REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 21 OF 2016

(From original conviction and sentence in Criminal Case No. 131 of 2015 of the Principal Magistrate's Court at Wang'uru.).

KENNEDY MAINA.................APPELLANT

VERSUS

REPUBLIC...................................ACCUSED

JUDGMENT

The appellant Kennedy Maina Wanja was charged with the offence of defilement contrary to Section 8(1)(3)of the Sexual Offences Act before the Principal Magistrate's Court at Karaba Cr. Case No. 131/2015. It was alleged that between 9th & 13/8/2015 at [particulars witheld] he caused his penis to penetrate the vagina of STW a child aged 15 years. The appellant denied the charge and after a full trial he was convicted and sentenced to imprisonment for twenty (20) years.

The appellant was dissatisfied with both the conviction and sentence and lodged this appeal which raised four grounds in his petition of Appeal dated 2/10/2017.

They are as follows:-

> ***1. That the learned Magistrate fell into error by failing to find that there was discrepancies on the time the alleged offence was committed and further the identification in question was marred by lots of contradictions.***
>
> ***2. That the trial Magistrate equally fell into error in failing to hold that the medical evidence casts doubt on the prosecution case and further there was delay in filing the medical examination report.***
>
> ***3. That the trial Magistrate erred in law and facts in failing to find that potential witnesses were not availed to tie the loose end of this.***
>
> ***4. That the learned Magistrate erred in law in failing to find that I was kept in custody contrary to Article 49 (1)(f)(i) of the Constitution.***
>
> ***5. That the learned Magistrate erred in law in failing to evaluate the defence case alongside that of the prosecution.***

He prays that the conviction and sentence be set aside and he be set at liberty.

There is however on record a Petition of Appeal filed and dated 13/5/2016 which is annexed to an application to file appeal out of time. On 18/8/2016 the appellant had filed an application to appeal out of time. The appellant had also filed an application dated 10/6/2016 which was filed in court on 20/6/16. He filed a further application dated 25/7/16 seeking orders that the application dated 10/6/16 be certified as urgent. None of these application was heard and determined. The appellant was sentenced on 28/4/2016 and he was given 14 days right of appeal. The petition of appeal was filed on 20/10/2017. No leave had been granted to file appeal out of time. ***Section 349 Criminal Procedure Code Cap 75*** provides:

> ***"An appeal shall be entered within fourteen days of the date of the order or sentence appealed against:***
>
> ***Provided that the court to which the appeal is made may for good cause admit an appeal after the period of fourteen days has elapsed, and shall so admit an appeal if it is satisfied that the failure to enter the appeal within that period has been caused by the inability of the appellant or his advocate to obtain a copy of the judgment or order appealed against, and a copy of the record, within a reasonable time of applying to the court therefor."***

The Section is clear that where an appeal is filed out of time, the appellant has to move the court to allow him to file his appeal out of time. Where this is not done the appeal is not properly before the court. This is because the court has to consider whether the appellant had good reasons for not filing the appeal in time. The appellant is supposed to show that he did not or could not obtain the Judgment or the order he wishes to appeal against within the time required for him to file the appeal. He must also proof that he could not obtain a copy of the record within a reasonable time. The court after considering the reasons given for the delay, if a good reason or cause is shown may exercise discretion and admit the appeal.

The application for leave to appeal out of time was not heard on merit. This may have been due to an oversight. The record shows that when the matter came up for that application parties stated it was for submissions. As a matter of fact the appellant had already filed his submissions. The State did not oppose and proceeded to file submissions in response to those of the appellant which were on appeal and not the application.

As it stands now the appeal was filed out of time and no leave to appeal out of time was granted. The issue is whether the court should proceed to strike out. In a persuasive decision in ***Misc Criminal Appeal No. 222/2013 H. C. Nakuru Miano & Another –v- Eliud Kariuki Ngige & Others***, it was stated –

> ***"None the less, the court should only strike out petitions in the clearest of cases. The delay was only 17 days and cannot be deemed inordinate. Despite the lack of an explanation it would be unjust to strike out the petition on the ground of the delay alone."***

The State did not address the issue that the appeal was filed out of time in their submissions. The court should not therefore strike out the appeal but exercise its discretion to hear the appeal and determine it on merits. ***Article 159(2)(a) of the Constitution*** mandates the court to do substantial justice other than determine matters on procedural technicalities. It provides:

"In exercising Judicial Authority, the Courts and tribunals shall be guided by the following principles –

- ***Justice shall be administered without undue regard to procedural technicalities;"***

As the matters stand, since the appeal has been heard and submissions filed and what is remaining is for me to give Judgment, I should proceed to do so. At this point in time failure to consider the application for leave to file appeal out of time is a technicality.

The Facts.

The complainant STW was a girl aged 15 years at the time she gave evidence on 12/11/15. On 9/8/15 she met the appellant as she came from the shops. He called her but she refused to go. On reaching home, she went back to where the appellant was. The appellant gave her a cake and Kshs 50/-. Her dad locked the gate and she feared going home. She went with the appellant to his house. The appellant told her he wanted to have sex with her. She refused but the appellant shut the door and stripped her then had sex with her.

The following day the appellant went away and locked her inside the house. He returned at about 3.00 Pm. The complainant spent the 2nd night in his house. The appellant had sex with her. The following day the appellant carried away her skirt and locked her inside the house. The appellant returned in the evening and the complainant insisted she wanted to go home. The appellant forced her to have sex again then returned her skirt. The appellant sent the complainant to the shop and while there a teacher sported her and reported to a village elder who went to the house and arrested the two.

The matter was reported to the police. The complainant was treated at Gategi Dispensary. Doctor Patrick Wachira who examined her found that the hymen was perforated and she had an infection on the urine. He filled a P3 form exhibit P3 and treatment notes exhibit 2. The complainant was 15 years old as per the birth certificate exhibit -1- which shows that she was born on 17/8/2001. The appellant was then charged.

In his defence the appellant denied having committed the said offence.

I have considered the evidence adduced before the trial Magistrate, the grounds of appeal and the submissions. I will consider the grounds of appeal.

1. Discrepancies and contradictions

The appellant alleges that there was discrepancy on the time of the alleged offence and identification was marred by contradictions.

In addition, PW 1 claimed she was given Kshs.50/= and cake by the appellant but then later stated it was milk and two ngumus.

Date of the offence;

PW 1 stated she met with the appellant on 09/08/2015 at 9 p.m. the charge sheet also indicates the offence took place on diverse dates between 09/08/2015 and 13/08/2015.

What PW 1 was given;

PW 1 stated the appellant gave her Kshs.50/= and a cake near the school gate. During cross examination, she stated that they reached the appellant's home at 10p.m and he bought two ngumus and milk.

Identification;

During cross examination she stated that the appellant gave her Kshs.50/= on 09/08/2015 and then she states she could not remember the month she met with him. PW 1 was categorically that the incident occurred on 09/08/2015 but what she could not remember was the first time she met with the appellant. Evidence is well corroborated that the complainant was rescued from the house of the appellant. The identity of the appellant was never in doubt or in dispute.

There is therefore no discrepancy or contradiction noted in the evidence tendered. This ground must therefore fail.

2. Medical evidence

According to the appellant, the medical evidence casts doubt on the prosecution case and there was also delay in filing the medical examination report. That no vaginal swab was done to validate the presence of spermatozoa. Further that PW 1 was taken to hospital five days after the commission of the alleged offence.

However, it is noted that PW 1 was kept inside the house from 09/08/2015 and 13/08/2015 when PW 2 together with others rescued.

The treatment notes shows that the appellant was treated at Kiandegwa Dispensary on 14/8/15. This was a day after they were arrested. The P3 form shows that the report was made to the police on 13/8/2015 at 22.05. The P3 form was filled on 15/8/18. The P3 form shows that laboratory examination was done as shown on Para -5 Part –c- of the P3 form. The allegations by the appellant are without basis. The medical evidence adduced by PW-5- Dr. Patrick Macharia corroborates the testimony of the complainant that she was defiled. The complainant testified that the appellant forced her to have sex. The perforated hymen is testimony that the complainant engaged in sexual activity. This has been proved by the medical evidence on record. The medical evidence is without doubts. This ground must fail.

3. Potential witnesses not called

The appellant claims that potential witnesses were not called to tie the loose end of the case. The father of PW 1 and the occupants who lived near the place the offence took place.

The Court of Appeal held in the case of **Erick Onyango Ondeng' v Republic [2014] eKLR** as follows;

> **In *BUKENYA & OTHERS VS UGANDA (supra)*, the former East Africa Court of Appeal held that the prosecution has a duty to call all the witnesses necessary to establish the truth even though their evidence may be inconsistent; that the court itself had the duty to call any person whose evidence appears essential to the just decision of the case;……**
>
> **While fully in agreement with the above statement, it should be remembered that the context in which it was made is that of a case in which the evidence called is barely adequate. In the present case, the proviso *to section 124 of the Evidence Act* and the medical evidence must be borne in mind as well *Section 143 of the Evidence Act (Cap 80)* which provides that, in the absence of any requirement by provision of law, no particular number of witnesses shall be required for the proof of any fact.**

The evidence tendered was sufficient to proof the fact. This ground must fail.

4. Kept in custody contrary to Article 49 (1)(f)

The appellant states that he was held for more than five days and no satisfactory explanation was given for the delay. He was arrested on 13/08/2015 and taken to court on 17/08/2015.

Article 49 (f) of the Constitution states;

An arrested person has the right— 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;*

13/08/2015 was on a Thursday and 17/08/2015 was on Monday therefore the delay was for only one day.

Patrick Kirimi M'bura v Republic [2015] eKLR

The Court held;

> **We have perused the trial court's record and note that the appellant never raised that issue before the trial court. Had he**

raised it, the police would have been called upon to explain the delay just in the event that the case fell under the exception given under Article 49 (i) and (ii) that is, if the 24 hours ended outside the ordinary court hours or on a day that is not a court day, then he would have been produced on the next day. The delay may have been caused by some good reason. The complaint is made rather late in the day because this court cannot call for that explanation. In any event, even if this court were to find that a violation was committed, it would not have any bearing on the innocence or guilt of the appellant as that can be vindicated in a separate petition in the High Court under Article 22 of the Constitution (enforcement of Bill of Rights).

The appellant did not raise any such complain in the trial court for the police to give an explanation for the delay. Be that as it may, the appellant was not arraigned in court within the schedule time and his remedy lies in award of damages in the form of monetary compensation from the appropriate authority.

Failure to take him to court within 24 hours is not a ground upon which the court can allow the appeal. The provisions serves as a check, to ensure that arrested persons are not kept in the police cells for too long. Where this right is violated, it entitles the appellant to damages as provided under ***Article 23 of the Constitution***. This must be pleaded and proved in appropriate suit to give the prosecution an opportunity to explain the delay. The criminal trial must therefore proceed independently and cannot be shipwrecked by the alleged violation of rights of the appellant. The ground must fail.

1. Appellant's defence not considered

The appellant alleges that his defence was not evaluated alongside f the evidence by the prosecution. Perusing through the judgment, the trial court duly considered the appellant's defence at page 5-7 whereby the court did not find merit in his argument that he only saw PW 1 for the first time at Karaba police station.

The trial court must have considered the entire defence to arrive at that finding.

Looking at the whole evidence adduced, I find the prosecution proved its case beyond all reasonable doubts. The entire evidence on record left no doubt, as the trial court found, that the appellant defiled PW 1 in the manner described. The evidence of PW 1 was corroborated by PW 5 the Doctor and other independent witnesses.

The trial court considered all the evidence presented benefit and having done so, came to a proper and inevitable conclusion. The defence of the appellant was a general denial which left the entire prosecution evidence infact. The prosecution discharged the burden to proof the charge against the appellant beyond any reasonable doubts. I find that the appeal is without merits and I dismiss it.

Dated at Kerugoya this 8th day of November 2018.

L. W. GITARI

JUDGE