



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AF KISHI

Criminal Appeal 168 of 2006

DUKE KENYATTA AUTA APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From original conviction and sentence in the Senior Resident

Magistrate's Court at Nyamira, Criminal Case No.786 of 2003

by K. W. KIARIE ESQ., P.M)

JUDGMENT

The appellant was charged with defilement of a girl contrary to the provisions of Section 145(1) of the Penal Code. The particulars of the offence were that on 24th August, 2003 at Omonono sub location in Nyamira District of the Nyanza Province, the appellant had carnal knowledge of L. N. a girl under the age of fourteen years. After a full trial, he was convicted of the said offence and sentenced to twenty-five years' imprisonment with hard labour.

The appellant was aggrieved by the said conviction and sentence and preferred an appeal to this court. In his amended Petition of Appeal filed through Nyamweya Osoro & Nyamweya Advocates, the appellant listed 12 grounds of appeal. I shall highlight some of them later on.

The brief facts of the case were as follows:

On 24th August, 2003 at about noon, L. N. PW3, went to a posho mill at [particulars withheld] and found the appellant seated outside the Posho mill. The complainant (PW3) was by then a twelve-year-old girl. The appellant hired the complainant to a solitary place and forcefully defiled her. Thereafter PW1 went home and told her mother, AN, PW4, who in turn reported the matter to the police. PW4 also took PW1 Nyamira District Hospital. Dr. Wilfred Basweti, PW1, examined PW3 and confirmed that she had been defiled.

On 3rd October 2003 an identification parade was conducted. The complainant was able to identify the appellant. She was with him from about 1 p.m. to about 4.30 p.m. Inspector Boniface Kutua, PW2, testified as to how the identification parade was conducted.

In his defence, the appellant stated that on the material day he was looking after cattle. He returned home at about noon and remained there throughout. The appellant also called his wife, SK, who testified in support of his evidence.

In the first ground of appeal, Mr. Bosire submitted that the trial magistrate occasioned a fundamental miscarriage of justice by trying the appellant when the appellant was facing a charge of unnatural offence before the same court in Criminal Case No.784 of 2003. The magistrate must have been prejudiced against the appellant, counsel added.

Mr. Bosire further argued that the appellant was arrested on 1st October, 2003 and kept in custody until 6th October, 2003 when he was arraigned in court. His constitutional rights as provided under Section 72(3) of the Constitution were therefore violated. The prosecution had not explained the reason why there was such delay.

It was further argued that the judgment by the trial court did not meet the requirements of section 169 of the Criminal Procedure Code,

which outlines the mandatory contents of a judgment in a Criminal case. Counsel cited the case of OKETHI OKALE AND OTHERS VS REPUBLIC [1965] E.A.555. In his view, the trial magistrate considered the prosecution case separately and accepted the same as true before purporting to reject the defence evidence.

Mr. Kemo, Principal State Counsel, opposed the appeal. He stated that the appellant was represented by an advocate before the trial court and no objection had been raised regarding the trial magistrate's participation in the trial when he was also hearing the other related case against the appellant. In any event, he added; if there was any error or mistake by so doing, the mistake was curable vide the provisions of Section 382 of the Criminal Procedure Code.

Regarding alleged breach of the appellant's constitutional rights under Section 72(3) of the Constitution, Mr. Kemo submitted that if there was any delay in arraigning the appellant in court, the issue ought to have been raised before the trial court so that the prosecution could be afforded an opportunity to explain the same.

Mr. Kemo further submitted that the appellant was properly convicted, having been positively identified by the complainant who had spent over three hours with him.

The trial magistrate had also given the reasons in support of his judgment, counsel added.

This being the first appellate court, it is mandated to reconsider the evidence that was adduced before the trial court, evaluate it and draw its own conclusions in deciding whether the judgment of the trial court should be upheld, see OKENO VS REPUBLIC [1972] E.A. 32. I have considered all the grounds of appeal that were filed, whether they were argued or not, alongside the evidence that was adduced.

According to the evidence on record, PW3, the complainant, met the appellant at about noon. At the time, the appellant appeared to the complainant to have been innocently seated outside the posho mill. The appellant began to chat with the young unsuspecting girl. The appellant then lied to the complainant that there were some letters which were with a certain woman in a garden and which he wanted both of them to go and collect so that the complainant could deliver to a person known as Makereri. The complainant obliged. They followed a path that led to some trees. The appellant turned on the complainant, knocked her down and defiled her. The ordeal went on upto about 4.30 p.m.

When the complainant went home, she described her assailant to her mother, PW4, as a tall and black person. She did not give any other description. When PW4 told members of the public what had taken place and she described the assailant, members of the public told her that it must be a person known as Duke Kenyatta, the appellant herein. PW4 did not know of such a person. When PW4 and the complainant went to Nyamira Police Station on the following day, the complainant said that she could identify her defiler if she saw him again. PW4 told the police that the alleged defiler was known as Duke Kenyatta. This was based on the information given by members of the public.

The prosecution did not adduce any evidence as to how the appellant was arrested on 3rd October, 2003. If there was evidence to the effect that immediately after the offence was committed, the police and members of the public started hunting for Duke Kenyatta, the appellant, there would be some basis of suspecting him. The investigating officer, PW5, merely told the trial court that after he was told of the name of the Duke Kenyatta, he issued an order of arrest and gave it to Administration Police at Nyaramba. He sent for the complainant on 3rd October, 2003 to identify the appellant after his arrest. It was only after the complainant identified the appellant that she wrote her statement.

It is trite law that before an identification parade is conducted, a witness should be asked to give a detailed description of the accused, see AJODE VS REPUBLIC [2004] 2KLR 81. That was not done. The circumstances under which the appellant was arrested were not disclosed at all. The investigating officer did not carry out any investigation as would lead to evidence connecting the appellant with the commission of the offence. The trial court relied on the evidence of identification only. This identification was done after more than two months from the date when the offence was committed. A mistake in identification cannot therefore be ruled out, particularly where the police and the complainant believed without any evidence that the defiler was a person known as Duke Kenyatta, who happens to be the appellant herein.

The appellant stated in his defence that from 24th August 2003 until the date of his arrest, more than two months thereafter, he was at his home. Why had he not been arrested all that time since the police had been given his name?

Whereas under Section 124 of the Evidence Act, a court can convict an accused person in a criminal case involving a sexual offence if the only evidence available is that of the alleged victim if it is satisfied that the alleged victim is telling the truth, great caution must be exercised in examining the entire evidence adduced by the prosecution before a conviction. Failure to do so may easily lead to miscarriage of justice. It must always be borne in my mind that the standard of proof in criminal cases is beyond any reasonable doubt. It is trite law that when doubt is made to arise in a trial magistrate's or judge's mind, the benefit of such doubt is always given to the accused.

From the foregoing, I am of the view that the appellant's conviction for such a serious offence was unsafe.

As regards alleged violation of the appellant's constitutional rights under section 72(3) of the Constitution, that issue was not raised before the trial court where the prosecution would have had an opportunity to explain the cause of delay. In ELIUD NJERU NYAGA VS REPUBLIC, Criminal appeal No.182 of 2006, the Court of Appeal held that not every delay amounts to a constitutional breach and results in automatic acquittal. Ideally, where unreasonable delay in arraigning an accused person before a court of law is alleged, the matter should first be raised before the trial court so that the prosecution can have an opportunity to give an explanation for the same. In the above quoted case, the court stated as follows:

“In the appeal before us the ground raising the violation of the constitutional right was raised only on the morning of the hearing when the court granted leave to (counsel) to file the supplementary memorandum of appeal out o time. We are, accordingly unable to hold that the prosecution had been given a reasonable opportunity to explain the delay but had failed to take advantage of the opportunity and therefore, that there was no reasonable explanation for the delay.”

I therefore reject the ground of appeal relating to violation of the appellant’s Constitutional rights.

As regards the ground that the trial magistrate should not have tried the appellant for the charge of defilement when the appellant was also facing a charge of committing an unnatural offence before the same court, it was not shown that any prejudice was occasioned to the appellant. A judicial officer is capable of handling several matters involving the same accused person without necessarily being influenced by the evidence adduced in any of those matters in determining any other. Every case is decided on its own merits. In any event, the appellant herein did not ask the trial magistrate to disqualify himself from hearing the case that gave rise to this appeal if he was afraid that the trial magistrate’s mind would be influenced by the evidence in the other case. I reject that ground of appeal.

In view of my finding regarding the appellant’s identification, I allow the appeal, quash the conviction and set aside the judgment that was pronounced by the trial court.

The appellant should be set at liberty unless otherwise lawfully held.

DATED, SIGNED and DELIVERED at KISII this 13th day of June, 2008.

D. MUSINGA

JUDGE

Delivered in open court in the presence of:

Mr. Nyakundi for the appellant

Mr. Kemo, Principal State Counsel for the Republic

D. MUSINGA

JUDGE