



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

Criminal Appeal 87 of 2006

RONALD MANYONGE CHEPKUI.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence of W.A. Juma – SPM in Criminal Case No. 406/2003 delivered on 13th September, 2006 at Kitale)

J U D G M E N T

On 13/9/2006 the appellant Ronald Chepkui Manyonge, was sentenced to ten (10) years imprisonment, after being convicted for the offence of indecent assault of a female contrary to section 144 (1) of the Penal Code.

Initially, the appellant had been charged with the offence of defilement contrary to section 145 (1) of the Penal Code. At that time, the offence of indecent assault was spelt out in the alternative charge.

At the close of the prosecution case the learned trial magistrate found that the appellant had a case to answer on the alternative charge.

The witnesses who had testified for the prosecution were four. The first prosecution witness was RW. She (PW1) testified that on 8/9/2003 she sent her 6 year old daughter, MN, to fetch an axe from her grandfather's home. PW1 said that that was about 4.00 p.m.

Even though the grandfather to PW2 lived fairly close by, the young girl did not come back until about 7.00 p.m.

By that time, both PW1 and the girl's father were at home. Both parents noticed that PW2 was walking with difficulty.

At the request of PW3, the girl's mother examined PW2 and found her private parts to have been "spoilt". PW1 noted blood and pus on the young girl's thighs.

When PW2 said that it was Manyonge who had done that to her, PW1 went with her to the home of the said Manyonge. As the Manyonge was present at home, PW2 is said to have pointed at him.

PW1 reported the incident at Kinyoro Police Post, and she was advised to take the child to Kitale

Hospital. She complied and PW2 was treated and then discharged.

During cross-examination, PW1 said that there was another Manyonge at the home of PW2's grandfather. That notwithstanding, PW1 did not ask the appellant if it is he who had defiled the child.

PW2, MN, was the complainant. She said that she knew the appellant's name, as Manyonge.

It was her testimony that PW1 had sent her for an axe from her grandfather's home. On her way to her grandfather's home, PW2 met Manyonge, who was sitting on a form. She said that the appellant held her hand and then carried her into a maize shamba.

Once inside the said shamba, the appellant is said to have removed PW2's pant as well as his own pant. The appellant then pressed the complainant's neck to keep her from crying.

PW2 testified that the appellant slept on her abdomen. However, the learned trial magistrate noted, in the court records, that PW2 pointed at her private parts when saying that the appellant had slept on her abdomen.

PW3, RW, is the father to PW2. He got back home from work after 5.00 p.m. When PW2 arrived back home from her grandfather's, PW3 saw her walking in a difficult manner.

After PW1 examined PW2 and said that there was blood, the girl's mother went with the girl to talk to the suspect's mother. Before PW1 left with PW2, to go over to the suspect's mother, PW2 had mentioned the name of the appellant.

On the following day, PW3 went to Kitale Police station, wherefrom he was referred to Kitale District Hospital.

According to PW3, when PW2 mentioned the suspect, she mentioned the appellant. PW3 emphasized that fact during cross examination, when he explained that the other person named Manyonge, who was at the home of the complainant's grandfather, was a small boy.

PW4, Peter Ombasa, was a clinical officer at Kitale District Hospital. He received a P3 form from the OCS Kitale Police Station. The form was dated 11/9/2003.

The clinical officer said that PW2, who was 4 years old, had claimed that she had been defiled on 8/9/2003 and also that she had been treated on 9/9/2003.

On examining PW2's private parts, PW4 found them to be swollen. He also testified that specimens taken from PW2's private parts showed spermatozoa and pus cells.

During the hearing of his appeal the appellant first took issue with the failure to produce evidence of the first report which was made to someone in authority. As far as he was concerned, the reports to the complainant's parents did not qualify as first reports.

There is no doubt that first reports are very important. The appellant submitted, such reports do enable the court to check the victim's truthfulness of subsequent statements. The said first reports often provide a basis upon which to test the statements made subsequently, as the victim or whoever else may have made such statements will not have had the opportunity to consult with other persons. Furthermore, such reports would normally have been made when the events in issue were still fresh.

In this case, PW2's first report was to PW1 and PW3, both of whom testified that the complainant did mention the appellant as the person who had sexually violated her person. As parents to PW2, those two witnesses could be deemed as persons in authority over her.

But even if they had not been persons in authority, I think that the truthfulness of the complainant and her

subsequent statement could be tested against that first report.

Often, the first person who a victim or a witness talks to may not be a police officer or a person who holds an official administration position in society. In such circumstances, I hold the view that it would stand the victim or witness in good stead he had told that first person about the identity or identifying characteristics of the suspect.

In this case the appellant did not call for the production by the prosecution, of the Occurrence Book. Therefore, the court never got to know whether or not the name of the appellant was given to the police on the first occasion when the victim and her parents reported the incident, at the police station. However, I would not be right to suggest that unless the Occurrence Book was produced in Court during a trial, a conviction could not be sustained. Nor is it the law that if the Occurrence Book was not produced in evidence, there should be an automatic assumption that the person who made the first report did not give to the police the particulars of the suspect.

As regards the provisions of sections 29 (d) and 35 of the Criminal Procedure Code, the appellant submitted that there has been non-compliance, as no police officer testified at the trial. He therefore contended that there was no proof that he was ever re-arrested by the police, or that the offence with which he was charged was ever investigated.

It is true that no police officer did testify at the trial. The reason for that is that although the prosecution had informed the Court that they wished to call the arresting officer as a witness, the said officer was not immediately available, as she had been transferred to Eldoret. The prosecution sought an adjournment, so as to enable it get that witness to testify at a later date. The appellant had no objection to the application for an adjournment. However, the learned trial magistrate rejected the application on the grounds that that was not the first time that the prosecution had cited the absence of the witness as a basis for seeking an adjournment.

Notwithstanding the failure by the arresting officer to testify, I hold the considered view that PW1, PW2 and PW3 had already given sufficient evidence, from which the court could form a prima facie view of the reason for the appellant's arrested. The reason given by those witnesses was that the appellant had defiled PW2, who then identified him as the assailant. That information was relayed to the police, who later arrested the appellant.

Having been arrested by the police, the issue of the appellant's re-arrest did not arise. As regards the origin of the charge sheet, the appellant submitted that that was in doubt because the investigating officer did not testify. To my mind, the origin of the charge sheet was very clear, as on the face of the said charge sheet there is an express statement to the effect that it was drawn out by the Officer-in-charge of the Kitale Police Station.

The particulars of the offence were that the appellant had carnal knowledge of the complainant, who was "a girl under the age of fourteen years."

Prior to the year 2003, the offence of defilement was committed if any person unlawfully had carnal knowledge of any girl under the age of fourteen years. By Act No 5 of 2003, the provisions of section 145(1) were amended so that the offence would be committed if the girl was under the age of sixteen years.

As the offence herein was alleged to have been committed on 8/9/2003, whilst Act No. 5 of 2003 came into force on 25/7/2003, the more accurate statement of the offence would have been one in which the age of the complainant was cited as being under the age of sixteen years.

However in as much as the complainant was no more than six years of age, I hold that the particulars cited in the charge sheet were well within the category of persons envisaged by section 145 of the Penal Code. Therefore, the appellant was not at all prejudiced.

The position would have been different had the charge purported to criminalize the appellant for defilement of a girl whose age was more than sixteen years.

PW1 stated the complaint's age as six years while PW4 assessed her age as four years. Regardless of whether PW2 was four or six years of age, the offence would still have been committed, as both those ages are well below the age which defilement is committed. The appellant submitted that his may have been a case of mistaken identity as there was another person named Manyonge, who was resident at the home of the complaint's grandfather.

However, after taking note of the evidence of PW4, it is clear that the other Manyonge was a small boy. Secondly, when PW1 went to the appellant's home, in the company of PW2, the complaint pointed out the appellant. That action cast out any possibility that PW2 had intended to make reference to "the other Manyonge", and not the appellant.

As regards the issue of who took the complainant to the hospital, both PW1 and PW3 said that they did so. Neither of them said that they went alone, with the child. Therefore, I find no inconsistency in their evidence, in that regard.

PW1, did testify that the appellant was arrested after 3 days. Therefore, as the offence was said to have been committed on 8/9/2003, that implies that the appellant was arrested on or about 11/9/2003. Meanwhile, the charge sheet indicates that the appellant was arrested on 25/9/2003.

Obviously, the evidence as to the date of the appellant's arrest is at variance with the particulars of the charge sheet. Therefore, the appellant submits that the evidence did not support the charge.

In my understanding, the date of the appellant's arrest did not constitute a part of the charge of defilement. Therefore, if the ingredients of the offence were proved and if the same were shown to have been committed by the appellant, the prosecution would have proved the charge against the appellant.

The appellant contended that if he had been arrested on 11/9/2003, it would mean that by the time he was arraigned in court, he would have been in custody for nineteen days. If that be the case, the appellant submits that his constitutional rights were infringed, because he was produced in court after more than 48 hours from the time of his arrest.

The appellant's said contention is founded only on a presumption. It is thus a hypothetical question, to which this court will give a hypothetical answer. The answer is that if indeed the appellant had been held in custody for over 19 days before he was arraigned in court, that would have constituted a violation of his constitutional rights.

But what is the factual position? The appellant did say, in his defence, that he was arrested a week after the offence was committed. On the other hand, the date of arrest, as specified in the charge sheet, was 25/9/2003. Thereafter, the appellant was arraigned in court on 29/9/2003. That would still be some four days from the date of arrest. Therefore, the prosecution would still have violated the appellant's rights as enshrined in section 72(3) of the Constitution of Kenya

Gerald Macharia Githuku vs Republic, Criminal Appeal No. 119 of 2004, the Court of Appeal expressed itself thus:

"Although the delay of three days in bringing the appellant to court 17 days after his arrest instead of within 14 days in accordance with section 72(3) of the Constitution did not prejudice the appellant and although, on the evidence, we are satisfied that he was guilty as charged, we nevertheless do not consider that the failure by the prosecution to abide by the constitutional requirements should be disregarded."

Consequently, the Court of Appeal quashed the conviction and set aside the sentence.

It is instructive that in reaching that conclusion, the Court of Appeal took into account the fact that the

appellant had already been in custody for over 12 years and that his co-accused had died in custody.

In my considered opinion, the Court of Appeal did not lay down a strict rule which requires the court to grant freedom to either accused persons or appellants as soon as it became clear that they were not arraigned in court within the time prescribed by section 72(3) of the Constitution. Had that been the intention of the court, I believe that it would not have needed to delve into the circumstances of that particular appellant, because it would then not have mattered at all, whether he had only been in custody for a couple of months.

The constitution itself provides the state with an opportunity to show that the accused person had been taken before a court as soon as it reasonably practicable.

As the Court of Appeal observed, the jurisprudence appears to be that an unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature and strength of the evidence which may be adduced to support the charge.

But that then leads to the question whether the prosecution is obliged in every case wherein there has not been a strict compliance with section 72(3) of the Constitution, to offer an explanation to the court, for the delay in bringing the accused to court, even if the accused has not raised the issue. In my view that would be the ideal scenario. However, one must then stop to ask themselves what the implications thereof would be.

I say so because it may well imply that any person who had been convicted would need to have the said conviction quashed, provided that the record of the proceedings before the trial court showed that he was not brought before the court within the period stipulated in section 72(3) of the Constitution; unless the prosecution did discharge the onus of proving that the accused was arraigned in court as soon as is reasonably practicable.

I shudder to think of the possible ramifications, and venture to suggest that persons whose constitutional rights had been violated in the manner discussed above should, if found guilty, serve the sentences metered out. However, the said person should have the opportunity, if he wished, to seek appropriate relief against those that had violated his constitutional rights.

For now, this court is bound by the decision of the Court of Appeal. Accordingly, notwithstanding the evidence against the appellant, I am obliged to quash the decision of the trial court, on the basis of the violation of the appellant's constitutional rights. In the result, the appeal is allowed, the conviction quashed and the sentence set aside. The appellant should therefore be set at liberty forthwith, unless he is otherwise lawfully held.

Dated and delivered at Kitale this 11th day of October 2007.

Fred A Ochieng.

JUDGE