



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: GITHINJI, MAKHANDIA & SICHALE, JJ.A.)

CRIMINAL APPEAL NO. 157 OF 2009

BETWEEN

WISTONE HAMISI CHILAGO.....APPELLANT

AND

REPUBLICRESPONDENT

(Appeal from a judgment of the High Court of Kenya at Mombasa (Omondi, J.) dated 25th May, 2009

in

H.C.Cr.A. No. 157 of 2007)

JUDGMENT OF THE COURT

The appellant, **WILSTONE HAMISI CHILANGO** was charged with the offence of defilement of a girl contrary to **section 8(3)** of the Sexual Offences Act No. 3 of 2006. The second second charge was that of an indecent act with a child contrary to **section 11(1)** of the Sexual Offences Act.

The matter proceeded before **C.O. Obulutsa**, Senior Resident Magistrate who found the appellant guilty and sentenced him to 20 years imprisonment. The trial court heard the evidence of six (6) witnesses, namely PW1 **S N**, PW2 **P N**, PW3 **Dr. Mutinda**, PW4 **M N**, PW5 **P N**, PW6 **Pc. Konde**. The appellant gave an unsworn statement of defence. He denied the charge and alleged that he was charged with the offences as PW5, **P P** used this to evade payment of sum of **Kshs.6,000/=** due and owing to him. The learned trial Magistrate considered the evidence and convicted the appellant.

Thereafter, the appellant filed an appeal in Malindi **Criminal Appeal No. 157 of 2007**. On 28th May, 2009, **H. A. Omondi, J.** dismissed the appellant's appeal and hence this appeal. In his memorandum of appeal the appellant listed the following 6 grounds that is:

“1. That the learned High court Judge erred in Law and fact by upholding by (sic) conviction and sentencing without properly seeing that the person who defiled the said girl was one BURU and not me the appellant due to the following fact.

i. The said name (BURU) is not mine, neither did it included (sic) as alias among my names in the charge.

2. That the learned high court Judge erred in Law and fact by upholding both my conviction and sentence without putting into consideration that the charge was fabricated against me due to the existing grudge between I the appellant and the father of the complainant which resulted to (sic) my imprisonment.

3. That the learned high court Judge erred in Law and fact by upholding my conviction and sentence without properly noting that the prosecution did not summon some of the essential witnesses.

4. That the learned high court Judge erred in Law and fact without properly finding that the charge sheet was defective in that it does not qualify the standard required under section 18(1) and (2) Chapter 84 of the Police Act to be admissible in evidence in a Legal proceedings.

5. That the learned high court Judge erred in Law and fact by upholding my conviction and sentence without properly noting that my constitutional rights were violated contrary to section 72(3) of the constitution in that I was not arraigned before court within the required (sic).”

6. That the learned high court Judge erred in Law and fact by rejecting my defense evidence which it was reasonable enough to cast doubt on the prosecution.”

During the hearing of the appeal, the appellant adopted his submissions filed in Court on the same day of hearing, that is, 15th April, 2013. In his submissions, the appellant reiterated the fact that there was no assessment of the complainant's age; that he is not called 'BURU'; that this was a case of mistaken identity; that he was not subjected to a DNA test; that the complainant may not have understood the importance of an oath and further that the charge was framed against him as the complainant used this to evade payment of a debt due to him.

Mr. Oyiembo, the learned State Counsel opposed the appeal. He urged the Court to find that the issues raised by the appellant in this appeal were similar to those raised in the superior court. The learned State Counsel further submitted that there was no legal issue that had been raised by the appellant and that this Court has no jurisdiction on issues of fact.

Looking at the evidence adduced at the trial court, PW1 **S N** was the complainant. She was aged about 13 years. She together with her sister PW2 **P N** who was aged 6 years were playing outside their grandmother's house. According to PW1, the appellant whom they know as BURU offered to buy them soda. PW1 **S** left with the appellant and along the way he knocked her down, undressed her and defiled her. The appellant gave her 50/= which **S** had with her when she eventually got back home. Her sister PW2 **P** had told their mother PW4 **M N** and their father PW5 **P N** about the appellant going with PW1 to buy soda, who both looked for their daughter at the shop but could not find her. The trial Magistrate addressed himself to the pertinent issues and framed these issues as follows:-

(a) Whether S is a juvenile

(b) Whether she was carnally known

(c) Whether the accused has been identified as the suspect

d. In the alternative whether he penetrated his genitals in her private parts.

The trial Magistrate analyzed the first three issues and answered them in the affirmative. Having found that the appellant had carnal knowledge of the complainant the court did not proceed to analyze the fourth issue as framed.

As regards the appellants contention that PW1 S may not have understood the importance of an oath and that the case was not proved beyond any reasonable doubt, the trial magistrate warned herself of the danger of convicting on the uncorroborated evidence of a child of tender years. This is what the court stated:

“The court as stated ... does believe the child is telling the truth. S says she was given 50/= by the accused and when she reached home she still had the money which was kept as an exhibit and produced in court.”

PW1's sister PW2 P testified that PW1 left with the appellant to go to the shop. The appellant's defence was that he was framed by PW1's father who owed him a sum of Kshs.6,000/=. The trial court did not believe the appellant's testimony. His appeal to the superior court raised the same grounds as in this appeal. We note however that the superior court evaluated the evidence of the trial court and came to the conclusion that the appellant's conviction was proper in law.

As regards the fact that this is a second appeal, **section 361** of the Criminal Procedure Code Cap. 75 Laws of Kenya provides that:

“361(1) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section -

- (a) On a matter of fact, and severity of sentence is a matter of fact: or***
- (b) Against sentence, except where a sentence has been***

In interpreting the said provision, in Mombasa **Criminal Appeal No. 319 of 2009 Hamisi Mbela Davis & Another v Republic** (unreported) the Court held as follows:-

“8. This being a second appeal, this Court is mandated under section 361(1) of the Criminal Procedure Code to consider only issues of law. As was held in M'Riungu v Republic [1983] KLR 445:

“Where a right of appeal is confined to questions of law, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holding of law or mixed findings of fact and law, and it should not interfere with the decision of the trial or first appellate court unless it is apparent that on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law (Martin v Glyneed Distributors Ltd (t/a MBS Fastenings)).”

This position was reinforced by this Court in Nakuru **Criminal Appeal No. 241 of 2008 John Sadera v R** (unreported)

On the authorities and looking at the grounds raised by the appellant there can be no doubt that the appeal raises issues of fact which the Court has no jurisdiction to entertain.

On the issue that the appellants constitutional rights under section 72(3) of the old constitution had been violated as he was not arraigned before the court within the required time, the position in law is now well settled. In the case of **Julius Kamau Mbugua vs Republic – Criminal Appeal No. 50 of 2008** (unreported) this Court had considered contravention of an appellant's right to personal liberty under **section 72(1)** and 3 and faced with similar facts had this to say:

“The underlying question arising in this appeal is whether an unconstitutional extra judicial incarceration by police before the suspect is charged in court either entitles the suspect not to be tried for the offence for which he was arrested, or, if tried, whether he is

*entitled to a discharge or acquittal. Simply put in another way, whether a breach of **Section 72(3)(b)** by depriving a suspect of his personal liberty by police before being charged in court entitles the suspect to go scot-free for the offence allegedly committed or about to be committed. This is a fundamental question of great public importance.”*

The Court went on to say:

*“In our view, the right of a suspect to personal liberty before he is taken to court under **Section 72(3)(b)** are clearly distinct from the rights of an accused person awaiting trial under **Section 77(1)**.*

*The main difference is that the breach of right to personal liberty is not trial-related. It is a right to which every citizen is entitled. It is the function of the Government to ensure that citizens enjoy the right. The duty is specifically on the police where the suspect is in police custody. If, by illustration, police breach the right to personal liberty of a suspect by unreasonable detention in police custody there is a right to apply to the High Court for a writ of **Habeas Corpus** to secure release (see **Section 389(1)(a)** of **Criminal Procedure Code** and **Section 84(1)** of the Constitution).*

*In addition, **Section 72(6)** provided a remedy by way of damages to a person who is unlawfully arrested or detained*

*In contrast, the right to a trial within a reasonable time guaranteed by **section 77(2)** is trial – related. It is related to the trial process itself and is mainly designed to ensure that the accused person does not suffer from prolonged uncertainty or anxiety about his fate. The duty is mainly on the court which has the control of the trial to ensure that the right to speedy trial is observed.*

In our view, it is not the duty of a trial court or an appellate court dealing with an appeal from a trial court to go beyond the scope of the criminal trial and adjudicate on the violations of the right to personal liberty which happened before the criminal court assumed jurisdiction over the accused.

*However, the trial court can take cognizance of such pre-charge violation of person liberty, if the violation is linked, to or affects the criminal process. As an illustration, where the prolonged detention of a suspect in police custody before being charged affects the fairness of the ensuing trial e.g. where an accused has suffered trial – related prejudice as a result of death of an important defence witness in the meantime, or the witness has lost memory, in such cases, the trial court could give the appropriate protection – like an acquittal. Otherwise the breach of a right to personal liberty of a suspect by police **per se** is merely a breach of a civil right, though constitutional in nature, which is beyond the statutory duty of a criminal court and which is by **Section 72(6)** expressly compensatable by damages*

We wish to adopt the afore set out reasons as applying to the circumstances prevailing herein.

Accordingly, the appeal fails and is hereby dismissed.

Dated and delivered at Malindi this 30th day of April, 2013

E. M. GITHINJI

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR