REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 89 OF 2009

M.W….....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being An Appeal From The Original Conviction And Sentence Contained In The Decision Of The Hon. B. Mong'are (Senior Resident Magistrate) Delivered On 3rd June, 2009 In Eldoret Chief Magistrate's Criminal Case No. 2041 Of 2009)

JUDGMENT

In Count I, the Appellant M. W was charged with incest by male contrary to Section 20 (1) of the Sexual Offences Act No. 3 of 2006.

Particulars of the charge were that on the 29th day of March, 2009 in Lugari District within Western Province unlawfully and intentionally did an act which caused penetration with a female person in that he caused penetration of his genital organ (particulars withheld) into the genital organ (particulars withheld) of C. M a girl child of the age of ten (10) years who is to his knowledge was his daughter.

In the alternative to Count I he was charged with indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006.

Particulars of the charge are that on the 29th day of March, 2009 in Lugari District within Western Province unlawfully had indecent act with C. M a girl aged ten (10) years by touching her private parts namely vagina.

In Count II he was charged with deliberate transmission of HIV (Human Immunodeficiency Virus) contrary to Section 26 (1) of the Sexual Offences Act No. 3 of 2006

Particulars of the same were that on the 29th day of March, 2009 in Lugari District within Western Province having actual knowledge that he was infected with Human Immunodeficiency Virus (HIV) knowingly and willfully caused penetration of his genital organ (particulars withheld) into the genital organ (particulars withheld) of C. M a girl aged ten (10) years an act which was likely to lead the said C. M to be infected with Human Immunodeficiency Virus (HIV).

The trial court found the Appellant guilty in Counts 1 and II and was sentenced to life imprisonment and 30 years imprisonment respectively. The sentences were ordered to run concurrently.

The Appellant was dissatisfied with the judgment of the trial court and has filed this appeal citing the following grounds;

1. That his fundamental constitutional rights were infringed when he was detained in custody for more than the time stipulated by law.

2. That the trial Magistrate erred in convicting him based on an erroneous medical report.

3. That the trial Magistrate erred by convicting him based on contradicting and inconsistent prosecution evidence.

4. That the trial Magistrate erred when he failed to consider that his case was not proved beyond reasonable doubt.

5. The trial Magistrate erred in failing to note that some of the key witnesses were not called to testify.

6. The trial Magistrate erred by convicting him on inconclusive testimony to link him with the said offence.

7. The trial Magistrate violated the Criminal Procedural Code by allowing the court prosecutor to amend the charge sheet without referring to the appropriate section under which the amendment was made.

This being a first appellate court, its duty is to re-evaluate the evidence adduced before the trial court and come up with its own finding but bear in mind that it has neither seen nor heard the witnesses.

The appeal was canvassed on 30th May, 2013. The Appellant informed court that he intended to rely on his written submissions which I noted were filed on the same day the appeal was canvassed. Mr. Mulati, the State Counsel made oral submissions in response thereof.

With regard to ground of appeal No. 1, the Appellant submitted that the whole trial was a nullity as he was detained in custody for more than 24 hours before being arraigned in court which detention violated his constitutional right under Section 72 (3) (b) of the Old Constitution.

According to the Appellant, he was arrested on 31st March, 2009 and brought to court on 3rd April, 2009 and was therefore detained at Turbo Police Station for four days.

Section 72 (3) (b) of the Old Constitution provided that:-

"3. A person who is arrested or detained

(b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence,

and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within twenty-four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with.

This law presupposed that the duty of proving that an accused person was brought to court within

a reasonable time lay with the person who alleged that the above provision of the law was complied with. Ultimately this was the duty of the arresting or investigating officer or the prosecution on their behalf. The accused is therefore bestowed with the onus of bringing to the attention of the court of any alleged violation of his constitutional rights in the event that the police did not offer the explanation in the first instance.

Throughout the trial the Appellant did not bring it to the attention of the court that he had been detained in police cells for four days. His complaint has only been raised in this appeal. So then, would his detention in police custody for more than twenty four hours render the trial a nullity?

In the case of **DOMINIC MUTIE MWALIMU –VS- REPUBLIC (2008) e KLR** S.E.O Bosire, E. M. Githinji & J. A. Aluoch, J.J.A held as follows:-

"The section further provides that where such a person is not taken to court within either the twenty-four hours for non-capital offence or fourteen days for capital offence as stipulated by law, then the burden of proving that such a person has been brought to court as soon as is reasonably practicable rests on the person who alleges that the Constitution has been complied with. Thus,where an accused person charged with a non-capital offence brought before the court after twenty-four hours or after fourteen days where he is charged with a capital offence complains that the provisions of the Constitution has not been complied with, the prosecution can still prove that he was brought to court as soon as is reasonably practicable notwithstanding, that he was not brought to court within the time stipulated by the Constitution. In our view, the mere fact that an accused person is brought to court either after the twenty-four hours or the fourteen days, as the case may be, stipulated in the Constitution does not ipso facto prove a breach of the Constitution. The wording of section 72 (3) above is in our view clear that each case has to be considered on the basis of its peculiar facts and circumstances. In deciding whether there has been a breach of the above provision the Court must act on evidence. Additionally, a careful reading of section 84 (1) of the Constitution clearly suggests that there has to be an allegation of breach before the Court can be called upon to make a determination of the issue which allegation has to be raised within the earliest opportunity".

Again in **REPUBLIC -VS- DAVID GEOFFREY GITONGA HIGH COURT CRIMINAL CASE NO. 79/2006 (MERU),** a dissenting view of Anyara Emukule, J. cited in **JULIUS KAMAU MBUGUA -VS- REPUBLIC (2010) e KLR,** the learned Judge said:

"I am aware that contrary opinions have been expressed by others in this court. I do not share those views. I hold the considered view that such trial is not a nullity at all. These are my reasons. Firstly, the principle of nullity presupposes that the process of trial is void either because it is against public policy, law, order, and indeed, nullity is non-curable. Secondly, for a trial to be void in law it must be shown either that the offence for which the accused is being tried is non-existent, or that the authority or court seized of the matter has no authority to do so. It is public policy of all civilized States that offenders be subjected to due process in respect of defined offences, and by duly competent courts or tribunal.

A trial will be a nullity where the offence is non-existent or there is lack of jurisdiction. To say otherwise would be against both public policy and the law. The court will not act against the law nor will it go against public policy. A rapacious rapist and a serial killer will not be allowed to go scot-free because either deliberately or inadvertently, the prosecution authority has not deemed it fit to have him brought before a court within 24 hours or as case may be within 14 days."

The Court of Appeal in **JULIUS KAMAU MBUGUA -VS- REPUBLIC (Supra)** concurred with Justice A. Emukule in the following words:-

"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 done and hence the breach can only be vindicated by damages. Again, we respectively agree with Emukule J. that breach of Section 72 (3) (b) entitles the aggrieved person to monetary compensation only."

I am of a similar view that the fact that an accused person was detained in police custody for a period exceeding twenty four hours does not automatically render a trial a nullity. As the Appellant did not raise the fact of his prolonged detention by police before the trial and no explanation therefore not having been given, I overrule the Appellant on ground of Appeal No. 1. My view is that he is at liberty to pursue compensation for damages against the person he alleges detained him.

Under ground of appeal No. 2 the Appellant submitted that the medical reports produced in court were signed by any medical officer and were therefore not admissible in court.

The medical reports produced before the trial court comprised a P3 form produced as P. Exhibit 1 and the treatment chits produced as P. Exhibits 2 (a) and (b) respectively. The P3 form was filled and produced by PW5, Jane Lamakoko, a Clinical Officer at Turbo Health Centre. A look at it shows that she signed it on 2nd April, 2009 and besides the official stamp are her signature and name. Further, the two medical treatment chits bear the official stamp of Turbo Health Centre. The Appellant did not question the authenticity of the hospital stamp at the trial. M, PW2, 3 and 5 confirmed that the complainant had been treated at Turbo Health Centre. My view is that the medical reports produced by the prosecution were authentic and the second ground of appeal must fail.

I will consider grounds of appeal numbers 3, 4 and 6 together as they relate to the weight of evidence tendered by the prosecution before the trial. To this extent this court shall determine whether the prosecution proved its case beyond reasonable doubt based on consistency and strength of the evidence.

PW1, the complainant testified that the Appellant who is her father would take her to his bedroom and defile her when her step mother is away. She said that this had happened severally. That she disclosed her ordeal to a neighbour who noticed her walking in funny manner and to teacher S who took her to hospital and later to Milimani Police Station.

PW2, S. M was PW1's teacher. She testified that PW1's neighbour confided in her that the complainant (PW1) had problems at home. That having noted that she was walking in a funny way, approached her in a friendly manner and that is when she confided in her that her father had been defiling her since the year 2007.

PW2 stated that she then took PW1 to hospital and to Police Station where she recorded her statement.

PW3 Police Constable Sheilla Kiptum of Turbo Police Station testified that she received a complaint from PW2 that the Appellant had been defiling PW1. That upon investigations it was found that the Appellant was H.I.V positive and had been attending Ampath Clinic for treatment of the disease.

PW5 Jane Lamoko, who should have been named as PW4 is the Clinical Officer who examined both PW1 and the Appellant. She also produced the complainant's P3 form. Her testimony was that, upon examination, PW1's genitalia had tears on both walls. She noted she had white smelly discharge. Laboratory tests revealed few white cells and few epithelial cells. She concluded that an offence of incest had been committed.

She further testified that it was confirmed that the Appellant was HIV positive and had been attending the Health Centre's Ampath Clinic in this regard.

PW6 (who should have been named as PW5), A. W testified that she had lived with the Appellant

as husband and wife for a period of six months. She said that she did not know that the Appellant had been defiling PW1. That she learnt that the Appellant had been defiling PW1 from a teacher and the police.

The Appellant gave an unsworn statement of defence in which he stated that he had lived with PW1 for a period of ten years but denied having defiled the minor.

However, all the prosecution's evidence crystallized together was consistent and not contradictory. PW1 having lived with her father (Appellant) for such a long period would not have had a reason to falsely implicate him. It is on record how traumatized she was as she began to account the beastly act her father meted on her.

It is factual that PW1 was the only eye witness to her case. But her testimony was candid leaving no doubts that the court believed in her. The Appellant took advantage of the frequent absence of his second wife (PW5) to defile his daughter. The trial court noted PW1 was brilliant enough to tell the truth and respectively found her evidence credible in the following words:-

"The minor was very clear on what happened. There was nobody at home. Accused person's second wife was away. I find the accused person had opportunity to defile the minor. The girl is brilliant. I am satisfied that she is truthful. Her testimony is convincing. Accused person's defence is a mere denial ...."

Moreover the proviso to Section 124 of the Evidence Act which reads thus;

"Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

In this regard, it was proper of the trial Magistrate to solely rely on testimony of PW1 which she believed in. The evidence of PW2, 3, 4 and 5 further corroboratesd that of PW1. It is therefore doubtless the Appellant defiled PW1 whom he knew was her daughter. He also knew that he was H.I.V positive and without the interest of his own daughter blantly had sexual intercourse with her notwithstanding the possible attendant results. Accordingly, grounds of appeal numbers 3, 4 and 6 must fail.

In light of the foregoing, I also overrule ground of appeal number 5. The prosecution is not restricted to call a particular number of witnesses in its case. Of paramount importance is that the witnesses it calls are sufficient to prove its case beyond all doubts. That is why under proviso to Section 124 of the Evidence Act, in a case of sexual assault, the evidence of the complainant can stand on its own. I have already observed that the prosecution called sufficient number of witnesses who adduced evidence that was concrete against the Appellant. No further decorations with superfluity of witnesses was required. After all, the Appellant's defence and his cross-examination of the prosecution witnesses did not in any way rebut the latter's strong evidence.

Finally, the Appellant submitted that the prosecution did not cite the specific provision of the law under which the charge sheet was amended.

I have noted that the amendment of the charge sheet was done on 29th May, 2009. The initial charge sheet was filed in court on 3rd April, 2009 in which the main charge to Count I was defilement of a girl contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act No. 3 of 2006.

The amendment replaced this charge with one of incest by male contrary to Section 20 (1) of the same Act.

Under Section 214 of the Criminal Procedure Code, the prosecution can amend the charge sheet at any stage of the trial before the close of its case. It provides as follows:-

"214. (1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:

Provided that -

(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;

(ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination. (2) Variance between the charge and he evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.

(3) Where an alteration of a charge is made under subsection (1) and there is a variance between the charge and he evidence as described in subsection (2), the court shall, if it is of the opinion that the accused has been thereby misled or deceived, adjourn the trial for such period as may be reasonably necessary. "

Record of proceedings shows that on 29th May, 2009 when the prosecution amended the Charge Sheet, the court called upon the Appellant to plead afresh to the amended charges in compliance with Section 214 (i) above.

At the point he pleaded to the fresh charges, he had the right to object to the amendment or request for a recall of any witness who may have testified. I accordingly rule that the trial court did not violate any provisions of the law at the time the charge sheet was amended.

However, it would have been prudent of the trial court to ask the Appellant whether or not he objected to the amendment. This did not however vitiate the process of a fair trial because the substituted charge gave rise to an offence known in law. The amendment only properly defined the offence in relation to the offender and the victim.

Under the ground of appeal number seven, though unrelated, the Appellant has submitted that the trial Magistrate did not make a ruling on whether he had a case to answer after close of the prosecution's case as envisaged by Section 211 of the Criminal Procedure Code.

This assertion is far from the truth. After the close of the prosecution's case, the learned Magistrate ruled as follows:-

"I have carefully considered the evidence on record. I am satisfied that prosecution has made out a prima facie case sufficient to warrant accused person to be put on his defence. Accused has a case to answer."

The trial Magistrate further noted:-

"Section 211 Criminal Procedure Code complied with."

The appellant in response said;

"**I will give unsworn statement. I have no witness."**

It is important to point out to the Appellant that a ruling on whether an accused has a case to answer or not is made after close of the prosecution's case pursuant to Section 210 of the Criminal Procedure Code as opposed to Section 211 thereof.

Section 211 of the Criminal Procedure Code outlines the various ways by which an accused can tender his defence. It provides:-

"211 (1) At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused, and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence,and the court shall then hear the accused and his witnesses and other evidence (if any).

(2) If the accused person states that he has witnesses to call but that they are not present in court, and the court is satisfied that the absence of those witnesses is not due to any fault or neglect of the accused person, and that there is a likelihood that they could, if present, give material evidence on behalf of the accused person, the court may adjourn the trial and issue process, or take other steps, to compel the attendance of the witness.

And as rightly pointed out herein above, the trial Magistrate fully complied with it in the terms the Appellant properly understood, that enabled him to properly respond as to how he intended to proceed with his defence.

I do accordingly find that neither Section 210 nor 211 of the Criminal Procedure Code were violated by the trial court.

In the premises, I find that the prosecution proved its case beyond all reasonable doubts and the appeal is hereby dismissed in its entirety. The Appellant shall continue to serve the same sentences unless he is otherwise lawfully set free.

DATED and **DELIVERED** at **ELDORET** this 1st day of October, 2013.

G. W. NGENYE - MACHARIA

JUDGE

In the presence of:

Appellant in person

Mr. Mulati for State