



IN THE HIGH COURT OF KENYA
AT ELDORET
Criminal Appeal 43 of 2006

WILSON KIPRONO ROTICH.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

JUDGMENT

This is an appeal against the decision of the Honourable Principal Magistrate V.W. Wandera in the Chief Magistrate’s Court at Eldoret Criminal case No 6016 of 2002 wherein the Appellant was convicted and sentenced to 10 years with 5 strokes of the cane and hard labour on 24th April, 2006.

The Accused had been charged with the offence of defilement of a girl contrary to section 148 (1) of the Penal Code. There was a second charge of indecent assault on female, contrary to section 144 (1) of the Penal Code. The offences were committed on 27th May, 2002 on a girl of less than 14 years, to wit, 3 years old.

The Accused being aggrieved with the conviction and sentence lodged this Appeal on 8th May, 2006. He had initially raised 6 grounds of appeal of appeal but at the hearing prosecuted Grounds 2 and 6 only.

Before the hearing, the Appellant’s Counsel applied for the Appellant to be referred to Hospital for an examination by a Psychiatrist. The Counsel stated that this was due to the fact that the Appellant was not examined during the trial for his mental condition and statuses. His Counsel applied for an order that they be allowed to tender additional evidence during the trial.

Grounds No.2 and 6 of the Memorandum of Appeal stated as follows:

“

2. That the Learned Principal Magistrate erred in law and fact by failing to take into consideration the evidence of the Appellant on the status of his mental health and epilepsy.

.....

6. That the Learned Principal Magistrate erred in law and in fact in failing to recommend the Appellant for medical and mental check-up thus excluding vital evidence that ought to have been tendered in Court”.

This Court referred the Appellant for Psychiatric assessment and for a medical report to be submitted. A Medical Report by the Chief Psychiatrist at Moi Teaching and Referral Hospital, Dr. Omar Aly was filed

and dated 24th May 2007. Upon perusal, I allowed the Appellant to produce or tender additional evidence by the said Doctor under the provisions of S. 358 of the Criminal Procedure Code. Dr. Omar Aly was then called as a witness and produced his report and opinions. He also gave his oral evidence on the examination and assessment of the Appellant.

He was cross-examined by the Respondent's Counsel.

The conclusion of Dr. Omar was as follows:-

“

CONCLUSION:

Following the history given, I confirm that the Appellant suffers from EPILEPSY. It would appear that he had an attack on the day he is accused of committing the offence, if he did at all. The history given to me by all the people summoned bears this out. Epilepsy is a serious neuro Psychiatric disorder where the patient totally loses consciousness just prior and during an attack. He convulses and after the attack the patient goes into a post ictal sleep. On waking up he can have automatism and confusion in which sometimes an offence is committed. Any offence committed following these events (epileptic) are in all cases and severally considered NOT TO BE RESPONSIBLE for the offences committed or their action. They cannot be called to account because of the nature of epilepsy.

RECOMMENDATION

It is recommended that the appellant (patient) be referred for Proper consultations to a Psychiatrist so that he can be commenced on the right medication and follow up”.

In his testimony, the doctor said that since the age of 7 years, the Appellant had not been treated by a conventional doctor. Counsel for the Appellant, Mr. Mitei submitted that at the time of plea taking and trial the Appellant was sick and insane. That he was unfit to stand trial. That the plea had been taken in the Children's Court and as a minor, the Court ought to have referred him for medical assessment. Counsel argued that the trial Court did not take into consideration the evidence of the accused on his state of mind. Also that the Court failed to recommend a medical examination to the Appellant's advocate; considering that he had not been represented throughout the proceedings. It was also argued that the state ought to have provided Counsel for the Appellant being a minor.

The Appeal was opposed by the Respondent through Mr. Omutelema, Senior Principal State Counsel. He submitted that:-

- Ø Under section 11 of the Penal Code, everyone is presumed to be of sound mind until the contrary is proved.
- Ø That it is not for the Court to establish to defence of insanity or otherwise for the accused.
- Ø The Court was entitled to proceed with evidence on record.
- Ø P.W. 1 and P.W.2 clearly placed the appellant at the scene of the crime.
- Ø P.W.2 gave strong circumstantial evidence.
- Ø That if the Court finds in favour of the Appellant in respect of the sickness of epilepsy on the basis of the additional evidence, the same does not wholly absolve him from blame.
- Ø That in the alternative, under section 166 of the Criminal Procedure Code, the Court should find him guilty but insane.

I have considered the Memorandum of Appeal, the Judgment and proceedings, the additional evidence by Mr. Omar Aly and submissions by Counsel.

This Court is alive to the provisions of section 11 of the Penal Code that every person is presumed to be of sound mind and to have been of sound mind at any time which comes in question, until the contrary is proved.

Having said that, I do agree that since the Appellant was himself a minor, the Court ought at the initial stage considered whether he should be given legal aid by way of legal representation under section 72 of the Children's Act. This is more so, considering this nature of the offence and the penalty. Be that as it may, the Appellant subsequently retained the service of an Advocate and was allowed to recall some witnesses and who were cross-examined.

Was the Appellant fit to plead? The Appellant pleaded not guilty. He elected to speak in Kiswahili. I hold that there is no way the Court could be placed on the inquiry that the Appellant suffered from some ailment like epilepsy or other illness that could require medical examination before the plea was taken. Secondly, from the record, the Appellant was able to cross-examine the witnesses to a reasonable standard. From the record, it would appear the Court presumed him to be of sound mind in terms of section 11 of the Penal Code.

During the testimony the Appellant testified that he suffered from epilepsy and that on the material day he had been sick. Perhaps, the Court ought to have recommended an examination but I think that since the Appellant was represented by Counsel, it was the duty of his Counsel to insist on medical examination or even better to call a Psychiatrist as a Defence witness. I do not think that the Court failed in any of its duties in this regard.

The Appellant testified and the record shows an intelligent person who understands what was going on and able to speak for himself.

I do hold and find that the two grounds of appeal are not proven and sustainable. I would not allow the appeal on the said grounds.

However, I am under a duty to consider the additional evidence of Dr. Omar Aly which is on record and was not available to the Subordinate Court.

I do hold that the said Medical Report, Conclusion and recommendations could only be useful and relevant in respect of sentencing. With regard to the conviction, while I respect and accept Dr. Omar Aly's opinion and assessment in respect of the Epilepsy suffered by the Appellant, the evidence however shows that in this particular situation, the epilepsy did not and could not have affected the Appellant.

The Appellant knew what he was doing. He was conniving and cunning. He lured the children with the so called mobile-watch which he promised the little girl. He took her into the room and left the boys outside. This action was deliberate and was of a conscious, active mind. He was not under any epileptic attack. He carried out the act constituting the offence to completion. He removed the girl's pants and inserted his male organ in her private place. Later when he heard people at the door he escaped through the cottage widow. He was arrested while in flight.

I do hold that during the commission of the offence the accused was conscious and sane. His mind was not impaired by an epileptic fit or seizure.

I do uphold the conviction. With regard to sentencing, I think the Appellant being a minor himself and suffering from epilepsy needs medical care and attention. I think with hindsight now the sentence of 10 years plus 5 strokes and hard labour was harsh and severe in the circumstances.

I do hereby uphold the conviction but do set aside the sentence. I do hereby uphold the conviction but set aside the sentence and reduce it to imprisonment for a period of five (5) years from the date of

conviction. He is thereafter placed on three (3) years strict probation considering the medical report so that he is not a danger to others including his family. During the said period, he is to be under reasonable medical treatment and medication under a Psychiatrist at the State's expense.

Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 15TH DAY OF NOVEMBER 2007.

M.K. IBRAHIM,

JUDGE.