REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA
Criminal Appeal 9 of 2006

KATANA KESI ……...…APPELLANT

VERSUS

REPUBLIC ……RESPONDENT

J U D G M E N T

The appellant herein, Katana Kesi, was tried on a charge of defilement of a girl contrary to section 145(1) of the Penal Code. In the end he was convicted and sentenced to serve ten (10) years imprisonment. Being aggrieved, he has now appealed to this court to challenge both the conviction and sentence. He has put forward a total of five (5) grounds of appeal. When the appeal came up for hearing the appellant argued all the grounds together. N M (P.W.1), the complainant, told the trial court that in the evening of 27th July 2004 she and one S N (P.W.8) had gone to buy ice cream at the home of K K, the appellant herein, P.W. 1 and P.W.3 said they found the appellant whom they knew by the name 'Sammy'. He was alone in his home. The two minors entered the house at intervals. The first to be called in was S (P.W.3) and then followed by P.W.1. P.W.1 said, when she entered the house, the appellant placed her on his bed and thereafter removed her innerwear. He then removed his under-pant and had carnal knowledge of P.W.1. He warned her not to tell anybody what he did to her. All this time P.W. 3 was at the sitting room. After performing the act, the appellant is said to have given the complainant and P.W. 3 each four ice creams. The two minors then went home. P.W.1 said she put on her Party and then removed the same when she reached home on her mother's request. P.W.1 said she explained to her mother what had happened to her who in turn informed her father on his arrival. P.W.1 said she was taken to hospital by her mother the next day. S N (P.W.3) gave a near similar story of her encounter with the appellant to that given by P.W.1. P.W. 3 said she waited for P.W.1 at the sitting room and when she came out they walked back home. On the way she said P.W.1 cried. She told P.W.3 that she had been defiled by the appellant. P.W.3 went and told her mother. Both P.W.1 and P.W.3 said they did not know the appellant. The complainant's mother, M A (P.W.4), told the trial court that her daughter (P.W.1) had come home at 3.00 p.m. and went to sleep. She said P.W. 1 appeared restless and she went to comfort her at 6.30 p.m. She made inquires from her upon which P.W.1 gave her the whole story. She said when she removed P.W.1's underpants she discovered that her private parts had bruises and swollen. P.W.1 took P.W. 4 to the appellant's house. His employer called him out and P.W. 1 and P.W.3 identified him as the person who sold them ice cream during the day. In the morning, the matter was reported to the police upon the doctor's request. P.W. 4 said the child was taken to hospital by her father. Dr. Said Omar, (P.W. 2), a medical officer attached to Coast Provincial General Hospital said he examined P.W.1 on 3rd August 2004. He estimated her age to be 7 years. In his report P.W. 2 indicated that P.W. 1 had been examined and investigated on 28th July 2004. P.W.2 stated in his examination that P.W.1's hymen was torn with bruises. She was also found to be infected. P.W. 2 came to the conclusion that P.W. 1 had been defiled. Corporal (retired) Bruno Makokha (P.W.5) stated that he issued the P3 form to the complainant's parents upon entering the report in the O.B. on 28.7.04. P.W. 5 thereafter arrested the appellant.

In his defence, the appellant gave sworn testimony without calling for independent evidence. He told the trial court that he was beaten up by his employer and his neighbour in the night of 26.7.2004 on allegations that he had raped children at 7.00 p.m. that day. He claimed that his employer's wife screamed and her screams attracted the attention of neighbours who came to rescue him. A huge crowd came in but that did not deter the beatings. Later he went to bed until the next day (i.e. 27.7.2004) when he got up to continue with his work. The appellant said he was arrested at 11.00 p.m. on 27.7.2004 by four policemen who came with P.W.1's father. He said he was then arrested and taken to court after being in cells for 11 days. The appellant confirmed that he used to sell ice cream. He claimed the children could have confused the house they bought ice cream with the one he worked.

On appeal, the appellant argued all his grounds together. The appellant urged this court to find that the *voire dire* evidence of the complainant (P.W.1) and P.W.3 were not taken in form of questions and answers but only the answers. This submission was not replied to by the learned state counsel. A critical look at the proceedings taken before the trial court will reveal that the voire dire evidence of N M(P.W. 1) were not taken in form of questions and answers. What the trial magistrate did was to record the answers given instead. But the same did not apply to P.W.3. In the voire dire evidence of P.W.3, there were questions and answers. The court of Appeal in the case of **Kiune =vs= Republic Criminal Appeal No. 77 of 1982** stated as follows."

"Where in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion on a voire dire examination whether the child understands the nature of oath in which even his sworn evidence may be received. If the court is not so satisfied, his unsworn evidence may be received if, in the opinion of the court, he is possessed with sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him. It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of oath so that the appellate court is able to decide whether this important matter was rightly decided and not be forced to make assumptions."

It is obvious from the recorded evidence that the trial magistrate concluded that the complainant (P.W.1) possessed sufficient intelligence. He did not however state whether or not the complainant understood the duty of speaking the truth. That is a fundamental error in the proceedings.

The appellant also raised the ground that there is doubt that he committed the offence. He pointed out in his written submissions that the complainant claimed that her defiler was called Sammy but she stated in her testimony that she did not know the assailant. The magistrate who took over the case from Mr. Opulu, the then Senior Resident Magistrate who took the evidence of P.W. 1 concluded that P.W. 1 was a truthful witness. I have already stated that Mr. Opulu did not make such conclusion. He only said that P.W.1 was possessed with intelligence. It was therefore erroneous for Mrs. Mdivo, learned Senior Resident Magistrate to make such a conclusion. This aspect brings me to the application of Section 200 of the Criminal Procedure Code. It is clear from proceedings that this case proceeded for hearing before Mr. Opulu who heard the evidence of P.W. 1 before leaving the judiciary. The proceedings indicate that the case was to be taken over under the provisions of Section 200 of the Criminal Procedure Code. The record shows that Mrs. Mdivo took over the hearing of the case without complying with section 200. She therefore had no opportunity of determining the veracity of the evidence of P.W. 1. The court of Appeal restated the importance of complying with S.200 in Peter Karobia Ndengwa =vs= R. CR.A. No. 125 of 1984 as follows:

"Section 200 is not to be invoked where as seemingly in the instant case, such as half heard trial is a short one. It could be conveniently started *de novo* because the prosecution witnesses are still available locally, and passage of time when the trial first commenced and another magistrate taking over almost mid-way, is so short so as not to cause or produce any accountable loss of memory on their part, whether actual, presumed or pretended, to the prejudice of either the prosecution or the accused. No rule of natural justice, no rule of statutory protection, no rule of evidence, no rule of common sense is to be sacrificed, violated or abandoned when it comes to protecting the liberty of the subject. He is the most sacrosanct individual in the system of our legal administration.

It could also be argued that the salutory and time honoured formular that the trial magistrate being the best person to do so, he should himself see, hear, assess and gauge the demeanor and credibility of witnesses. It has been and will be so in the other cases that will follow. In this case, however, the second magistrate did not himself see and hear all the prosecution witnesses even though he said he carefully observed the evidence given by the prosecution witnesses. He therefore was not in a position to assess the personal credibility and the demeanor of all witnesses in the case. That is a fatal vacuum in this case, in our opinion."

It is clear that Mrs. Mdivo violated the Statutory Protection accorded to the appellant under Section 200 C.P.C. The learned magistrate had no opportunity to herself see, hear, assess and gauge the demeanor and credibility of P.W.1 who was the crucial witness: It is possible the appellant was mistaken for somebody else. Where there is doubt, the same is always given to the benefit of the appellant. It is the submission of the appellant that the evidence of identification of the appellant is that of recognition. A careful perusal of the recorded evidence will not support that submission. It is apparent from the evidence of P.W. 1, P.W.3 and P.W.4 that these witnesses did not know the appellant prior to his arrest.

For the above reasons I am of the opinion that the appeal must succeed. I hereby quash the conviction and set aside the sentence. The appellant is hereby set free forthwith unless lawfully held.

Dated and delivered at Mombasa this 27th day of June 2008.

J. K. SERGON

J U D G E

In open court in the presence of Mr. Monda for state and in the presence of the appellant.