



Mohammed v Republic (Criminal Appeal 148 of 2007)
[2008] KEHC 3896 (KLR) (27 June 2008) (Judgment)
ABDUL AZIZ MOHAMMED v REPUBLIC [2008] eKLR

Neutral citation: [2008] KEHC 3896 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CRIMINAL APPEAL 148 OF 2007
DK MUSINGA, J
JUNE 27, 2008

BETWEEN

ABDUL AZIZ MOHAMMED APPELLANT

AND

REPUBLIC RESPONDENT

(From original conviction and sentence in the Senior Resident Magistrate's Court Homa Bay Criminal Case No 365 of 2007 by EK Mwaita Esq, Ag SRM)

A child was not capable of consenting to any sexual acts

The court held that pursuant to section 43 of the Sexual Offences Act a child was not capable of consenting to any sexual act. Under that provision, sex between a man and a girl who was under 18 years old was unlawful. Further, the court held that holding an arrested person in police custody beyond the legal period of 24 hours without that person being arraigned in court breached the constitutional rights of that person.

Reported by Moses Rotich

Constitutional Law - rights of an accused person - accused not arraigned in court within the prescribed period - where no explanation was given for the delay in charging the accused - whether the rights of the accused had been violated - Constitution of Kenya (repealed) section 72(3).

Criminal Practice and Procedure - defilement - accused charged with defilement of a girl - appeal against conviction and sentence - accused alleging that the trial magistrate convicted him on insufficient evidence - validity of order - Sexual Offences Act, No 3 of 2006, section 43(4)(f).

Evidence - voire dire examination - objective of voire dire examination - whether the child was possessed of sufficient intelligence to justify the reception of the child's evidence - Oaths and Statutory Declaration Act (cap 15) section 19.



Brief facts

The appellant was charged with defilement contrary to section 9(1) as read with sections 48 and 49 of the Sexual Offences Act No 3 of 2006. The particulars of the offence had been that on the 11th of October 2006 at Oyuga beach in Mbita Division of Suba District the appellant committed an act which caused penetration with his male genitals into the genital organ of F M, a child aged 13 years. He was tried, convicted and sentenced to twenty years. Being aggrieved by the sentence, he preferred an appeal faulting the magistrate for convicting him on insufficient evidence. In his defence the appellant denied having committed the offence as charged. The appellant had earlier been charged with the same offence but the case was terminated under section 87(a) of the Criminal Procedure Code.

He claimed that the complainant was his girlfriend and that on the material night she had willingly come to his house and spent the night, although no sexual act had taken place. There was however evidence to the contrary as it was shown upon medical examination that her hymen had been broken and there was mucoid stain or discharge. The prosecution brought witnesses who testified as to seeing the girl emerge from the appellant's house at 4 am in the morning. The appellant had been arrested and remained in custody for longer than 24 hours without being charged. No explanation was given for that delay in charging him.

Issues

- i. Whether a child was capable of consenting to sexual acts.
- ii. Whether the failure to arraign an arrested person in court within the prescribed period of 24 hours violated the constitutional rights of that person as provided in section 72 (3) of the Constitution of Kenya (repealed.)

Held

1. The trial court conducted a *voire dire* examination of the complainant who was a child in order to satisfy itself that the complainant was competent to testify and understood the meaning of an oath. The purpose of a *voire dire* examination was to determine not only whether a child understood the nature of an oath but also whether the child was possessed of enough intelligence to justify the reception of the child's evidence and that the child understood the duty of speaking the truth.
2. Evidence tendered by the complainant showed that at the material time, the appellant asked the complainant to accompany him to his home so he could give her some fruits. What happened at his home was that the complainant was defiled for several hours after being threatened that she would be beaten if she refused to remove her clothes.
3. The complainant who was released and allowed to return to her parent's home, early in the morning after being defiled, was examined on the same day by a clinical officer who found that she had recent penetrative sex.
4. According to section 43 of the Sexual Offences Act a child was not capable of consenting to any sexual act. Under the said provision of the law, sex between a man and a girl who was under 18 years old, even with the girl's consent was unlawful. The appellant's conviction was therefore well founded in law.
5. The appellant was arrested and stayed in police custody for longer than the prescribed legal period of 24 hours within which the law required him to be arraigned in court. No reason was given for the delay in charging him and the continued delay amounted to a constitutional breach of the appellant's right. The appellant's constitutional right as provided by law was violated.
6. (*Obiter*) Though the ground on violation of constitutional rights under section 72(3) of the Constitution (repealed) was not raised by the appellant, it was an important legal issue that could not be overlooked by any court, even when it was not raised before the trial court. The court had a duty to raise the issue under its own motion.

Appeal allowed.



Orders

- i. *Appellant's conviction was quashed and his sentence was set aside.*
- ii. *The appellant was set at liberty forthwith unless otherwise lawfully held.*

Citations

Cases

Kenya

1. *Mohamed v Republic* [2005] 2 KLR 138 - (Mentioned)
2. *Murunga, Paul Mwangi v Republic* Criminal Appeal No 35 of 2006; [2008] eKLR - (Explained)

Statutes

Kenya

1. Constitution of Kenya (Repealed) section 72(3)- (Interpreted)
2. Criminal Procedure Code (cap 75) section 87(a)- (Interpreted)
3. Oaths and Statutory Declarations Act (cap 15) section 19 - (Interpreted)
4. Sexual Offences Act (cap 63A) sections 9(1); 43(4)(f); 48; 49- (Interpreted)

Advocates

Mr Kemo, Senior Principal State Counsel, for the respondent

JUDGMENT

June 27, 2008, D Musinga J delivered the following Judgment.

1. The appellant was charged with defilement contrary to section 9(1) as read with sections 48 and 49 of the *Sexual Offences Act* No 3 of 2006. The particulars of the offence were that on the October 11, 2006 at [Particulars Withheld] beach in Mbita Division of Suba District the appellant committed an act which caused penetration with his male genital into the genital organ of FM, a child aged 13 years.
2. The appellant, aged 23 years, was tried, convicted and sentenced to twenty years' imprisonment. He was aggrieved by the said conviction and sentence and preferred an appeal to this court. He faulted the learned trial magistrate for convicting him on insufficient evidence.
3. Before the trial commenced, the learned trial magistrate conducted an examination of the complainant, FM, and satisfied himself that she was "competent to testify and also understands the meaning of an oath". He therefore directed that she testifies on oath. It is important that I state the objective of *voire dire* examination as stipulated under section 19 of the *Oaths and Statutory Declarations Act*. It is to determine not only whether the child understands the nature of an oath but also whether the child is possessed of sufficient intelligence to justify the reception of the child's evidence and that the child understands the duty of speaking the truth, see *Mohamed vs Republic* [2005] 2 KLR 138 at page 247.
4. The complainant testified that on October 11, 2006 at about 10 pm she went to pour ash outside her parent's house. The appellant called her and asked her to accompany him to his house so that he could give her some fruits. She agreed and upon entering his house he offered her a chair and she sat down. The appellant locked the door, switched off the lights and pulled her to his bed. He ordered her to remove her clothes and because he threatened to beat her up if she refused, she obliged. The appellant defiled her upto about 4.00 am.
5. PW1 went on to state that the appellant opened the door to his house after 4.00 am and asked her to go to their house which was about 40 metres away. When she stepped out, the complainant heard some people talking and one of them, HOD, PW2, called her. PW2 went and called the complainant's



- father, PW4. Together they proceeded to the appellant's house but he took off to a nearby mosque. They tried to arrest him but the appellant hit PW4 with a stone. The matter was reported to the police and they arrested the appellant.
6. PW2 corroborated the evidence of PW1, the complainant, in all material aspects. PW1 was examined by a clinical officer, PW3, on the same day and he established that she had had recent penetrative sex.
 7. PW4 testified that on the material night at about 10.00 pm he realized that PW1 was not in the house. He began to look for her and even enlisted the help of his neighbours including PW2. At about 3.00 am PW4 was told that PW1 was seen coming out of the appellant's house. When he confronted the appellant, the latter told him that PW1 was his girl friend. PW4 accused the appellant of befriending his young daughter and having sex with her.
 8. In his defence, the appellant denied having committed the offence as charged with. The appellant had earlier been charged with the same offence but the case was terminated under section 87(a) of the *Criminal Procedure Code*. He added that the complainant had on October 11, 2006 recorded a statement at Mbita Police station. She stated that she left her parent's house at about 11.00 pm after her parents had slept. She went to the appellant's house as earlier agreed between the two of them. She said that she knocked the door and the appellant opened it. She sat on the bed and the appellant inquired whether her parents had already retired to bed and she answered in the affirmative. She went on to state that they slept on the same bed but they did not have any sexual intercourse. She further stated that when she left the appellant's house at about 3.00 am, her father asked her where she had come from and she lied to him that she had been in the house. The father told her that he knew the house she had come from. Thereafter he took her to the police station and made a report that she had been abducted by the appellant. The said statement was produced before the trial court as an exhibit.
 9. From the evidence on record, it is clear that the appellant and PW1 were together in the appellant's house from about 10.00 pm to about 4.00 am. What is not clear is whether PW1 went to the house of the appellant voluntarily as earlier agreed between them or whether the appellant saw her outside their house and lured her into his house. This is because her statement to the police, recorded a few hours after she came out of the appellant's house, is very different from what she stated when she testified in court.
 10. The complainant's father said that the appellant told him that PW1 was his girl friend. PW1 recorded in her statement that she sneaked out of her parents' house after they had slept. When PW1 walked out of the appellant's house at about 4.00 am, she did not tell the first person she met, Ouma Daudi, PW2, that she had been defiled by the appellant. PW 1 owned up to her father that she was in the house of the appellant; she said that he had deceived her into going there. It is more likely than not that PW 1 had made an arrangement with the appellant that she would go to his house that night. There is evidence that the appellant used his male organ to penetrate the complainant's genital organ. When she was examined by PW3 on the same day, her hymen was perforated and there was mucoid stain or discharge. The offence of defilement as defined in section 8(1) had thus been committed.
 11. According to section 43(4)(f) of the *Sexual Offences Act* No 3 of 2006, PW1 was not capable of consenting to any sexual act. Under the said provision of the law, sex between a man and a girl who is under eighteen 18 years old, even with the girl's consent, is unlawful. Such a girl is a child and lacks capacity to consent to any sexual activity. Any man who engage s in sex with a girl who is under eighteen years commits the offence of defilement whose punishment is prescribed as hereunder:
 - (i) If the girl (or child) is aged eleven years or less, imprisonment for life.



(ii) If the girl (or child) is between the age of twelve and fifteen years, a term of not less than twenty years.

(iii) If the girl (or child) is between the age of sixteen and eighteen years, imprisonment for a term of not less than fifteen years.

From the foregoing, the appellant's conviction and sentence were well founded in law.

12. That notwithstanding, the appellant was arrested on October 11, 2006 and remained in police custody until October 16, 2006. No explanation was given for that delay in charging him. Under section 72(3) of the Constitution, the police could hold the appellant in custody for upto twenty-four hours before arraigning him in court. Thereafter, any continued detention amounted to constitutional breach of the appellant's right. Though this ground was not raised by the appellant, it is an important legal issue that cannot be overlooked by any court, even when it was not raised before the trial court or this court.
13. In *Paul Mwangi Murunga vs Republic*, Criminal Appeal No 35 of 2006 at Nakuru (unreported), the appellant was convicted of robbery with violence and sentenced to death. The appellant had been held in custody for twenty-four days instead of fourteen days. The police therefore detained him in their custody for a period of some ten days beyond the permitted period of fourteen days. No explanation was offered either to the magistrate's court where he was first tried or in the High Court, the first appellate court.
14. Before the Court of Appeal, the State Counsel contended that there had to be a complaint by an accused person when he or she is first taken to court before the prosecution can be called upon to explain the delay. In rejecting that argument, the court held as follows:

"We do not accept the proposition that the burden is upon an accused person to complain to a magistrate or a judge about the unlawful detention in the custody of the police. The prosecuting authorities themselves know the time and date when an accused was arrested. They also know when the arrested person is taken to court and accordingly, they know or ought to know whether the arrested person has been in custody for more than twenty four hours allowed in the case of ordinary offences and fourteen days in the case of capital offences. Under section 72(3) of the Constitution, the burden to explain the delay is on the prosecution, and we reject any proposition that the burden can only be discharged by the prosecution if the person accused raises a complaint. But in case the prosecution does not offer any explanation, then the court, as the ultimate enforcer of the provisions of the Constitution must raise the issue."

15. The court proceeded to allow the appeal, quashed the conviction and set aside the death sentence that had been imposed upon the appellant.
16. On the basis of the above cited decision, I hold that in this matter, the appellant's constitutional right as provided under section 72(3) of the *Constitution* was violated and this court has a duty to raise the issue on its own motion. Consequently, I allow the appeal, quash the conviction and set aside the sentence that was handed down by the trial court. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT KISII THIS 27TH DAY OF JUNE, 2008.

D. MUSINGA

JUDGE

Delivered in open court in the presence of:



for the appellant

Mr. Kemo, Senior Principal State Counsel for the Republic

