



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI Criminal Appeal 6 of 2009

PATRICK WAMUNYU WANJIRU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence of L. Mbugua, Ag Principal Magistrate in the Senior Resident Magistrate's Criminal Case No.417 of 2007 dated 19th December 2008 at Karatina)

JUDGMENT

PATRICK WAMUNYU WANJIRU, the appellant herein, was tried on a charge of defilement contrary to Section 8 (1) of the Sexual Offences Act No. 2 of 2006 before the Senior Resident Magistrate's Court Karatina vide S.R.M.C.Cr. Case No. [...]. In the end, the Appellant was convicted and sentenced to ten (10) years imprisonment on the alternative charge of indecent assault. He is now before this Court seeking to upset the decision on appeal.

The Appellant put forward the following grounds in his Petition of Appeal referred to as 'amended grounds':

1. *The learned magistrate erred in law and in fact, with regard to the rights of the accused under section 72 (3) (b) and section 71 of the Constitution Laws of Kenya, in that prosecution delayed the appellant's case be heard "as soon as is practicable" for a fair trial, when they failed to bring him before the court "within 24 hours of his arrest, but on 17/MAY/2007; having been arrested on 11/MAY/2007 a delay of 3 days.*
2. *The learned magistrate erred in law and in the facts with regard to punishment ought to have been imposed to a child, who is found guilty by the court, having been charged under the sexual offences or any other charge and the court satisfied itself that when committing the said offence, the suspect was a juvenile as court find "As per the medical report to this court dated 19/12/08, it states that accused is 18 years old." Pg 13 lines 22-23; his sentence is to be founded under the child act 8 of 2006 that doesn't provide, the convict be imprisoned, or be sentenced to death or to life sentence but either to board school, probations etc.*

3. *The learned magistrate erred in law and in the facts with regard to issues of all reasonable doubts that are ought to have been resolved to the appellant, and rejected the appellant's defence.*

When the appeal came up for hearing, the Appellant, with leave of court, filed written submissions. Miss Ngalyuka, learned State Counsel, vehemently opposed the appeal. Let me first state in brief, the case that was before the trial court before considering the merits or otherwise of the appeal. The Prosecution's case was supported by the evidence of seven witnesses. The Complainant, C. W.W (P. W. 1), a girl aged 9 years at the time of trial, told the trial court that on 3rd May 2007 at about 4.00 p.m. the Appellant arrived at their home with a letter to be given to J.M.M (P.W. 5), an uncle to P. W. 1. The Complainant said the Appellant took her to the nearby cowshed where he removed his trouser half, laid on top of her and used a tooth pick to prick her genitalia. It is said the Appellant left after warning P. W. 1 not tell anyone of what had happened lest he would kill her. The Complainant later informed D.W.M (P. W. 3), her aunt, of what had happened to her on 9th May 2007. P. W. 3 said that on 9th May 2007, P. W. 1 came home early from school. She appeared unwell. The following day, P. W. 3 accompanied P. W. 1 to school where she met the school head, T W (P. W. 7). The duo (that is, P. W. 3 and P. W. 7) interrogated P. W. 1 and that is when the Complainant revealed that the Appellant had defiled her. P. W. 3 took P. W. 1 to Kiamachibi Police Station where she reported the incident. She was issued with a P3 form which was filled and produced in evidence as an exhibit. Dr. Kuresh (P. W. 2) indicated in the P3 form that the Complainant's hymen was intact. She indicated that there was no penile penetration though there was an allegation that a tooth pick had been inserted in the Complainant's genitalia.

The Appellant was placed on his defence. He said he was arrested at home but he did not know why he was arrested.

Having given in brief, the case that was before the trial court, I now wish to consider the appeal. The first ground raised on appeal is that the Appellant's constitutional rights under *Section 72 (3) (b)* of the Constitution were breached. The Appellant said he was arrested on 11th May 2007 and taken to court on 17th May 2007, yet he was required to be taken to court within 24 hours from the time of arrest. Miss Ngalyuka, learned State Counsel, filed the Replying Affidavit of P. C. John Mwangi, Investigating Officer to explain the cause of the delay. It is admitted that the Appellant was held in Police custody from 11th May 2007 until 17th May 2007 when he was arraigned before court. Basically it is said that the Appellant was arrested on 11th May 2007 which was a Friday hence he had to spend the weekend in Police custody. On 14th and 15th, the Appellant was taken for medical examination. He was taken to court on 16th May 2007 but plea was deferred to 17th May 2007. I have looked at the calendar for the year 2007 and I am convinced by the facts deponed in the affidavit of P. C. John Mwangi. I find the delay to take the accused (Appellant) to court to have been properly explained. In the case of EUNICE KAMAU JABU =VS= REPUBLIC, CRIMINAL

APPEAL NO. 327 OF 2008 (unreported) at page 7, the Court of Appeal stated as follows:

“What we are saying is that in order to rely on the provisions of Section 72 (3) to declare that accused’s constitutional rights have been violated, the facts must establish delay beyond any reasonable doubt. Borderline cases will not do. Courts must take judicial notice of the need for the Police stations to prepare the case for presentation to court; Things such as taking witness statements, opening files for the suspects and preparing a summary of facts just in case a suspect decides to plead and does plead guilty in court are matter that cannot be ignored. All these take time and so if one is arrested close to the close of a working day e. g. at 4.00 p.m or 6.00 p.m., it cannot be practical to carry out all these procedural requirements and produce the suspect in the court for plea the following day at 9.00 a.m. in cases such as this where time limit is 24 hours.”

I will apply the above explanation to this case. I find the delay not to be inordinate hence I will countenance the same. Consequently, the first ground is dismissed.

The second ground argued on appeal is that there was no credible evidence to sustain a conviction. It is argued that the Complainant took long to report the incident and that the evidence presented did not establish the offence. In a nutshell the Appellant is saying that prosecution did not establish its case beyond reasonable doubt. Miss Ngalyuka was of the view that the evidence of P. W. 1 and P. W. 2 proved the offence beyond reasonable doubt. I have carefully re-evaluated the evidence tendered before the trial court. There is no doubt that the Complainant was a child aged 9 years at the time of the trial. Before receiving the evidence of such a child, the court must conduct a *voir dire* examination of the child. In such a case the court must be satisfied, first that the child understands the meaning of an oath. Secondly, if not, then whether or not she is possessed of sufficient intelligence to be allowed to testify either on oath or otherwise. It is the duty of the court after observing the child to decide whether the child understands the meaning of an oath in which case he may be sworn before testifying, but if not, whether she possesses reasonable intelligence to be allowed to testify. In this case, the learned Senior Resident Magistrate, after conducting the *voir dire* examination on P. W. 1, stated that she was satisfied that though the child is a minor she is capable of understanding the motion of the trial. It is obvious that the learned Senior Resident Magistrate did not appreciate the requirements of *Section 19 (1)* of the Oaths and Statutory Declarations Act. In JOSEPH OPONDO =VS= REPUBLIC CRIMINAL APPEAL NO. 91 OF 1999 (unreported), the Court of Appeal outlined the stages to be followed in determining whether a child of tender years may give sworn evidence as follows:

“There are two stages which must be followed and must appear on the record of the trial court. First, the examination must endeavour to ascertain whether the witness understands the meaning, nature and purpose of an oath. The question or questions by the court must be directed to that. If the court, from the answers it receives from the witness is satisfied that the witness understands the meaning, nature and purpose of an oath, the witness must then be allowed to give sworn evidence. Stage two of the matter does not then come into play.

Where, however, the witness does not understand the meaning, nature and purpose of an oath, stage two of the examination then follows. The witness is examined by the court to ascertain

whether the witness is possessed of sufficient intelligence to justify reception of his or her evidence though not upon oath. This examination must, equally, appear on record. Simple elementary questions would normally be asked like the date, the day, the school the witness is attending and other matters. If the court is satisfied from the answers to such questions that the witness is possessed of sufficient intelligence, the court will allow the witness to give unsworn evidence.”

In the end I find that the evidence of the Complainant (P. W. 1) was not properly received. Even assuming that the same was properly received, the same must be corroborated by credible evidence. In this case, the evidence of Dr. Kuresh (P. W. 2) comes into play. The Complainant told the trial court that the Appellant held her by the arm, took her to the cow shed area where she alleged, that the Appellant removed his trouser and underwear half way, laid on her and then put a tooth pick in her genitalia. Dr. Kuresh (P. W. 2) examined P. W. 1. She found her hymen intact. P. W. 2 said that though P. W. 1 had alleged that a tooth pick had been inserted into her genitalia, she found no penile penetration. It is obvious that the evidence of P. W. 2 did not corroborate the evidence of P. W. 1. The learned trial Senior Resident Magistrate was of the view that there is no evidence to show that the Complainant could have set out to implicate the accused or that she was mistaken as to who her assailant was. That is a correct proposition but unfortunately such an issue did not arise. The question is whether or not the evidence of P. W. 1 was credible. Secondly whether the same was properly corroborated. It is not permissible for a court of first instance to speculate or to insert a finding unless it is supported by evidence or unless it is a necessary inference from the primary facts. I find that the prosecution did not prove its case beyond reasonable doubt.

Miss Ngalyuka pointed out that the sentence slapped against the Appellant was not in compliance with the provisions of the Children’s Act. She urged this Court to correct the anomaly. I have noted that the medical report presented to the trial magistrate indicates that the Appellant was aged 18 years. The definition of a child is given under *Section 2* of the Children’s Act 2001 to be any human being under the age of eighteen years. It would appear Miss Ngalyuka was of the view that the Appellant was below the age of 18 years. That submission, with great respect, is not supported by the medical evidence of age assessment. I cannot therefore fault the learned Senior Resident Magistrate. The sentencing of Appellant did not fall within the provisions of *Section 191* of the Children’s Act, 2001.

In the end the appeal is allowed. The conviction is quashed and the sentence set aside. The Appellant is hereby set free forthwith unless lawfully held.

Dated and delivered at Nyeri this 2nd day of March 2010.

J. K. SERGON
JUDGE

