



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

MISC. CRIMINAL APPL. NO. 20 OF 2010

PETER BAARIO..... APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to section 8(2) of the Sexual Offences Act No. 3 of 2006 the particulars of which were that on the 15th day of March 2009 at Timau Town in Timau Division of Meru Central District within Eastern Province penetrated C.K.K. a child of eight (8) years.
2. He pleaded guilty to the charges but when the facts were read it was found that the appellant was not mentally fit to stand trial and was eventually admitted to Mathare hospital for treatment.
3. Upon completion of the said treatment the appellant pleaded not guilty to the charges was tried convicted and sentenced to death.
4. Being aggrieved by the said conviction and sentence he filed this appeal and in his home grown grounds of appeal raised the ground that the trial magistrate did not consider that there was a domestic dispute between them. That his defence and mitigation were never considered and his rights of justice violated.
5. When the appeal came up for hearing Miss Kitoto appeared for the state and opposed the same while the appellant who was unrepresented filed an amended petition of grounds and written submissions which he relied upon.

AMENDED GROUNDS AND SUBMISSION

6. In his amended petition of appeal the appellant raised the following issues:

1. ***That the trial court erred in law and in fact by failing to hold that he was unfit to undergo trial.***
2. ***His constitutional rights were violated.***
3. ***Proceedings were never interpreted to him and was convicted without his medical report.***

1. It was submitted by the appellant that he underwent trial while he was mentally incapacitate and that no record was tendered from Mathare hospital to indicate that he was fit to stand trial. It was further submitted that his constitutional rights were violated in that he was arrested on 15th day of March 2009 and arraigned in court on 19th day of March 2009 contrary to the then section 72(3) of the Constitution and no explanations given by the prosecution for the delay.
2. It was submitted further that he was not medically examined neither was he provided with Kimeru Interpreter and therefore he was prejudiced.

3. Miss Kitoto for the state in opposing the appeal submitted that there was delay of three (3) days but that the same was not inordinate and the fact that he has the remedy to seek for compensation should the court rule in his favour. She further submitted that it was not necessary to examine the appellant medically to confirm the offence of defilement and that the evidence tendered against the appellant was very strong.
4. On the issue of interpretation it was submitted that from the record the appellant was able to cross examine all the witnesses.

ISSUES

5. The appeal raises a very fundamental issue as regards trial of persons who are found to be mentally unsound as to the time of taking plea and referred for treatment.
6. Section 162(1) of the Criminal Procedure Code puts an obligation on the trial court to inquire on to the said unsoundness of an accused person in the following terms:

“When in the course of a trial or committal proceeding the court has means to believe that the accused is of unsound mind and consequently incapable of making his defence, it shall inquire the fact of the unsoundness.”

7. In the appeal before me it is clear from the record that the court ordered the appellant to be committed to Mathare mental hospital on 3rd April 2009 and that on 7th August 2009 when the appellant appeared before court the prosecution stated as follows:

Prosecution: *“He is said to be fit to plead”* and the court records shows that the charge was read to the appellant who replied in Kiswahili – not guilty.

8. There is no record as stated by the appellant in his submissions to confirm that a report was tendered from Mathare Hospital to confirm his mental status neither is there any record to show that the trial magistrate inquired into his unsoundness as per the provisions of section 162(1) CPC stated herein with the only evidence on record being a letter from the AG office but not supported by any medical record.
9. I therefore agree with the appellant that there is a possibility that at the time of the trial the same was still mentally incapacitated. The issue therefore for determination is whether the said omission vitiated the trial and subsequent conviction.
10. Section 12 of the Penal code provides that ***“a person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing or of knowing that he ought not to do the act or make the omission but a person may be criminally responsible for an act or omission although his mind is affected by disease if such a disease does not in fact produce upon his mind one or other of the effect above mentioned in reference to that act or omission”***
11. Taking into account the fact that the appellant was not represented at his trial the question which the court should have answered is:- If the appellant was alleged to have committed the offence on 15th March 2009 and was on 19th March 2009 found not to be fit to take a plea for which the court had this to say:

Court: ***“From the talk of accused he could be having mental “issues” problem”***

and which was subsequently confirmed by Dr. S. Owino in his report dated 31st May 2009 in the following terms:

OPINION: ***Peter most likely suffers a chronic mental illness and is unfit to plead. He needs treatment”***

then what was the mental status at the time of the offence.

12. I have looked at the appellant defence before the trial court and in the absence of any further medical report to confirm the status of the mind of the appellant and noting that he was unrepresented I find that his trial was irregular and the subsequent conviction and sentence a nullity.
13. The appellant has also raised the issue of violation of his constitutional right to be taken to court within 24 hours as then provided for under section 72(3)(b) of the then Constitution. It should be noted that the section 72(b) spelt out the consequences of unlawful detention and as submitted by Miss Kitoto I find that the appropriate remedy would be for the appellant to seek compensation and not to render the trial a nullity.
14. I further agree with Miss Kitoto that taking into account the nature of the offence a delay of three days was not inordinate since there was need to secure medical report on the complainant which was done on 17th March 2009. I therefore find no merit on that ground of appeal.
15. I would therefore allow the appeal herein set aside the conviction and quash the sentence herein and order that the appellant be set free forthwith unless otherwise lawfully held.

Delivered, dated and signed this 5th day of February 2014.

J. WAKIAGA

JUDGE

5/2/2014

Before Hon. Justice J. Wakiaga - Judge

Court clerk - Wanjohi

Mr. Cheboi for the State

The appellant in person.

Court: The judgment read in open court in the presence of the above named.

J. WAKIAGA

JUDGE

5/2/2014