IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, AZANGALALA & KANTAI, JJ. A)

CRIMINAL APPEAL NO. 16 OF 2014

BETWEEN

PAUL ODHIAMBO MBOLA.....APPELLANT

AND

REPUBLIC .....RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Kisumu (H. K Chemitei, J) dated

17th March, 2011

in

KISUMU HCCRA NO. 175 OF 2010)

****

JUDGMENT OF THE COURT

The jurisdiction of this Court on a second appeal such as this one is confined to dealing with issues of law. This court will have loyalty to findings of fact of the lower courts and resist the temptation to treat findings of fact as holdings of law. We should not interfere with the decision of the trial or the first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that decision - see judicial pronouncements on the effect of Section 361 (1) (a) Criminal Procedure Code in such decisions of this court as **Patrick Macharia v Republic [2010] e KLR** and **Daniel Wycliff Namai v Republic (Kisumu) Criminal Appeal No. 35 of 2010 (ur)** amongst others.

The appellant, **Paul Odhiambo Mbola**, was charged before the Chief Magistrates' Court, Kisumu, with the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act No. 3 of 2006. It was alleged in the charge sheet that on diverse dates between May, 2009 and 29th June, 2009 in Kisumu he penetrated the vagina of **L N K**, a girl aged eleven years, with his penis. It was alleged, in the alternative, that on the said dates at the said school he committed an indecent act to the said LN K by touching her private parts namely vagina.

A trial took place before the learned Principal Magistrate (Ezra Owino) who after hearing seven prosecution witnesses and the sworn testimony of the appellant convicted him in the judgement delivered on 16th November, 2010. The appellant appealed to the High Court of Kenya, Kisumu (Chemitei,J) but in

a judgement delivered on 24th September, 2012 the appeal was dismissed. The appellant thereafter filed this appeal.

In the homegrown Memorandum of Appeal filed by the appellant on 22nd September, 2014 grounds of appeal are taken to the effect that the Doctor called by the prosecution produced an incompetent document; that there was delay in taking the appellant to court; that there was breach of Section 19 (1) of the Oaths and Statutory Declarations Act; that the complainants age was not ascertained; that there were breaches of Sections 211 and 214 of the Criminal Procedure Code and that the appellant was not accorded an opportunity to defend himself.

It is necessary to examine the prosecution case and the defence and examine how they were treated by the trial court and then by the first appellate court to enable us establish whether there are issues of law that emerge calling for our consideration in terms of the said jurisdiction donated by Section 361 (1) (a) Criminal Procedure Code.

The prosecution case was this: L N K was at the material time a class 5 pupil at [Particular Withheld] Primary School within Kisumu Municipality. One of the activities undertaken at the school was Physical Education (P.E.) Pupils would line up outside class 4 and would enter the class for a change of clothes to P.E. clothes. The appellant, a maths teacher, doubled up as P.E. teacher and would remain in Class 4 to ensure that appropriate P. E. uniform was worn by pupils.

One day in May, 2009 pupils lined up outside Class 4 at 10.00 a.m ready for a change of clothes. The appellant instructed L N K to stand aside. When all pupils had changed and gone to the playing field the appellant first penetrated L N K using his finger but he then instructed her to lie on the table facing up and proceeded to do:

> **"... bad things, he removed his penis and penetrated me. He then cleaned with his underwear and gave me Kshs. 10/=... he told me not to report to anybody and that he will beat me up if I do so…"**

L N K further testified that similar episodes took place five times on different occasions; that she had severe pain in her vagina and thighs and this led her to miss school on 29th June, 2009. On this day the appellant visited L N K s' home where her mother R N W (PW2) confronted her and it was then that she informed her mother of the happenings leading to her illness. The appellant took her outside the house where L N K told him that because of the pain she was in, she had decided to reveal all to her mother whereupon the appellant:

> **"... said he had warned me and that the consequences are serious and will go far..."**

The appellant insisted on taking L N K with him back to school but this was resisted by others including **PW4 M A J** who insisted that she be taken to hospital first. This led to a visit to Kisumu District Hospital where L N K was received by **Perez Auma Wawire (PW6) (the Clinical Officer)** who testified that L N K was eleven years old and had suffered lacerations of her labia minora; there was no hymen and there was inflammation of the urethral orifice. The witness concluded that L N K was sexually

abused with a blunt object and had suffered grievous harm.

The appellant was arrested by **No. 62924 P. C. Dominic Kimeli Limo (PW7)** and was charged in court as already stated. Other witnesses who included L. N. Ks' father and also the head teacher of the school testified in court.

In a sworn statement the appellant confirmed that he was a teacher at the said school who also took P. E. lessons; that the pupils did, indeed, change their uniforms to P.E. clothes but he denied the charges preferred against him stating that the only interaction he had with L N K was on 30th June, 2009 when her mother visited the school with a complaint that L N K was late to get home and was not undertaking her school work as required. He thought the charges were prompted by malice.

The learned trial magistrate thought the prosecution had proved the case as required in law convicting the appellant on the main charge which, based on the complainants age, led to the sentence of life imprisonment which was upheld on first appeal.

When the appeal came for hearing before us on 22nd September, 2014 it was urged by the appellant himself who had filed written submissions the same day. The appellant challenged the complainants age stating that it was wrong for the lower courts to have accepted the age stated in the charge sheet as eleven years. He thought she was twelve. The appellant also complained that the charge sheet was substituted without any basis being laid for substitution of the same to be allowed.

Mr. C. A. Abele, the learned Assistant Director of Public Prosecutions in supporting conviction and sentence submitted that the complainants age had been properly proved as eleven years. On substitution of the charge learned counsel submitted that the same was apparent on the face of the document because it was meant to correct the name of the school and the date when the appellant was arrested.

We have considered the record of appeal, the grounds of appeal, submissions made before us and the law.

On the complaint relating to a medical document produced in evidence which the appellant believed to be incompetent we note that the same was accepted by the trial court and also by the first appellate court. The learned judge stated of the document in the judgement:

> **"An argument was raised by the defence counsel then (sic) about Post Rape Care Form 1. Although the trial court intimated that this was a dot com generation, it is necessary to note that this is the form from the Ministry of Public Health and Sanitation and in conjunction with the Ministry of Medical Services. The same is titled National Guidelines on Management of Sexual violence in Kenya 2nd Edition 2009."**

The learned judge proceeded to hold that the said document was an official document admissible in evidence by virtue of the provisions of Section 77 of the Evidence Act. We agree with the learned judge that this document was properly taken and considered as part of the evidence by the trial court.

The appellant complains that he was not taken to court within the time required in law. It was a requirement under the retired Constitution that a person arrested or detained on reasonable suspicion of having committed or about to commit an offence had to be taken to court as soon as was practicable. Section 72 (3) of that Constitution stated:

> **"A person who is arrested or detained -**
>
> **(a) ……**
>
> **(b) Upon reasonable suspicion of him having committed, or being about to commit a criminal offence and who is not released, shall be brought before a court as soon as 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 reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with."**

This court in the case of **Dominic Mutie Mwalimu v Republic Criminal Appeal No. 217 of 2005 (ur)** considered the same issue raised before us and addressed itself thus:-

> **"A plain reading of the provision of the Constitution as a whole shows that the provision requires that a person arrested upon reasonable suspicion of having committed or about to commit a criminal offence, among other things, has to be brought before the court as**

soon as is reasonably practicable (emphasis ours). 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 suggest 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."

We note from the record that the appellant was represented by counsel before the trial court and also on first appeal. Alleged breach of constitutional rights was not raised in either court. As we stated in **Ernest Shiemi & Anor v Republic [2013] e KLR:**

> **".... the position in law is that an allegation on breach of constitutional rights must be raised at the earliest opportunity to afford the trial court opportunity to interrogate the issue and take evidence, if any, on whether there is delay in presenting the suspect to court within the time required in law…"**

Having not raised that issue before the trial court, facilities for an interrogation of the issue were lost as it is not possible for this court to ask for an explanation from police. Again, and as stated in the Ernest Shiemi case (supra) the appellant may pursue the remedy of damages at a different forum.

On alleged breach of Sections 211 and 214 Criminal Procedure Code we note from the record that at the close of the prosecution case the counsel for the appellant stated:

> **"Mr. Onsongo - Let us take a date for ruling"**

Whereupon the court held that the appellant had a case to answer and that Section 211 Criminal Procedure Code had been explained. The trial magistrate then recorded that defence case would be heard on 10th September, 2010; case was not heard on that date but on the trial court resuming on 8th October, 2010 when the appellant gave sworn testimony, was cross - examined by the Court Prosecutor whereupon counsel for the appellant closed the case as he did not wish to call any witnesses. The counsel made submissions the same day and judgement was reserved to be delivered on 16th November, 2010. The trial court followed procedure to the letter and complaints on alleged breaches of procedural provisions of the Criminal Procedure Code have no basis.

On whether a voire dire examination was conducted before the complainant testified we note from the record that the trial magistrate, before he took the complainants evidence, recorded her as saying:

> **"I speak Kiswahili. I am eleven years old. I go to std. 5 class, I will speak the truth and I will carry the Bible".**

It is true that a more elaborate voire dire examination should have been conducted.

The substance of the response by the complainant to the obvious question whether she understood the

importance of telling the truth was that she would speak the truth and took refuge in the Bible to assist her in sticking to the truth. We agree with the learned State Counsel that there was substantial compliance with the law as minor transgressions were curable but must add that it is always important for the trial court to record in question and answer form the nature of a voire dire examination that the trial court has conducted.

What was the complainants' age when the appellant was charged in court? This question is important because the punishment provided by Section 8 of the Sexual Offences Act No. 3 of 2006 is clustered according to the age of the complainant when defilement takes place.

The appellant in submissions before us believed that the complainant was twelve years in May, 2009.

The charge sheet gives the age of the complainant as eleven years. The complainant stated that she was eleven years old while her mother R N W stated that her daughter the complainant was eleven years old having been born on 28th January, 1998. The Clinical Officer gave the same age and a Certificate of Birth was introduced into evidence giving the complainants date of birth as the said 28th January, 1998.

The question of age assessment became one of the issues in Thmaini **Maasai**

Mwanya v Republic (Mombasa) Criminal Appeal No. 364 of 2010 (ur) where this court stated:

> **"In case of doubt about the categorization of age, the High Court on first appeal has power under Section 354 (3) (a) (of Criminal Procedure Code) to alter the finding and reduce the sentence in favour of the offender to correspond with the apparent age of the victim.**
>
> **Similarly, on second appeal, the Court has power under section 361 (2) to make an order including passing the appropriate sentence which the subordinate court should have made. An appellate court should follow that course particularly where it considers that no substantial injustice will be caused to the appellant."**

The Sexual Offences Act adopts a definition of a child in the Childrens' Act and by Section 2 thereof "age" is defined as:

> **"... Where actual age is not known means the apparent age..."**

So the actual age does not have to be proved. It will do if apparent age is proved.

In the present case there was overwhelming evidence on the age of the complainant by the complainant, her mother and the Clinical Officer which was also supported by Certificate of Birth that the complainant was born on 28th January, 1998. She was therefore eleven years old when she was defiled by the appellant in May, 2009.

The appellant was properly convicted by the trial court as there was overwhelming evidence that proved the charge beyond reasonable doubt. The High Court on first appeal carried out its duty of re-appraisal of the evidence. There is no merit at all in this appeal which we accordingly dismiss.

Dated and Delivered at Kisumu this 23rd day of October, 2014

D. K.MARAGA

.....

JUDGE OF APPEAL F.AZANGALALA

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR