



**Chokera v Republic (Criminal Appeal 487 of 2007)
[2010] KECA 467 (KLR) (25 June 2010) (Judgment)**

Dennis Muthee Chokera v Republic [2010] eKLR

Neutral citation: [2010] KECA 467 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CRIMINAL APPEAL 487 OF 2007
SEO BOSIRE, EM GITHINJI & JG NYAMU, JJA
JUNE 25, 2010**

BETWEEN

DENNIS MUTHEE CHOKERA APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from a judgment of the High Court of Kenya at Nyeri
(Kasango, J) dated 1st October, 2007 in HCCRA No 185 of 2005)*

Failure to have a person accused of defilement clinically tested is not fatal to the charge of defilement where clinical evidence contained in the P3 Form confirmed penetration

The appeal was against the conviction and sentence of the appellant for the offence of defilement of a girl under the age of 16. The court held that the failure to have the appellant clinically tested, though ideal, was not fatal to the charge of defilement since the clinical evidence contained in the P3 Form inter alia, confirmed penetration although the complainant was taken to the hospital long after the incident. In addition, the court noted that the two courts below had accepted the evidence of the complainant as true and the clinical evidence was corroborative of the complainant's story. It did not stand alone; it was reinforced by the direct evidence of the complainant. The court further held that failure by the appellant to raise the alleged violation of his rights at the earliest opportunity in the two courts below constituted a waiver of such rights.

Reported by Kakai Toili

Criminal Law - sexual offences - defilement - failure to clinically test a person accused of defilement - whether failure to have a person accused of the offence of defilement clinically tested was fatal to the charge of defilement, where clinical evidence contained in the P3 Form confirmed penetration.

Constitutional Law - fundamental rights and freedoms - raising claim of violation of constitutional rights in a criminal case - what was the effect of failure to raise a claim of violation of an accused person's rights at the earliest opportunity in the trial court and first appellate court.



Brief facts

The instant appeal was a second appeal against the conviction and sentence of the appellant for the offence of defilement of a girl under the age of 16. The appellant's main grounds of appeal were that his constitutional rights were violated since he was held in police custody for three days beyond the constitutional limit of 24 hours without any explanation and therefore his trial was a nullity; that the intensity of the light from the hurricane lamp which was used by the complainant to identify him or to recognize him was not ascertained by the court and therefore there was a possibility of mistaken recognition; further that the superior court below erred in inferring that failure by the appellant to cross-examine some witnesses meant that the appellant was the culprit; and that the superior court failed in not addressing the fact that no matching tests were conducted on the appellant and that only clinical tests were selectively done on the complainant and finally that the superior court failed to sufficiently evaluate the evidence on record and therefore it reached a verdict that was against the weight of the evidence.

On its part, the prosecution stated that the evidence presented was overwhelming; moreover, the appellant was identified by recognition, the hurricane lamp having provided sufficient light for the purpose of identification and immediate recognition and that the appellant never raised the ground of infringement of his constitutional rights in the trial court or in the superior court where he had engaged the services of an advocate. It also added that the sentence was well merited.

Issues

- i. Whether failure to have a person accused of the offence of defilement clinically tested was fatal to the charge of defilement where clinical evidence contained in the P3 Form confirmed penetration.
- ii. What was the effect of failure to raise a claim of violation of an accused person's constitutional rights at the earliest opportunity in the trial court and first appellate court?

Held

1. The alleged failure of the court to consider the intensity of the light from the hurricane lamp could not be sustained since the appellant had earlier in the day spoken to the complainant in a manner which suggested an intention to have sexual intercourse with her. The appellant had told the complainant that he was "taking cows to her mother" meaning that the appellant had designs to marry the complainant. In addition, the complainant had ample opportunity to recognize the appellant.
2. The allegation that the appellant did not cross-examine certain witnesses could not arise since the superior court below made reference to it and because cross-examination had formed the heart of the case before the court.
3. The failure to have the appellant clinically tested, though the testing was ideal, was not fatal to the charge of defilement since the clinical evidence contained in the P3 Form *inter alia*, confirmed penetration although the complainant was taken to the hospital long after the incident. In addition, the two courts below accepted the evidence of the complainant as true and the clinical evidence was corroborative of the complainant's story. It did not stand alone; it was reinforced by the direct evidence of the complainant.
4. The record reflected a very careful evaluation of the evidence hence; the superior court discharged the duty as the first appellate court.
5. The alleged violation of the appellant's constitutional rights was an afterthought in that had the appellant raised the challenge in the trial court or the superior court below, the State would have had the opportunity of explaining the alleged detention. Failure by the appellant to raise the alleged violation of his rights at the earliest opportunity in the two courts below constituted a waiver of such rights

Appeal dismissed.

Citations

Cases

None referred to



Statutes

Kenya

1. Constitution of Kenya articles 72, 84(1)(7) - (Interpreted)
2. Penal Code (cap 63) sections 144(1); 145(1) - (Interpreted)

Advocates

Mr Muthoni for the appellant.

Mr Kaigai Senior Principal State Counsel for the respondent.

JUDGMENT

1. Before the trial court, Senior Resident Magistrate's Court at Nanyuki, the appellant was charged with offence of defilement of a girl under the age of 16 years contrary to section 145(1) of the *Penal Code*. He faced an alternative charge of indecent assault of a female contrary to section 144(1) of the *Penal Code*.
2. The particulars of the charge were that on April 5, 2005 at [particulars withheld] Division, Meru Central District in the Eastern Province, the appellant unlawfully had carnal knowledge of IW a girl under the age of 16 years. The particulars of the alternative charge were that on the same day at Ngare Ndare Market, the appellant unlawfully and indecently assaulted IW by touching her on her private parts.
3. After full trial the appellant was convicted and sentenced to twenty (20) years imprisonment in the main count. Vexed by the verdict the appellant filed an appeal against both conviction and sentence in the superior court. As against conviction the appeal was unsuccessful but the sentence was reduced to fifteen years (15). Dissatisfied with the outcome of the first appeal he has now come to this court by way of a second appeal and has raised the following grounds of appeal:-
 1. That the learned trial judge of the superior court erred in law and in fact in not finding that the appellant's trial was unconstitutional for his being in police custody after arrest in excess of the constitutional time - time of 24 hours having been arrested on April 5, 2005 and brought to court on April 8, 2005 without any explanation for such undue delay.
 2. That the learned judge of the superior court erred in law and in fact not addressing her mind to the possibility of mistaken recognition/identity of the perpetrator of the offence while the intensity of the hurricane lamp was not disclosed.
 3. That the learned judge of the superior court erred in law in finding that failure by the appellant to cross-examine PW1, PW2 and PW3 on the issue of identification tended to show that he was the culprit.
 4. That the learned judge of the superior court erred in law and in fact in not addressing herself on the ground that no marching (sic) tests were done on the appellant to march (sic) with those on the complainant while he was arrested shortly after the incident.
 5. That the learned judge of the superior court erred in law and in fact (sic) not evaluating the evidence on record sufficiently."
4. The appeal was argued before us on May 18, 2010. The appellant was represented by learned counsel Mr Muthoni while the State was represented by Senior Principal State Counsel Mr Kaigai.
5. In his submissions Mr Muthoni concentrated on what he considered the principal grounds which included that the trial was unconstitutional because the appellant was held in police custody for three



days beyond the constitutional limit of 24 hours as set out in section 72 of the Constitution without any explanation and therefore the trial was a nullity; that the intensity of the light from the hurricane lamp which was used by the complainant to identify him or to recognize him was not ascertained by the court and therefore there was a possibility of mistaken recognition; that the superior court erred in inferring that failure by the appellant to cross-examine PW1, PW2 and PW3 meant that the appellant was the culprit; that the superior court failed in not addressing the fact that no matching tests were conducted on the appellant and that only clinical tests were selectively done on the complainant and finally that the superior court failed to sufficiently evaluate the evidence on record and therefore reached a verdict that was against the weight of the evidence.

6. On his part, the learned Principal State Counsel Mr Kaigai summarized his submissions by stating that the evidence presented by the prosecution was overwhelming; that the appellant was identified by recognition; that the hurricane lamp provided sufficient light for the purpose of identification and immediate recognition; and finally on the constitutional issue the appellant never raised the ground in the trial court or in the superior court where he had engaged the services of Mr Muthoni and finally as regards the sentence he submitted that it was well merited.
7. Perhaps it is a good starting point to state that the two courts below did make concurrent findings of fact which bind us as they are based on sound and acceptable evidence. In this regard the superior court in its evaluation of the evidence as per the judgment summarised the pertinent factual issues as under: -
8. The complainant was 14 years old (sic) girl attending primary school. On April 5, 2005 at night while she was asleep and when her mother had gone out to irrigate the farm she felt somebody in bed. She asked who the person was and he turned her thigh and slept on top of her. She began to scream but the person held on to her mouth. He tore her underpants. She began to struggle with the man but he overpowered her and defiled her. Since the lamp was on she was able to clearly see the man and identified him as Muthee (the appellant). She screamed again and the appellant jumped through the window and ran away. Earlier that day the appellant had told the complainant when he had gone to her house that she was now grown up and he would “take cows” to her mother.”
9. Regarding the submission that the appellant could have been mistakenly identified due to the alleged failure of the court to consider the intensity of the light from the hurricane lamp, it cannot be sustained in that the appellant had earlier that day spoken to the complainant in a manner which suggested an intention to have sexual intercourse with her. The appellant told the complainant that he was “taking cows to her mother” meaning that the appellant had designs to marry the complainant. In addition the complainant had ample opportunity to recognise the appellant, as the superior court so admirably put it, first, as the appellant defiled her on the bed and second, when he jumped out of the window. In addition after the incident the complainant was able to immediately inform those who responded to her screams especially PW2 and PW3 that it was “Muthee” the appellant who had defiled her. The evidence touching on recognition was also strengthened by the complainant unshaken evidence upon cross-examination. On the alleged failure by the appellant to cross examine PW1, PW2 and PW3 on the issue of identification, in our view, the superior court made reference to it because identification was the heart of the case before the court. In the circumstances, the learned Judge was perfectly entitled to make reference to the non-cross-examination because ordinarily good cross-examination is a powerful weapon for defence in testifying the veracity of the prosecution witnesses or casting doubts concerning the guilt of an accused person. Reference to the non cross-examination would however have been adverse to the prosecution if the learned Judge were in an indirect manner suggesting that the appellant had any burden of proof as far as the evidence of the three witnesses was concerned but this is not what the challenge is all about. We think nothing turns on this ground.



10. Touching on the submission regarding the need for matching clinical tests for both the complainant and the appellant, with respect, we do not think that the failure to have the appellant clinically tested, though ideal, was fatal to the charge of defilement. The clinical evidence contained in the P3 form *inter alia*, confirmed penetration although the complainant was taken to the hospital long after the incident. It must be pointed out that the two courts below accepted the evidence of the complainant as true and the clinical evidence was corroborative of the complainant's story. It did not stand alone; it was reinforced by the direct evidence of the complainant.
11. On the allegation that the superior court did not evaluate the evidence, with respect, the record reflects a very careful evaluation of the evidence and in our view as quoted above the superior court did discharge the duty as the first appellate court along the lines so carefully marked by a long line of decisions of this court. In the circumstances, the superior court cannot be faulted.
12. Finally the alleged violation of the appellant's constitutional rights is in our view an afterthought in that had the appellant raised the challenge in the trial court or better still in the constitutional court, namely the superior court, the State would have had the opportunity of explaining the alleged detention. In this regard we note that the appellant was represented by counsel in the superior court who could have raised the issue of the alleged contravention of the appellant's constitutional rights. In our view failure by the appellant to raise the alleged violation of his rights at the earliest opportunity in the two courts below constitutes a waiver of such rights. Section 84(1) of the Constitution provides that the High Court is vested with the original jurisdiction to undertake an inquiry concerning any alleged contraventions of any fundamental rights and upon any such inquiry any aggrieved person is entitled to come to this court by way of an appeal pursuant to section 84(7). As the necessary steps that are required to have been taken by the appellant as per the relevant provisions of the Constitution were not taken as outlined above this ground is unsuccessful as well.
13. The upshot is that this appeal lacks merit and the same is dismissed.

DATED AND DELIVERED AT NYERI THIS 25TH DAY OF JUNE, 2010

SAMUEL E ONDARI

JUDGE OF APPEAL

ERASTUS M GITHINJI

JUDGE OF APPEAL

JOSEPH G NYAMU

JUDGE OF APPEAL

I certify that this is the true copy of the judgement

DEPUTY REGISTRAR

