REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 16 OF 2015

B K J ..... APPELLANT

VERSUS

REPUBLIC ……..…….…….. RESPONDENT

(From the original conviction and sentence in Criminal Case No.905 of 2014 of the Senior Resident Magistrate's Court at Githongo by C.A Mayamba– Senior Resident Magistrate)

JUDGMENT

The appellant, **B K J**, was Charged with an Offence of attempted defilement contrary to section 9 (1) (2) (sic) of the Sexual Offences Act No.3 of 2006. He was alternatively charged with an offence of indecent act with a child contrary to section ii (iii) of the Sexual Offences Act No.3 of 2006.

The particulars of the offence were that on 16th day of September 2014 at *[particulars withheld]* village, in Imenti Central District of Meru County intentionally attempted to cause his penis to penetrate the vagina of **S.M** a child aged 5 years. Alternatively, he unlawfully and intentionally touched the complainant's vagina.

The appellant was tried and was convicted in the substantive charge and ordered to be detained in prison at the pleasure of the president. He now appeals against both conviction and the order.

The appellant raised three grounds of appeal as follows:

1.That the proceedings were conducted in a language he did not understand.

2.That the learned trial magistrate failed to appreciate that he was detained in police custody for more than two days.

3.That the learned trial magistrate failed to appreciate that there were no independent witnesses before proceeding to convict him.

The state opposed the appeal and was represented by Mr. Musyoka, the learned counsel.

The facts of the case are briefly as follows:

The appellant took the complainant to his bed and attempted to defile her. He left her when she screamed.

On his part the appellant contended that he was falsely implicated.

This is a first appellate court as expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated Case of **OKENO VRS. REPUBLIC 1972 EA 32.**

Before I address the grounds raised by the appellant, I wish to comment on the way the charges were drafted. It is incorrect to cite a nonexistent section in the substantive charge he was accused of offending **section "...9(1) (2) "** while in the alternative charge he is accused of offending **section ii(iii)** Roman numbers. In the substantive charge ought to have been contrary to **section 9(2)...** and if the drafter wanted to include a definition section then it ought to have read **".. contrary to section 9(1) as read with section 9(2)..."** Since there was no prejudice to the appellant I will say no more. I however find that in the alternative charge there would have been a miscarriage of justice if he had been convicted of the same. Our sections are not numbered as indicated thereof. The trial court has a duty to ensure that charges are correctly drafted before reading the same to accused persons to avoid issues of correctness of the same arising when it is too late. In the instant case I find that no miscarriage of justice occurred.

The appellant contended that he did not follow the proceedings due to the language used. On 18/9/2014 when the plea was taken, the record indicates that the interpretation was done in Kimeru. Though the record does not show who did the actual interpretation a court clerk called Penina is shown to have been present. The appellant responded to the charge before a plea of guilty was entered. He subsequently changed the same. During the hearing of the case all the witnesses except the complainant testified in Kiswahili and the court clerk Penina was present throughout. When the appellant was placed on his defence he tendered a defence that indicate he was able to follow the proceedings. His claim on the issue of language is not tenable.

It is now settled law that where an accused alleges that his right has been breached the remedy lies in a civil court for damages and not in an acquittal. This was decided in the case of **Julius Kamau Mbugua v Republic [2010] eKLR** where the court of Appeal on the issue said:

> **"The alleged unlawful detention does not exonerate the appellant from the serious crime he is alleged to have committed. The breach could logically give rise to a civil remedy – money compensation as stipulated in Section 72 (6). That is the appropriate remedy which the appellant should have sought in a different forum."**

The contention by the appellant that he was detained in police custody more than the law requires can only be addressed in a civil court.

It is not conceivable that in every case there must be an eye witness. Sexual offences in particular are perpetrated in secrecy and the only duty the court has is to ensure that the evidence adduced is sufficient. In the instant case my perusal of the record show that the learned trial magistrate had adequate evidence at his disposal. The conviction was based on sufficient evidence on record.

After his conviction the appellant was ordered to be detained under section 167 (1) of the Criminal Procedure Code. . The section provides:

> **(1) If the accused, though not insane, cannot be made to understand the proceedings—**
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> > **(a) in cases tried by a subordinate court, the court shall proceed to hear the evidence, and, if at the close of the evidence for the prosecution, and, if the defence has been called upon, of any evidence for the defence, the court is of the opinion that the evidence which it has heard would not justify a conviction, it shall acquit and discharge the accused, but if the court is of the opinion that the evidence which it has heard would justify a conviction it shall order the accused to be detained during the President's pleasure; but every such order shall be subject to confirmation by the High Court;**
> >
> > **(b) in cases tried by the High Court, the Court shall try the case and at the close thereof**

shall either acquit the accused person or, if satisfied that the evidence would justify a conviction, shall order that the accused person be detained during the President's pleasure.

(2) A person ordered to be detained during the President's pleasure shall be liable to be detained in such place and under such conditions as the President may from time to time by order direct, and whilst so detained shall be deemed to be in lawful custody.

(3) The President may at any time of his own motion, or after receiving a report from any person or persons thereunto empowered by him, order that a person detained as provided in subsection (2) be discharged or otherwise dealt with, subject to such conditions as to the person remaining under supervision in any place or by any person, and such other conditions for ensuring the welfare of the detained person and the public, as the President thinks fit.

(4) When a person has been ordered to be detained during the President's pleasure under paragraph (a) or paragraph (b) of subsection (1), the confirming or presiding judge shall forward to the Minister a copy of the notes of evidence taken at the trial, with a report in writing signed by him containing any recommendation or observations on the case he may think fit to make.

There are two mandatory procedural requirements upon the court making an order under section 167 (1) of the Criminal Procedure Act.

1. Every such order shall be subject to confirmation by the High Court. My perusal of the trial court record shows that after the order was made, the same was not send to the High Court for confirmation.

2. The confirming or presiding judge shall forward to the minister a copy of the notes of evidence taken at the trial with a report in writing signed by him containing any recommendation or observations on the case he may think fit to make. Since the file was not send to the judge for the confirmation, obviously this is why this requirement was not met.

I will therefore quash the order made 10.12.2014.The appellant will be taken back to Githongo law courts for compliance. In the interest of justice, the Hon. magistrate will call for another psychiatric report before he can make an appropriate order.

I wish to make the following observations:

A sick person's place is at the hospital and not in prison. I find section 167 of the penal code discriminative to people with mental illness for prescribing their detention to be in prison instead of a health facility and for the detention to be indeterminate. This offends articles 25 and 29 (f) of the Constitution. Article 25 provide as follows:

25. Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—

(*a*) freedom from torture and cruel, inhuman or degrading treatment or punishment;

It is my opinion that keeping a sick person for an indeterminate period in a prison is cruel, inhuman and degrading treatment.

Article 29 (f) of the constitution provide as follows:

29. Every person has the right to freedom and security of the

person, which includes the right not to be—

.....

.....

(*f*) treated or punished in a cruel, inhuman or degrading manner.

The order envisaged under section 167 (1) of the Criminal Procedure Code is a punishment. Any punishment that is cannot be determined from the onset is cruel, inhuman and degrading.

I therefore make a finding that this section is unconstitutional to the extent it offends the said articles of the constitution.

It is now the duty of our legislature to act with haste and bring this section in harmony with the constitution.

DATED at Meru 10th day of May 2016

KIARIE WAWERU KIARIE

JUDGE