Mokaya v Republic (Criminal Appeal 49 of 2006)
[2006] KEHC 3486 (KLR) (15 August 2006) (Judgment)

Reagan Mokaya v Republic [2006] eKLR

Neutral citation: [2006] KEHC 3486 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CRIMINAL APPEAL 49 OF 2006

JK SERGON, J

AUGUST 15, 2006

BETWEEN

REAGAN MOKAYA ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

Necessity for trial courts to give reasons for the rejection of an accused's defence under section 169 of the Criminal Procedure Code

It was incumbent upon trial courts to give reasons for rejection of an accused defence under section 169 of the Criminal procedure Code.

Reported by John Ribia

Criminal Law *- defilement - appeal - reliance on the evidence of a child victim - claim that the prosecution's evidence was uncorroborated, unreliable, incredible and contradictory - summary rejection of the defence by the trial court - whether the required standard of proof had been met- Penal Code (cap 63) section 145(1).*

Criminal Procedure *- defence - rejection of defence by trial courts - whether it was incumbent upon trial courts to give reasons for rejection of an accused defence - Criminal procedure Code (cap 75) section 169.*

Evidence *- evidence of a child of tender years - where the child was the victim of the offence - manner in which courts should deal with such evidence - preliminary inquiry - corroboration of child evidence - duty of the court to expressly record its finding that the child appreciated the necessity of telling the truth - whether failure to record the court's satisfaction that the child was telling the truth was a fatal omission - whether a conviction could be sustained on such evidence - Evidence Act (cap 80) section 124.*

Brief facts

The appellant had been charged with defilement of a girl contrary to section 145(1) of the Penal Code. After full trial, the appellant was convicted and sentenced to serve 10 years imprisonment with hard labour. Being dissatisfied with conviction and sentence, he preferred an appeal where he listed ten (10) grounds which were argued together. In the appeal, it was argued that the evidence by the complainant was not corroborated as

required under section 124 of the Evidence Act. It was also argued that the evidence tendered was unreliable incredible and full of contradictions hence a conviction should not have been sustained as the date on which the offence was allegedly committed was in dispute. It was further argued that the trial magistrate rejected the appellant's defence without good reasons.

Issues

i. Whether failure to record the court's satisfaction that the child was telling the truth was a fatal omission in a defilement case.

ii. Whether it was incumbent upon trial courts to give reasons for rejection of an accused's defence under section 169 of the Criminal procedure Code.

Held

1. Complainant's evidence ought to have been corroborated.
2. Section 124 of the Evidence Act was categorical that the court had to state in the proceedings that it was satisfied that the child appreciated the necessity of telling the truth and consequences of telling a lie. Failure by the trial court to comply with the said section was hence a fatal mistake.
3. There existed material contradictions and discrepancies in the entire evidence. There was no evidence laid to prove the offence and in view of that mix up and contradictions the court was convinced that there was no credible and consistent evidence to sustain a conviction.
4. The trial magistrate did not comply with section 169 of the Criminal procedure Code when she failed to justify her rejection of the defence. It was incumbent upon her to state the reasons as to why she thought the defence story was an afterthought.

Appeal allowed.

Citations

Cases

None referred to

Statutes

Kenya

1. Criminal Procedure Code (cap 75) section 169 - (Interpreted)
2. Evidence Act (cap 80) section 124 - (Interpreted)
3. Penal Code (cap 63) section 145(1) - (Interpreted)

JUDGMENT

August 15, 2006, JK Sergon, J delivered the following Judgment.

1. The appellant herein, Reagan Mokaya, was tried and convicted for the offence of defilement of a girl under the age of 16 years contrary to section 145(1) of the *Penal Code*.

2. The particulars of the offence are that on the July 8, 2004 at Kisauni Magogoni area of Mombasa District within Coast Province, unlawfully had canal knowledge of PM a girl under the age of 16 years. The appellant was then sentenced to serve 10 years imprisonment with hard labour. Being dissatisfied he preferred this appeal. On appeal the appellant has listed ten (10) grounds which grounds were argued together.

3. Before considering the appeal let me set out the case which was before the trial court. The prosecution's case was supported by the evidence of four witnesses. The complainant (PW1), PM, told the trial Senior Resident Magistrate that she knew the appellant as a teacher at Savina Academy though he did not teach her class. She said the appellant took her to his house during break time and defiled her ten

(10) times. She did not tell her mother this story because she had been pre-warned not to do so by the appellant. She said her mother (PW2), discovered on her own that she had been defiled. BN (PW2) told the learned Senior Resident Magistrate that the complainant (PW 1) told her that she was defiled by the appellant. She said she managed to get that information from PW 1 when she threatened to beat her upon discovering she was unable to control the passing of urine hence wetting her pants. She said she discovered that her daughter (PW1) had wet her pants on 7/7/2004. She said she reported the incident to the police on 8/7/2004 because on 7/7/2004 she was feeling unwell. PW2 was then given a P3 form which form was later filled by the doctor showing that PW 1 had a raptured hymen indicating that the complainant had been defiled. On the basis of this information the appellant was arrested and arraigned before court.

4. The appellant gave an unsworn statement on his defence. He claimed that he was a boyfriend to the complainant's (PW 1's mother (PW2). He said that as a result of that relationship he managed to have P W1 learn for free at Savina Academy where he acted for a while as the school headmaster. He said he discontinued the arrangement when the school Proprietor discovered their secret deal and this made PW2 develop a grudge against him. He said things were made worst when PW2 discovered that he had relationship with another woman having severed his love relationship with her. The learned Senior Resident Magistrate rejected the defence raised by the appellant as a make up story and as an afterthought.

5. Having given a summary of the case before the trial court, let me now consider the merits of the appeal. The sum total of the nine (9) grounds of appeal is that the evidence tendered by the prosecution in support of the charge was uncorroborated, unreliable, incredible and contradictory. It is also argued that the trial magistrate failed to seriously consider the defence raised by the appellant.

6. To begin with, it has been alleged that the evidence tendered was not corroborated. It is the submission of Mr Opulu advocate for the appellant, that the only eye witness was the complainant who is a child of tender age which means that her evidence required corroboration under section 124 of the *Evidence Act*. It is the submission of Mr Mondah, learned State Counsel that the learned Senior Resident Magistrate properly received the evidence of the complainant pursuant to the Proviso to section 124 of the *Evidence Act*. I have considered the rivalling submissions and I have come to the conclusion that the proviso to section 124 of the *Evidence Act* is so explicit to the extent that the evidence of a child of tender years who is the alleged victim to not need corroboration, so long as it is recorded that the court was satisfied that the child was telling the truth. The recorded evidence shows that the learned Senior Resident Magistrate conducted a preliminary inquiry before receiving the evidence of the child and came to the conclusion that the child did not know the importance of giving evidence under Oath. On the basis of this preliminary inquiry the learned magistrate allowed the child to give unsworn testimony. I am satisfied the trial magistrate applied the correct principle in receiving the unsworn testimony. The proviso to section 124 of the *Evidence Act* is categorical that the court must state in the proceedings that it is satisfied that the child appreciated the necessity of telling the truth. This appears to be missing in the entire proceedings. This is a fatal mistake. In fact it is a requirement that before receiving such evidence the court must first record that it is satisfied that the child understands the importance of telling the truth and consequences of telling a lie. I agree with the submissions of Mr Opulu that the learned Senior Resident Magistrate did not comply fully with the proviso to section 124 of the *Evidence Act*. That was a fatal mistake in view of the fact that the child's evidence was not corroborated. It is her word against the word of the appellant.

7. It has also been argued that the evidence tendered were unreliable incredible and full of contradictions hence a conviction should not have been sustained. Mr Mondah was of the opposite view. I have reconsidered and reassessed the entire evidence and I have noted there existed some material

contradictions. It is the evidence of PW1 PM that she did not know the house of the appellant. She however at some point told the trial Magistrate that she went on her own ahead of the appellant and waited outside his house before the appellant came to open the door. PW 1 further said that she found some women selling some potatoes outside the appellant's house as she waited for the appellant. This piece of evidence contradicts the evidence of PW3, who claimed that the house has no neighbours hence there were no eye witnesses. There was a sharp contradiction between the evidence of PW1 and PW2 in relation as to who sent the complainant to take some shoes for repair. According to PW2, the complainant (PW 1) had been sent by her aunt to take a pair shoes for repair whereas it is the evidence of PW 1 that she was sent by PW2 to take a pair of shoes for repair. Why the contradiction in such an obvious case?

8. The evidence on record shows that the appellant was arrested on July 23, 2004 and taken to court on the same day where he plead not guilty to the charge. The P3 form that was produced in court is said to have been issued on July 8, 2004. It is said the alleged offence occurred on 7.7.2004. The complainant was sent for examination on September 23, 2004.The question which remains un answered is why did it take so long for the complainant to be taken to hospital? It appears investigations were going on while the appellant was already before court. The evidence contained in the P3 form produced by Dr Njoroge (PW 4) is respect of an offence allegedly committed on 7.7.2004. The particulars of the charge relate to an offence allegedly committed on July 8, 2004. There was no evidence laid to prove the offence of 8/7/2004. In view of the above mix up and contradictions I am convinced that there was no credible and consistent evidence to sustain a conviction. I agree with the submissions of Mr Opulu that the Prosecution's case was full of contradictions and discrepancies which renders it unsafe to sustain a conviction. This is one of those cases where there was no proper investigation. The investigation were carried in a casual manner thus making the case fall below the standard of proof.

9. It has been said that the learned Senior Resident Magistrate rejected the appellant's defence without good reasons. I have perused the record and it is clear that the trial magistrate considered the appellant's defence in one statement as follows: "I reject the defence story as an afterthought" It is quite clear that the Magistrate did not justify her rejection of the defence. It was incumbent upon the trial magistrate to state the reasons as to why she thought the defence story was an afterthought. The trial magistrate is not entitled to make a sweeping statement. She was bound by law to give reasons for her decision under section 169 of the *Criminal procedure Code* and on the basis of the evidence received. The appellant's defence was therefore improperly rejected.

10. In the end I am satisfied that the appeal must succeed. The appeal is allowed with the consequential order that the conviction is quashed and the sentence is set aside. The appellant is hereby set free forthwith unless lawfully held.