I am the bread winner in the family and long time absence

will cause my offsprings suffer more.

5. That the conviction and sentence imposed on me is too heavy for me and I earnestly request the honourable High Court to reduce the same for me.

6. That my Lords as I cannot recall all that transpired in Court during the trial I kindly request that I be furnished with copies of the trial proceedings to enable me prepare more reasonable grounds of appeal.

7. That my Lords I wish to be present during the hearing of this appeal.

### **REASONS WHEREFORE**

I pray that conviction be quashed and set aside the sentence of thirty (30) years.

Before this appeal was set down for hearing on 12<sup>th</sup> March, 2009 the appellant raised a preliminary objection on the ground that he was held in Kabarnet Police Station for more than twenty four (24) hours and hence his constitutional right was violated. He requested that his preliminary objection be heard before the appeal. The appellant submitted that he was arrested on the 30<sup>th</sup> May, 2006 by police officers from Kabarnet Police Station and was kept in police custody until 5<sup>th</sup> June, 2006 before he was taken to Court.

The appellant argued that his constitutional right under Section 72 (3) of the Constitution having been violated by his not being brought to Court within twenty four (24) hours of his arrest, the trial was itself a nullity and by that fact alone the appellant was entitled to an acquittal.

Mr. Omutelema learned Counsel appearing for the State in opposing the appellant's preliminary objection relied on the affidavit sworn by the Investigating Officer PC. Nancy on 23<sup>rd</sup> March, 2009 and filed on 30<sup>th</sup> March, 2009 in which she has explained why the appellant was not taken to Court within twenty four (24) hours of his arrest. In her affidavit the officer has explained that the appellant had defiled his own daughter aged nine (9) years. On the

same date the appellant was arrested by Administrative Police Officers from Kaptimbor AP Camp and was escorted to Kabarnet Police Station. PC. Nancy says she was instructed to record statements from the witnesses but apparently she could not do so because the witnesses were interfered with and they were hidden. She only managed to record the statement of the complainant on the 2<sup>nd</sup> June, 2006. There was a public holiday in between being 1<sup>st</sup> June, 2006. The complainant was examined on 2<sup>nd</sup> June, 2006 and the P3 Form was filled and returned to her. The appellant was to be taken to Court on 2<sup>nd</sup> June, 2006 but Kabarnet Court was not sitting. This was a Friday followed by the weekend 3<sup>rd</sup> and 4<sup>th</sup> June, 2006 and the appellant was taken to Court on Monday the 5<sup>th</sup> June, 2006. It is Mr. Omutelema's submission that the delay was not unreasonable and immediately the appellant was arraigned in Court and he never raised any preliminary objection during his trial and urged the Court to dismiss the preliminary objection and allow the appeal to proceed to trial.

The Courts seek to prevent exploitation of the rights conferred by the Constitution and weigh the rights of the accused against the public interest in ensuring that the trial should only take place when the guilt or innocence of the accused can be established by all the relevant evidence.

There are four (4) factors which should assist the Court to assess to determine whether a particular defendant has been deprived of his right. They are:-

- (1) Length of delay
- (2) The reasons given by the prosecution to justify the delay
- (3) The responsibility of the accused for ascertaining his rights
- (4) Prejudice to the accused

Every case has to be considered on its own merit. Having considered the appellant's preliminary objection I do not find any merit in it. The delay was

not unreasonable and the reasons given by the prosecution for the delay are satisfactory. The appellant having failed to assert his right from the time he appeared in Court and throughout the proceedings, he must now be treated as having waived the alleged violation of the constitutional right and I reject this ground and further no prejudice to the appellant has been established. Secondly, a declaration that the accused right has been violated does not automatically entitle the accused to acquittal. As is often said justice must not only be done but must also be seen to be done by the watchful eye of the public. The Court must constantly balance the claim of the accused against the possibility unproven and unprovable in many cases that delay has been procured or encouraged by someone acting in the interest of the accused.

For the reasons stated above I have come to the conclusion that the appellant's appeal ought to be heard on its own merit and I must accordingly reject, as I hereby do, the appellant's contention that he is entitled to acquittal because his constitutional rights under Section 72 (3) of the Constitution were violated. If those rights were violated, he waived the right to complain by keeping silent about the violation throughout the proceedings before the trial Magistrate.

Accordingly, the Appellant's preliminary objection is dismissed.

**DATED AND DELIVERED AT ELDORET THIS 17<sup>TH</sup> DAY OF DECEMBER, 2009.**

**J. L. A. OSIEMO**  
**JUDGE**