



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA OF KISII

Criminal Appeal 97 2007

V O APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in the Resident Magistrate's at Rongo, Criminal Case No.1097 of 2004 by D. KIMEI ESQ., RM)

JUDGMENT

The appellant was charged with **defilement** of a girl under the age of fourteen years contrary to **section 145(1)** of the **Penal Code**. The particulars of the offence were that on the 23rd day of September, 2004 at Kanyimbo sub location in Gucha district, the appellant had unlawful carnal knowledge of V G, a girl aged 6 years. After a full trial, the appellant was convicted and sentenced to eight years' imprisonment.

The appellant was aggrieved by the conviction and sentence and preferred an appeal to this court. In his petition of appeal, he stated that the learned trial magistrate erred in law by convicting him without evidence of any eye witness. He also faulted the learned trial magistrate for accepting the evidence of a Clinical Officer regarding the girl's defilement while there was no medical evidence to show that he was the one who had defiled the girl. Lastly, the appellant stated that the sentence passed was harsh and excessive.

The facts of the case were that **V G, PW1**, a girl aged about 6 years, was on the material day at about 1.00 p.m. walking home from school. She met the appellant whom she knew as they were in the same school. The appellant was also walking home after school. The appellant, who was aged about 16 years, grabbed the complainant and pushed her to the ground. He removed her under pants and defiled her as he held her throat so that she could not scream for help. After the ordeal the appellant walked away. The complainant went home and reported to her father that the appellant had defiled her. The complainant's mother had travelled.

The complainant's father, **D J O, PW2**, examined PW1 and realized she was bleeding. He rushed her to Tabaka Mission Hospital where she was treated and discharged. The following day PW1 and PW2 went to the complainant's school to look for the appellant but he was not in school. The teachers sent some pupils to the appellant's home and he was found and taken to school. PW1 positively identified the appellant and thereafter he was taken to Ogembo Police Station.

Police Constable **Paul Kaganga, PW3**, of Ogembo Police Station testified as to how the appellant was

taken to the Police Station on 24th September, 2004. PW3 issued PW2 with a P3 which was filled by **James Mageto, PW4**, a Clinical Officer at Gucha District Hospital.

PW4 examined PW1 and found that there were tears on her vagina. There was also discharge of pus. Male sperms were also detected. The witness filled the P3 form.

In his short defence, the appellant merely stated that the allegations levelled against him were false. He added that there was no eye witness to the incident.

During the hearing of the appeal, the appellant chose to rely entirely on his aforesaid grounds of appeal and said no more.

Mr. Kemo, learned Principal State Counsel, opposed the appeal and submitted that there was overwhelming evidence that the appellant had indeed defiled PW1. He added that the complainant knew the appellant as they were in the same school and both of them were in school uniform at the material time. The appellant was therefore recognized by the complainant.

This being the first appellate court, it is mandated to submit the evidence that was tendered before the trial court to fresh examination, re-evaluate the same and reach its own independent conclusion; see **OKENO VS REPUBLIC** [1972] E.A 32.

The complainant was a minor aged about 6 years. The learned trial magistrate conducted **voire dire** examination of PW1 and satisfied himself that the child was possessed of sufficient intelligence to justify the reception of her testimony.

However, she did not understand what an oath was but she was religious and knew the importance of telling the truth.

The complainant gave very clear evidence and was emphatic that it was the appellant who defiled her. She reported the incident to her father, **PW2**, and told him that the appellant was the assailant. The offence was committed in broad day light and there was no possibility of any mistake in recognition of the appellant by PW1. Evidence of recognition is much more reliable and accurate than evidence of identification, see **ANJONONI VS REPUBLIC** [1980] KLR 59.

The complainant's evidence was corroborated by the evidence of PW4 who examined her a day after commission of the offence. Even though there was no eye witness, the complainant had no reason to frame up the appellant. PW1 was truthful.

Having carefully re-evaluated the evidence that was tendered before the trial court, I am satisfied that the appellant was properly convicted and I dismiss his appeal against conviction.

Before I consider the issue of sentence, I wish to make some observations regarding the age of the appellant at the time of commission of the offence and the manner in which he was tried. Under the **Children Act, 2001**, (hereinafter referred to as "**the Act**"), a child means any human being under the age of eighteen years. The Act stipulates how child offenders should be dealt with. **Section 186 (c)** of the Act requires that every case involving a child be determined without delay. When the appellant was taken to court on 27th September, 2004, the learned trial magistrate ordered that his age be assessed before the plea could be taken. He remanded the appellant at Kamagambo Police Station until the 28th day of September, 2004. The age assessment report was forwarded to court and it showed that the appellant was sixteen years old.

The learned trial magistrate was therefore clear in his mind that he was trying a child yet he did not conduct the trial in accordance with the provisions of the Act. The trial was not conducted expeditiously because it was finalised on 26th May, 2006.

In his judgment, the learned trial magistrate sentenced the appellant to eight years' imprisonment which is contrary to the provisions of **Section 190(1)** of the Act which states as follows:

“190(1) No child shall be ordered to imprisonment or to be placed in a detention camp.”

The learned magistrate should have dealt with the young offender according to the provisions of **Section 191** of the Act which includes placement in a borstal institution.

The learned magistrate chose to disregard the provisions of the Act in the entire trial and even in the preparation and delivery of the judgment. There is no indication that the trial was held in a setting that was friendly to the child offender. The appellant was openly referred to as ***“the accused”***. The trial was not expedited. The court used words such as ***“conviction”*** and ***“sentence”*** in its judgment which was delivered in an open court. Such words are not supposed to be used in relation to a child dealt with by the Children's Court or any other court that trying a child offender, see **Section 189** of the Act. The privacy of a child offender should be respected at all times, see **Section 186 (g)** of the Act.

Although the learned magistrate did not remit the case to a Children's Court, under the Provisions of **Section 185(5)** of the Act, the court was under an obligation to apply all the provisions of the Act as relate to the safeguards to be accorded a child offender.

The appellant was unrepresented. **Section 186(b)** of the Act required that he be provided by the Government with assistance in the preparation and presentation of his defence.

That was not done. **Section 186(f)** also requires that where a child is found guilty the decision and any measures imposed in consequence thereof be reviewed by a higher court. That was also not done.

Considering that the appellant's statutory rights were grossly violated, I am of the view that the sentence that was passed by the trial court cannot stand. I allow the appeal against sentence and hereby set aside the sentence. The appellant has been in prison since 29th May, 2006.

He is now set at liberty unless otherwise lawfully held.

DATED, DELIVERED and SIGNED at Kisii this 3rd day of April 2008.

D. MUSINGA

JUDGE.

In open court in the presence of Mr. Kemo Senior Principal State Counsel for Republic

Appellant – present in person

D. MUSINGA

JUDGE