REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

(CORAM: R MWONGO, J)

CRIMINAL APPEAL NO. 30B 0F 2016

ANTONY MWANGI GITHAIGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Original Conviction and Sentence in Criminal Case No 632 of 2014 in the Senior Resident Magistrate's Court, Engineer, (Hon M K Mutegi – SRM)

JUDGMENT

1. The appellant has appealed against the judgment of Honourable M.K. Mutegi dated 30th June, 2016 issued at Engineer Law Courts. His amended grounds of appeal are as follows:

> *1. That the trial Magistrate erred in law and in fact by convicting the appellant without appreciating that the age of the victim was not proved as required by the law*
>
> *2. That the trial Magistrate erred in law and fact by convicting the appellant on medical evidence that was not proved in court beyond reasonable doubt.*
>
> *3. That the trial Magistrate erred in law and fact by failing to note that the appellant's fundamental rights were violated under article 49(f) of the constitution of Kenya.*
>
> *4. That the trial magistrate erred in law and fact by accepting the prosecution evidence that was not proved as required by the law.*

2. The appellant was charged with the offence of defilement contrary to **section 8(1)** as read with **section 8(3**) of the **Sexual Offences Act No. 3 of 2016**. Particulars of the offence were that on the 9th day of July 2015 at [particulars withheld] within Nyandarua County the accused intentionally caused his penis to penetrate the vagina of DWW aged 14 years. The appellant denied the charges. After a hearing in which 5 prosecution witnesses and the appellant and one other defence witness testified, he was found guilty of the offence, was convicted accordingly and sentenced to 20 years in prison.

3. I now deal with each of the grounds of appeal.

Grounds 1 and 2 – Age of the complainant

4. The appellant impugns the decision of the trial court on the ground that the age of the complainant was not proved. In her evidence as PW1, however, the complainant stated that she was 14years old. The investigating Officer Philip Gatheru (PW5) produced a baptismal card indicating that the complainant was born in the year 2000, hence was 14 years old. PW 4 Dr Maingi Muchiri produced a P3 Form which indicates the complainant's age to be 14.

5. The importance of confirming the age of the complainant in sexual offences cases was well outlined in the Ugandan case of **Francis Omuroni versus Uganda Court of Appeal Criminal Appeal No. 2 of 2000**, where it was held that:

> ***"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."***

6. In the case of **Musyoki Mwakavi v Republic [2014] eKLR** it was held that:

> ***"…apart from medical evidence, the age of the complainant may also be proved by birth certificate, the victim's parents or guardian and observation or common sense…".***

7. In the present case, the observation of the medical officer in the P3 form taken together with the complainant's baptismal certificate are sufficient evidence to show that the complainant was 14 years old. Accordingly, I am satisfied that the age of complainant was duly proved.

Ground 3 – Medical Evidence

8. The appellant complains that the complainant was first taken to North Kinangop hospital, from where the P3 and PRC were produced, the two medical officers who actually wrote the reports were not called to give evidence. Instead a doctor from Engineer District Hospital was called to give evidence.

9. He asserts that the medical evidence from the first test at North Kinangop Medical Hospital was not availed. In addition, that the PRC form indicated that there was "no struggle" and this did not justify a finding of penetration. Further that the accused ought to have been taken to hospital for testing and the failure to this was a breach of **section 36** of the **Sexual Offences Act.** That section provides that an appropriate sample may be taken from an accused person for testing including DNA testing in order to ascertain whether or not the accused person committed the offence.

10. I have checked the record and the judgment of the trial court. I note that the complainant went for examination on 15/7/2015 but had been to North Kinangop Hospital on 9/72015. At Engineer district Hospital she was examined on 10/7/2015.

11. I agree with the appellant that there are discrepancies in the oral testimony as to the date on which the complainant was examined. However, the reports are clear that the complainant was defiled, had a torn hymen, and that the absence of a struggle or of an ejaculate could not rule out defilement.

12. From the evidence availed, it was clear that no sperm were seen during medical examination in or at the vagina of the complainant. As such a medical test of the appellant would have been unhelpful as it would have yielded no additional evidence of any probative value.

13. However, I do not find that the discrepancy in dates, taken within the context of the evidence as a whole, is sufficient to create any doubt that the complainant was defiled, or that the appellant committed the offence.

Ground 4 – Violation of Accused's fundamental rights

14. Appellant states that he was arrested on Thursday 9th July 2015 and arraigned in court on Monday 13th July, 2015. That this is confirmed in the Charge Sheet, and discloses that his rights under **Article 49(f)** of the **Constitution** were violated. **Article 49 (1)** provides as follows:

> ***49. (1) An arrested person has the right:***
>
> ***(f) to be brought before a court as soon as reasonably possible, but not later than—***
>
> ***(i) twenty-four hours after being arrested; or***
>
> ***(ii) if the twenty-four hours ends outside ordinary court hours,***
>
> ***or on a day that is not an ordinary court day, the end of the next court day"***

15. I have perused the Charge Sheet. The date of arrest is stated as 9/7/2015. The date of apprehension report to court is stated as 13/7/2015. The proceedings also show that the Accused was first brought before a Magistrate on 13/7/2015. This was three days later than allowed by the Constitution except for reasonable explanation.

16. A similar complaint on violation of fundamental rights was raised in the case of **Joshua Mumo Kioko v Republic [2012] eKLR.** There, the court stated as follows concerning the complaint:

> ***"The appellant complains that his Constitutional rights were contravened. That he was held in custody for 8 days before being brought to court. Article 49 (1) (f) of the Constitution (2010) provides that an arrested person should be brought to court within 24 hours. Though there has been earlier jurisprudence developed by courts that violation of this right leads automatically to an acquittal that jurisprudence has now changed. The remedy for such violations if proved, is a claim for damages. The Constitution (2010) adequately provides for such remedies. On my part, I will not hold that the conviction herein cannot stand because of that violation, even assuming that there was such violation of the provisions of Article 49 (1) (f) of the Constitution."***

17. The same position was held in the case of **Ezekiel Oramat Sonkoyo v Republic [2012] eKLR** where the court was faced with a similar situation. The court said

> ***"Applying the above principle to the instant case, I hold the considered view that the breach complained of by the appellant at this stage cannot be undone, and accordingly the appellant can only be compensated for that breach by way of damages. The appellant's block of grounds of appeal based on the issue of breach must therefore fail."***

18. The courts take the approach that the rights of the accused person do not abate, but that he may sue for damages in the appropriate manner.

19. Finally, on this point, the case of **Julius Kamau Mbugua v Republic, Criminal Appeal No. 50 of 2008 [2010] eKLR** is apposite where the Court of Appeal held inter alia, that though an accused person had a right to trial without delay, it was not a right not to be tried after undue delay and that it is not designed to avoid trials on the merits. The court concluded by saying that:-

> ***"If it had been found that the extra judicial detention was unlawful and that it related to the trial, nevertheless we would still consider the acquittal or discharge as a disproportionate, and draconian remedy seeing that public security would be compromised. If by the time an accused person makes an application to the court, the right has already been breached, and the right can no longer be enjoyed, secured or enforced, as is invariably the case, then the only appropriate remedy under section 84(1) would be an order for compensation for such breach. The rationale for prescribing monetary compensation in section 72 (6) was that the person having already been unlawfully arrested or detained, such unlawful arrest or detention cannot be undone and hence the breach can only be vindicated by damages."***

20. Accordingly, the appellant's complaint is not a ground of appeal, and his redress is in a suit for damages.

Ground 5 – Additional witnesses

21. The appellant submits that the prosecution's case was not strong enough to warrant a conviction since the prosecution did not call crucial witnesses like the mother of the victim and the other two doctors who attended to the victim. In other words the appellant's complaint is that the prosecution did not call enough witnesses to prove the offence.

22. The question that arises is whether the persons not called as witnesses would have aided the just disposition of the case. **Section 143** of the **Evidence Act** provides:

> ***"No particular number of witnesses shall in the absence of any provision of the law to the contrary be required for proof of any fact."***

23. In my view, the witnesses availed proved the key elements of the crime with which the appellant was charged. Additional witnesses, though they might fill more evidential transcripts would have added little to the just determination of the case as none of them were in any event direct witnesses.

24. In **Julius Kalewa Mutunga v Republic - Criminal Appeal No. 31 of 2005,** the Court of Appela held as follows:

> ***" ...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive."***

25. In **George Kioji v R Nyeri Criminal Appeal No. 270 of 2012** (unreported) the court held that-

> ***"Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."***

26. There is no obligation on the prosecution to call on any particular number of witnesses. The prosecution, in addition to the victim, called other witnesses who corroborated the story and made it believable enough for the trial magistrate to find the appellant guilty and convict him. On this issue, therefore, I see no basis for impugning the trial court's determination.

Disposition

27. Taking into account all the foregoing and having carefully reviewed the evidence on record, I find that all the grounds of appeal fail. Accordingly, I find that on the basis of the available evidence, the learned magistrate correctly convicted the appellant.

28. Accordingly, the appeal is dismissed.

29. Orders accordingly.

Dated and Delivered at Naivasha this 2nd Day of May, 2019

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Mr. Koima for the State
2. Appellant in person
3. Court Clerk - Quinter Ogutu