



IN THE COURT OF APPEAL

AT NAIROBI

CRIMINAL APPEAL NO.198 OF 2008

RAPHAEL KAVOI KIILU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

*(Appeal from a conviction and sentence of High Court of Kenya at*

*Machakos (Lenaola, J.) dated 14<sup>th</sup> October, 2008*

*in*

**H.C.CR.C.NO.37 OF 2007)**

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**JUDGMENT OF THE COURT**

The appellant Raphael Kavoi Kiilu was in the trial court namely the Kajiado Senior Resident Magistrate Court, charged with defilement of a child aged 3½ years contrary to *section 8(2)* of the Sexual Offences Act 2006. It was alleged that on the 23<sup>rd</sup> day of September, 2006 in Kajiado District within Rift Valley Province, the appellant had carnal knowledge of a girl aged 3½ years. The trial court found the appellant guilty as charged and meted out to him a life sentence.

On 14<sup>th</sup> October, 2008 the superior court dismissed the appellant’s appeal and upheld both the conviction and sentence.

The appellant has filed a second appeal to this Court citing the following grounds:-

- 1. The learned judge erred in law to consider that I was charged on a defective charge as laid (sic) on the charge sheet on the particulars of the offence as the particulars has failed to include the word “unlawful” contrary to CRIMINAL LAW, PROCEDURE AND PRACTICE.***
- 2. That my sentence was not proper, as the court failed to order that the sentence be served with “hard labour.”***

**3. That my confinement in police custody for 19 days before being charged in court of law was contrary to section 72(sic(a.b.c.)).**

**4. That the clinical officer who did the examination and testing was not qualified, as the law on (sic) evidence act allows a qualified doctor's evidence report in matters relating to sexual offences.**

During the hearing of the appeal, the appellant appeared in person while Mr Kaigai, Principal senior State Counsel, appeared for the State.

In his brief address, the appellant reiterated the grounds as set out above and pleaded to this Court to release him.

Mr Kaigai on his part submitted that the complainant's evidence against the appellant was consistent and was fully corroborated by the clinical officer's evidence. He added that the injuries suffered by the complainant child further strengthened the evidence against the appellant that the defilement was perpetrated and was also quick to emphasize that according to the P3 form and upon examination the child was found to have suffered from the same strain of gonorrhoea as that suffered by the appellant. Mr Kaigai drew the court's attention to the fact that on all factual matters the two courts below had made concurrent findings hence those findings cannot be upset by this Court as a matter of law. Finally on the challenge touching on sentence, the learned counsel submitted that in law severity of sentence was a matter of fact and therefore interference with it would be outside the ambit of a second appeal.

On the first ground the charge sheet clearly states that the offence was contrary to **section 8(2)** of the Sexual Offences Act and therefore nothing turns on this. The second ground does not, in our view, raise any challenge which touches on the legality of the sentence and for this reason the ground must fail. However, we agree that grounds 3 and 4 fall within our mandate. However, a careful scrutiny of the calendar shows that the official days in which the appellant was held in custody before being taken to court were 15 days and not 19 days as claimed by the appellant. The prescribed period was therefore exceeded by one day. We find that as it was necessary for the prosecution to take the appellant for medical examination and the fact that they did so would explain the one day delay in satisfying the requirement of **section 72(3)(b)** of the Constitution. In any event, if the appellant is aggrieved, he is still at liberty to seek redress as set out in **section 84** of the Constitution and the rules made pursuant to **section 84(6)** thereof.

The challenge touching on the clinical officer's qualification is in our view taken care of by a scrutiny of the Act governing the affairs of clinical officers bearing in mind that the appellant did not lay any factual basis for his allegation in the first place. Under **section 2** of the Clinical Offences Act (Training, Registration and Licensing Act Cap 260 (LoK) a clinical officer means:-

**“a person who, having successfully undergone a prescribed course of training in an approved training institution, is a holder of a certificate issued by that institution and is registered under the Act. ....”**

**Section 7(4)** of the Act states:-

**“A person who is registered by the council shall be entitled to render medical or dental services in any medical institution in Kenya approved for the purposes of this section by the Minister by Notice in the Gazette.”**

The Act goes further to provide that such officers may engage in private practice **“in the practice of medicine, dentistry or health work for a fee.”** It follows that the clinical officer did testify in this case on his area of competence.

We have examined the provision of Sexual Offences Act. There is no such requirement that a P3 form must be produced only by a medical doctor.

Finally concerning severity of sentence and second appeal, **section 361(1)(a)** the Criminal Procedure Code provides:-

**“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 enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence.”**

We cannot therefore interfere with a lawful sentence.

For those reasons, this appeal must fail and the same is dismissed.

It is so ordered.

**DATED and delivered at Nairobi this 5<sup>th</sup> Day of March, 2010.**

**D.K.S. AGANYANYA**

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**JUDGE OF APPEAL**

**ALNASHIR VISRAM**

.....

**JUDGE OF APPEAL**

**J.G. NYAMU**

.....

**JUDGE OF APPEAL**

*I certify that this is a*

*True copy of the original.*

**DEPUTY REGISTRAR**