



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

**Criminal Appeal 106 of 2004**

**IGNAS KIRINGO ..... APPELLANT**

**- Versus -**

**REPUBLIC ..... RESPONDENT**

**J U D G M E N T**

The appellant Ignas Kiringo, has appealed to this court against conviction and sentence for the offence of defilement contrary to section 145(1) of the Penal Code. The particulars of the offence read as follows

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“IGNAS KIRINGO: One the night of the 24<sup>th</sup> December, 2000 at Mgange Nyika location in Taita District within Coast Province, had carnal knowledge of “[*Particulars withheld pursuant to section 76(5) of the Children Act, 2001*]”.a girl under the age of sixteen years.”

During the trial, the prosecution called five witnesses. After hearing them, the court found that there was a case to answer and put the appellant on his defence. He made an unsworn statement pleading an alibi and called two other defence witnesses. After hearing them all, the appellant was found guilty as charged and sentenced to serve 10 years imprisonment with hard labour, thereby precipitating this appeal.

At the hearing of the appeal, Mr. Omido and Ms. Muthee appeared for the appellant and Mr. Onserio appeared for the Republic. Out of the ten amended grounds of appeal, Mr. Omido said he would argue the constitutional point; that no evidence on record was led to show the age of the complainant; and that the trial magistrate had no jurisdiction to sentence the appellant to more than seven years imprisonment. Ms. Muthee would then argue that the production of the P3 Form did not comply with the relevant provisions of the Evidence Act, and that the charge was defective.

Mr. Omido submitted that the appellant’s constitutional rights as enshrined in section 72 (3) (b) of the Constitution as read with section 36 of the Criminal Procedure Code were violated. He was first arrested on 25<sup>th</sup> December, 2000 and taken to court on 29<sup>th</sup> December, 2000. Mr. Omido then submitted that the appellant was kept in custody for more than the 24 hours allowed for in section 72(3) of the Constitution as well as section 36 of the Criminal Procedure Code. The delay was never explained, and the burden of doing this lies on the police.

He was convicted in the lower court and the conviction was upheld in the High Court. He then appealed to the Court of Appeal which, on 7<sup>th</sup> August, 2003, ordered that the appellant be retried. The plea was next taken on 15<sup>th</sup> September, 2003. All this time the appellant was in custody, and the delay of 39 days was not explained. Mr. Omido then referred the court to GERALD GITHUKU v. REPUBLIC [2007]e KLR; Cr. Appeal No. 119 of 2004; ALBANUS MUTUA v. REPUBLIC, Cr. Appeal No. 120 of

2004; RONALD CHEPKUI v. REPUBLIC, High Court (Kitale) Cr. Appeal No. 87 of 2006; ANNE NJOGU & ORS. v. REPUBLIC High Court (Nairobi) Misc. Criminal Application No. 551 of 2007, and AWADH SALIM FARAJ & ORS. v. ATTORNEY GENERAL High Court (Mombasa) Misc. Cr. Application No. 5 of 2007. He then submitted that the jurisprudence emerging from these decisions is that once the rights of an accused person are violated, what is supposed to result is an acquittal. In such cases, it is upon the prosecution to explain the delay, and not for the accused to raise the point, and in this matter, that burden remains undischarged. Counsel then referred to PAUL MURUNGA v. REPUBLIC Cr. Appeal No. 35 of 2006.

Mr. Omido further argued and submitted that the age of the complainant was never ascertained by the court, and that it can only be proved by a birth certificate or by assessment. The last point that he took was that the trial magistrate had no jurisdiction to sentence the appellant to more than seven years imprisonment, and that she did not take into account that the appellant had already served some time which was a mitigating factor.

On her part, Ms. Muthee submitted that the P3 Form was produced by a person other than the clinical officer who completed and signed it contrary to the provisions of the Evidence Act. She finally submitted that the charge was defective as the word “unlawfully” was missing thereby raising the possibility that the sexual intercourse was lawful. She referred the court to DANIEL BURURE v. REPUBLIC [2006] e KLR, High Court (Kisii) Cr. Appeal No. 471 of 2004; and also to JOHN MWANGI CHEGE v. REPUBLIC [2004]e KLR, High Court (Nyeri) Cr. Appeal No. 421 of 2003. She urged the court to quash the conviction, set aside the sentence, and set the appellant free.

In his response, Mr. Onserio for the Republic opposed the appeal. He argued that the appellant was taken to court only two days late since 25<sup>th</sup> and 26<sup>th</sup> December were public holidays, and submitted that the delay was not inordinate. He further submitted that delay should be explained at the earliest opportunity and, at any rate, before the close of the prosecution case. He referred to REPUBLIC v. CHARLES NJOROGI NJENGA, Cr. Case No. 624 of 2006. He also relied on SAMUEL NDUNGU KAMAU & ANOR v. REPUBLIC Cr. Appeal No. 223 of 2006 for the proposition that when an appellant raises a constitutional point for the first time on appeal, the court may not be able to investigate the truth or falsehood of the matter, and thereupon submitted that this ground of appeal is bound to fail. He also relied on MORRIS N. NJUGUNA & 3 ORS. v. REPUBLIC Cr. Appeal No. 232 of 2006 and submitted that the best course is for an appellant to have aired any grievance at the trial so that the same may be investigated, and since it cannot be investigated at this stage, then an appellant cannot raise it. He finally submitted on this point that there is no provision in the Constitution for an acquittal, and that any such acquittal would be ultra vires. He referred to REPUBLIC v. WANYOIKE MBUGUA & ANOR. Cr. Case No. 91 of 2004 (Nairobi) and submitted that the proper remedy is to compensate, otherwise an acquittal is unconstitutional.

On the other grounds of appeal, Mr. Onserio submitted that the offence was proved beyond reasonable doubt. The Clinic Card showed clearly that the complainant was born in 1987, and in the rural areas birth certificates are issued much later in life. The P3 Form also showed that the complainant was defiled, and P.W.5 had no difficulty in identifying the signature of the maker of the document. In any event, the appellant did not object to the production of the document while he had an opportunity to do so.

Finally, Counsel submitted that the defect in the charge was curable under section 382 of the Criminal Procedure Code, and if it was not so curable, then the appellant should be taken back for retrial. He submitted that the appeal should be dismissed and the conviction upheld, but that the court was at liberty to interfere with the sentence.

In his reply, Mr. Omido submitted that this court is bound by the principle of stare decisis, and the Court of Appeal has decided whether an accused should be acquitted or compensated. As for the stage at which a constitutional point may be raised, he submitted that it can be raised at any time. Lastly, he submitted that if the court finds that the charge is defective, it should not order a retrial as the appellant has been re-tried before after going all the way to the Court of Appeal.

After considering the pleadings and submissions of counsel, I find that the issues to be determined are whether a constitutional point can be raised at this time; whether the onus is on the accused to raise the issue; whether there was a violation of the appellant's constitutional right (s) in this case; if so, whether he should be acquitted or compensated; whether there was proof of the complainant's age in the lower court; whether the P3 Form was properly produced; whether the trial magistrate had jurisdiction to sentence the appellant to ten years imprisonment; and whether the charge was defective.

The answers to nearly all these questions are, happily, to be found in the cases cited to the court. The first one is whether the onus of raising the constitutional issue lies exclusively on the accused. It would be naïve for anyone to pretend that our people know their legal rights, let alone their constitutional rights. The stark reality is that they simply don't know those rights. If they cannot be protected unless they raise those rights, such rights will be as good as non-existent. That would further amount to granting the people the rights through the Constitution, then depriving them of the same rights through the agency of the courts. It is, I think, the duty of the courts to enforce those rights, even if the accused persons do not expressly plead them. Many Kenyans are not even aware that any such rights do exist. And the vast majority cannot afford to engage advocates. In the case of NDEDE v. REPUBLIC [1991] KLR 567, the appellant was charged with being a member of an unlawful society, and taking an unlawful oath. He was convicted on his own plea of guilty. He challenged the conviction and sentence on the grounds that he was held in police custody for thirty days prior to his production in court, and his plea of guilty was obtained as a result of torture, intimidation and threats. On a second appeal, the Court of Appeal said at page 573 –

“We would add that where as happened in this case at the time of the taking of plea there appears to be an unusual circumstance such as injury to the accused, or the accused is confused or there has been inordinate delay in bringing the accused to court from the date of arrest etc. then an explanation of the circumstance must form an integral part of the facts to be stated by the prosecution to the court ...”

Recently in the case of PAUL MWANGI MURUNGA v. REPUBLIC Cr. App. No. 35 of 2006, the Court of Appeal reiterated their above view as espoused in Ndede's Case and added –

“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 ...”

It matters not, therefore, that an accused has not raised the issue. If he does not do so, the court itself can and should raise it.

Can a constitutional issue be raised on appeal or is it to be raised exclusively during the trial? From the authorities cited, the issue has been raised mostly during the appellate stage, and for good measure. Whereas it would be good practice to raise it during the trial, as an important point of law which is a fundamental component of human rights, it should qualify to be raised at any stage. And where such an important issue is not raised at the trial, not even by the court, that ought to be a good ground of appeal.

The next issue is whether there was a violation of the appellant's rights in this matter. The facts are that he was first arrested on 25<sup>th</sup> December, 2000, and taken to court on 29<sup>th</sup> December. Mr. Onserio argued that both 25<sup>th</sup> and 26<sup>th</sup> days of December were public holidays, and that the court may countenance a delay of two days. Indeed in PAUL MWANGI MURUNGA v. REPUBLIC Cr. App. No. 35 of 2006, the Court of Appeal said –

“... So long as the explanation preferred is reasonable and acceptable, no problem would arise. Again the court might well countenance a delay of say one or two days as not being inordinate and leave the matter that ...”

Taking the cue from there, it is to be noted that the two days delay in this case followed two days of celebrations and merry-making. Although that was not a reason for not taking the accused to court on 27<sup>th</sup> December, 2000, it is a minimal delay which, to use the words of the Court of Appeal, the court may and does hereby countenance.

But that was not all. That matter went all the way to the Court of Appeal which, on 7<sup>th</sup> August, 2003, ordered that the appellant be arrested and tried afresh for the same offence. It is not clear exactly when he was arrested the 2<sup>nd</sup> time round, but he was not taken to court until 15<sup>th</sup> September, 2003. It is his contention that period which was a span of 39 days. No attempt has been made to explain why he was not taken to court any earlier. In the absence of any such explanation, I find that his right to be produced in court within 24 hours as prescribed under section 72 (3) of the Constitution was blatantly breached. Upon such a breach, the next issue is what should the remedy be. Mr. Onserio submitted that what the court ought to do is to order the pursuit of damages by the appellant, otherwise an acquittal would be ultra vires.

My sympathies lean heavily in favour of ordering compensation under section 72 (6) of the Constitution. However, I am constrained to observe that I am bound by the decisions of the Court of Appeal, and in ALBANUS MUTUA v. R. (supra) that court was unequivocal that “... an unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced in support of the charge ...” For this reason, I find that on that ground alone, the appellant ought to be acquitted.

With regard to other grounds of appeal, Mr. Omido argued that the age of the complainant was never ascertained by the court, and that no evidence was led to show her age. Although the prosecution produced a Clinic Card which showed that the complainant was born in 1987, the issue of the complainant’s age never featured in the evidence, either in the course of the proceedings, or in the trial magistrate’s judgment. However, in the P3 Form which was produced in court, the Clinical Officer who examined the complainant estimated her age at 12 years. This was not contested, and it would imply that the defence was contented to go along with it. Although the best mode of proving age would be by way of a birth certificate, I would be happy to go along with a medical assessment as suggested by Mr. Omido. And if we can embrace a medical assessment, how does it differ from an estimate of age as happened in this case? In any event, my thinking is that birth certificates may be necessary only in borderline cases. And what constitutes a borderline case is a matter of fact, which will depend on the circumstances of each particular case.

But then Ms Muthee contested the production of the P3 Form on the ground that it was not produced by the maker. In his evidence in chief, P.W.5, Dr. Shem Patta who produced the P3 Form told the court –

“I am Dr. Shem Patta the Medical Health Officer of Taita Taveta District. Mr. Gicheha was a Clinical Officer based at Wesu District hospital, he was transferred from Wesu and we don’t know where he is. I can identify his signature. This is it.”

Dr. Patta produced the P3 Form because Mr. Gicheha who signed it could not be availed to do so. As the doctor said, Mr. Gicheha had been transferred from Wesu and they did not know where he was. Section 50 of the Evidence Act which deals with opinion as to hand writing states in subsections (1) and (2) as follows –

“(1) When the court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written by or signed by that person is admissible.

(2) For the purpose of section (1), and without prejudice to any other means of determining the question,

a person is said to be acquitted with the handwriting of another person when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when in the ordinary course of business documents purporting to be written by that person have been habitually submitted to him.”

No doubt Dr. Patta’s evidence is admissible under section 50(1) if he is acquainted with the signature of Mr. Gicheha. He said he could identify that signature. But he did not state the basis, under section 50 (2), upon which he qualified to identify that signature. Put simply, the question which he should have answered and which he did not answer was – how did he know it was Mr. Gicheha’s signature? In the absence of such a question and an appropriate answer thereto, it cannot be assumed that since he was the District Medical Health Officer, he automatically knew the signature of the Clinical Officer at Wesu as submitted by Mr. Onserio. In the circumstances I agree with Ms. Muthee that section 50 of the Evidence Act was not complied with. However, that document may be validated under section 77 (2) of the Evidence Act, which, as Mr. Onserio submitted, allows the court to presume, inter alia, that the signature to any document which purports to be a report by a Government medical practitioner upon any person submitted to him for examination is genuine and the person signing it held the office and qualification which he professed to hold at the time when he signed it. The court was therefore entitled to presume that the signature on the P3 Form was that of Mr. Gicheha, the Clinical Officer.

Since learned State Counsel conceded that the trial magistrate imposed a sentence which was beyond her jurisdiction, I need not go into that issue. This brings me to the final issue, which relates to the validity of the charge. The appellant was charged with defilement contrary to section 145 of the Penal Code (repealed by Act No. 3 of 2006). That section read as follows –

“Any person who unlawfully and carnally knows any girl under the age of sixteen years is guilty of a felony and liable to imprisonment with hard labour for life.”

In order to constitute an offence under this section, the carnal knowledge must be unlawful. In the charge against the appellant, the word “unlawfully” was missing. That word was central to a charge under that section because in the proviso to section 145 (2) of the Penal Code (now repealed) one could lawfully carnally know a girl under 16 years without committing an offence if one has reasonable cause to believe and did in fact believe, that the girl was above the age of sixteen years. In that case it is not unlawful to carnally know the girl. See DANIEL BURURE v. REPUBLIC High Court (Kisii) Cr. App. No. 206 of 2004. In NGENO v. REPUBLIC [2002] 1 KLR 457, it was also held that failure to state in the particulars of the charge that the carnal knowledge was unlawful renders a charge of defilement fatally defective, and that such a charge cannot stand as it discloses no offence.

The charge against the appellant in this case was therefore fatally defective. Mr. Onserio told the court that if the charge was defective, the appellant should be taken back for retrial. The appellant was first charged in court on 29<sup>th</sup> December, 2000. He was convicted on 18<sup>th</sup> May, 2001 and sentenced to serve 8 years imprisonment plus 2 strokes of the cane with hard labour. On 13<sup>th</sup> September, 2002, the High Court upheld his conviction, but the conviction was quashed and sentence set aside by the Court of Appeal on 7<sup>th</sup> August, 2003. The Court of Appeal also ordered a retrial which has brought about this appeal. In such circumstances, I would find it oppressive to order another retrial. The applicant has been in custody for nearly eight years now, and his constitutional rights have been violated which alone entitles him to an acquittal. He has made some reasonable atonement for his offence and he should get a break.

In the totality of the circumstances, I therefore quash his conviction and set aside the sentence. I further direct that he should be set at liberty forthwith unless he is otherwise lawfully held.

Dated and delivered at Mombasa this 17<sup>th</sup> day of June, 2008.

**L. NJAGI**

**JUDGE**