REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT KISUMU

Criminal Appeal 183 of 2009
JOSHUA OTIENO OGUGA ……..……APPELLANT

AND

REPUBLIC ……RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kisumu (Karanja, J) dated 30th October, 2007

in

H.C.Cr.A. No. 104 of 2007)
****
JUDGMENT OF THE COURT

This is a second and last appeal. Pursuant to the provisions of ***section 361*** of the Criminal Procedure Code, on the main, only matters of law are to be considered by this Court. The complainant ***S. A. M*** was mentally retarded and when called to testify, she could not give evidence. Be that as it may on 1st October, 2005 at about 5.00 p.m. ***Peter Owino Okar*** (PW5) (*Peter*) who had been to the house of ***Peter Odweo Ondudu*** (PW4) (*Odweo)*, and was going back to his home through a bushy area, heard a child crying in the bush. He rushed to assist. On approaching the place where the child was, he saw the appellant whom he knew well, lying on top of that child. On a closer look he identified the child as S. According to Peter, the appellant's trouser was drawn and he was on top of S whose dress was also drawn up. S had no pants as the pants were placed on the side of the two. Peter observed that the appellant was having sex with S as S was crying in pain. On realizing that Peter was around, the appellant stood up. Peter enquired from him as to what he was up to. The appellant's response was that he was cutting a tree. Peter went and called Odweo. Odweo went there and the two asked the appellant what he was doing. The appellant again said he was cutting a tree, but when challenged to show the panga he was using for cutting the tree, he admitted, he did not have any panga. By that time the child had stood up and put on her pants. Peter and Odweo took the child, who was a girl aged below twelve (12) years according to Robert Mulwani Ongwenyi (PW1), a Clinical Officer from Siaya, to her grandmother. He told her grandmother what he had witnessed. The next day, Peter met D.O.N (PW2) , the grandfather of S. He narrated to him what he had witnessed concerning the appellant and his granddaughter. He said further on cross-examination that he saw blood stains on S's pants and that when S stood up from the scene she was not able to walk and that was why he had to escort her to her grandfather's home. Peter Odweo corroborated that evidence of Peter except that by the time he responded to Peter's call and reached the scene, the appellant was standing up and was not in the act of raping S and that the child had no blood stains on her. D.O.N, S's grandfather put the age of S at eleven (11) years and said S was mentally retarded and was attending special school at R. She had difficulties in talking. He received the report of rape from Peter and

reported the incident to H Administration Police Post. He also took S to hospital where she was examined and given treatment. He obtained a P3 form which he took to the Doctor and was filled. He said in court that the Administration Police arrested the appellant but later set him free on grounds that D.O.N had not paid money for transporting the appellant to Siaya Police Station. D.O.N was not deterred. He reported the matter to Siaya Police Station. He was given a note to take to Chief of the area. He did so and the appellant was again arrested by Administration Police (APs), but again on the pretext that transport fee had not been paid, the Chief released the appellant. D.O.N now complained to the District Commissioner and the appellant was arrested a third time and was, this time, taken to Siaya Police Station. He ended his evidence in chief by saying S was born on 7th April 1995. Pc. Ann Wambugu (PW3) from Siaya Police Station took S to Siaya District Hospital and she was examined in her presence and a P3 form filed by one Dr. Ochieng. He produced that P3 form which indicated that S's labia minora and labia majora were bruised. The Doctor assessed her age as ten years. She and some APs arrested the appellant. Later, on 8th April, 2007, Robert Mulwani Ongwanyi (PW1) a Clinical Officer from Siaya District Hospital examined S as to her mental status. He found that S had unstable mind and was inconsistent. He also filled a P3 form which was produced in court.

The appellant was at first charged with the offence of defilement of a girl contrary to ***section 145(1)*** of the Penal Code. The particulars of that charge stated:

> ***"On the 1st day of October, 2005 in Siaya District within Nyanza Province, had carnal knowledge of S. A. M a girl under the age of fourteen years."***

He pleaded not guilty to that charge which was presented to court on 28th October, 2005. There was an alternative charge of indecent assault but from what will be clear in this judgment, we do not think it necessary to reproduce that charge here. The trial began on 28th October, 2005. After three witnesses were heard, the prosecution applied to amend the charge and on 26th June, 2007 about two years later, an amended charge was read to the appellant. That new charge was of Defilement of a child contrary to ***section 8(1)*** as read with ***section 8(2)*** of the ***Sexual Offences Act No. 3 of 2006***. The particulars for the charge were as follows:

> ***"On the 1st day of October, 2005 in Siaya District within Nyanza Province unlawfully had carnal knowledge of S.A. M a girl under the age of eleven years."***

He pleaded not guilty to the amended charge, together with an alternative charge of Indecent assault on a female which again we find unnecessary to set out here. The trial began afresh. At the close of the prosecution case, the appellant was put on his defence and stated ***"I want to say that the prosecution witnesses have lied against me. That is all.***" After the full trial the learned Principal Magistrate (*G. K. Mwaura*) found the appellant guilty of the offence of defilement and stated in part in his judgment delivered on 9th July, 2007 as follows:-

> ***"From the foregoing, I find that the accused defiled the complainant. I do not doubt the prosecution case at all and find the accused guilty as charged on the main count and proceed to convict his (sic) accordingly***."

On sentence the learned Principal Magistrate stated:-

> ***"The charge carried only one sentence which I now proceed to pronounce. The accused to serve life imprisonment****."*

The appellant was dissatisfied with the conviction and the sentence imposed by the learned Magistrate. He appealed

to the superior court vide ***High Court Criminal Appeal No. 104 of 2007.*** After hearing the submissions on first appeal, and analyzing and evaluating the evidence as the superior court is required by law to do, the learned Judge of the superior court (*Karanja, J.)* dismissed the appeal stating;-

> ***"From all the foregoing, it is apparent that the offence was committed against the complainant, a retarded child called S. A. The necessary ingredients of the offence set out in section 8(2) of the Sexual Offences Act No. 3 of the 2006*** *(sic)* ***were duly established by the medical evidence availed vide a P3 form dated 11th October, 2005 (P.Ex. 2). The evidence by Peter (PW5) and Petro (PW4) confirmed and established that the appellant was the person responsible for the offence. He was caught "red-handed" by Peter PW4 while in the process of sexually assaulting the child complainant. He really had nothing to say in his defence other than alleging that all the witnesses lied against him. … The case against him by the prosecution was however proved beyond reasonable doubt. In the circumstances, there would be no reason for this court to interfere with the findings of the trial court."***

He thereafter considered the complaint before him that the provisions of ***section 72(3)*** of the Constitution was violated and dismissed it as he found that the delay of 24 hours in taking the appellant to court was not inordinate and did not warrant any precipitate action.

This is the decision that has prompted this appeal before us premised on three grounds of appeal which are, in a summary, that the learned Judge of the superior court erred in refusing to allow the appeal on account of breach of the appellant's constitutional rights under ***section 72(3)*** of the Constitution of Kenya; that failure by the prosecution to call the medical and investigation officers to give evidence was fatal to the case; that the courts below should have found the appellant not guilty on those grounds and that the entire prosecution case was not corroborated.

The appellant conducted his appeal before us in person and submitted, with the court's permission written submissions which we have perused and considered. The written submissions, on the main, complained against alleged breach of the provisions of ***section 72(3)*** of the Constitution; the way the P3 form was produced as it was not produced by the author; and also complained that the appellant was convicted notwithstanding the complainant did not give evidence in court and there was no corroboration of the evidence adduced in court. ***Mr. Musau***, the learned Senior Principal State Counsel opposed the appeal stating that the superior court dealt fully with the complaint in respect of alleged violation of ***section 72(3)*** of the Constitution and arrived at a proper conclusion that the delay, if any, was not inordinate. He contended that there was ample corroboration of the material and relevant evidence.

We have anxiously considered the entire record, the submissions before us and the law. This is a straight forward case. The appellant was, as the superior court rightly found, caught red-handed or more appropriately, with his pants down. Peter saw him on the complainant and the complainant, a child aged between 10 and 12 years was crying. Her pants had been removed and the appellant's pants were also lowered down even as her clothes were also drawn. Peter says this happened at 5.00 p.m. that is during broad day light. When the appellant was challenged as to what he was up to, his answer was that he was cutting a tree when he had no means for cutting a tree. Peter called Petro who also found the appellant and the child was still there. Medical evidence showed that her labia minora and labia majora were bruised. Even though S did not give evidence because of her health condition, the evidence that was given by Peter, part of which was confirmed by Petro and the whole of which was confirmed by medical evidence, was in our view overwhelming. We see no reason to fault the subordinate court and the superior court in accepting that evidence. That evidence accepted as it was, leaves no other alternative but that the appellant had carnal knowledge of a child below fourteen years and not only that, but by force. ***Section 77(1)*** of the

Evidence Act as amended by ***Act No. 14 of 1991*** states:

> ***"In criminal proceedings any document purported to be report under the hand of a Government analyst, medical practitioner or ballistics expert, document examiner or geologist upon any person, matter or things submitted to him for examination or analysis may be used in evidence."***

and ***section 77(3)*** states:

> ***"When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, and medical practitioner or geologist, as the case may be and examine him as to the subject matter thereof."***

That in short means that if the appellant wanted the medical report to be produced by a doctor, he had to apply to the court to summon the doctor who prepared the report, otherwise there was nothing wrong in law in the P3 form being produced by Pc. Ann Wambui as she did. Nothing turns on that complaint. Pc. Ann Wambui was the arresting officer. She also investigated the case. Thus the complaint that the investigation officer was not called is neither here nor there. On the alleged violation of ***section 72(3)*** of the Constitution, our view is that the alleged delay was so short that when one considers that the appellant was arrested several times by the Administration Police and released on flimsy reasons of lack of payment of transport charges from H area to Siaya, a fairly long distance and that the time when he was lastly arrested is not known, the delay might even be far less than 24 hours. What we mean is that if he was arrested at night on 26th October 2005, we would not expect him to be produced in court on 27th October 2005. That would be practically not possible and 28th October 2005 would be the probable earliest date for his production in court. This Court made it clear in the case of ***Paul Mwangi vs Republic Criminal Appeal No. 35 of 2006*** which was relied on by the superior court, that the court might well countenance a delay of say one or two days as not being inordinate and leave the matter at that. The superior court considered this complaint at length and, in our view came to a right conclusion that the delay was not inordinate and could be countenanced by the court. We accept that position.

All in all, on the facts of the case, and the law, the appellant had carnal knowledge of S against the law; we have no problem with that.

However, one matter raised our concern. The appellant was at first charged with defilement of a girl contrary to ***section 145(1)*** of the Penal Code. The offence took place on 1th October, 2005. At that time the Sexual Offences Act No. 3 of 2006 had not been enacted or come into operation. Its date of commencement was 21st July, 2006. The appellant could not therefore be charged with any offence under the Sexual Offences Act then as it was not existing. However, as the case dragged on for a long time till the year 2007 after the Sexual Offences Act came into operation, the prosecution applied for and was allowed to amend the charge under the Sexual Offences Act. The importance of this is that under the repealed ***section 145(1)*** under which the appellant was originally charged, the provision on sentence was that:

> ***"Any person who unlawfully and carnally knows any girl under the age of fourteen years is guilty of a felony and is liable to imprisonment with hard labour for fourteen years together with corporal punishment."***

But even that provision had in itself long been repealed by ***Act No. 5 of 2003*** which was providing as follows:

> ***"145(1) Any person who unlawfully and carnally knows any girl under the age of sixteen***

years is guilty of a felony and is liable to imprisonment with hard labour for life."

> ***"A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."***

That sentence is mandatory and that is why the learned Principal Magistrate stated in his notes on sentence that the charge carries only one sentence. On the other hand the offence under which the appellant should have been charged that is defilement of a girl under the age of sixteen years which was introduced by Act No 5 of 2003 and which was the relevant law at the time the appellant was charged in court and which in our mind, was the offence proved, stated that the person convicted of such an offence was "*liable to improvement with hard labour for life"* which in effect meant that he could be sentenced to any term of imprisonment upto a maximum of life imprisonment. It is our duty to prescribe lawful sentence for the offence proved.

In the appeal before us, facts prove the offence under ***section 145(1)***as amended by Act No. 5 of 2003 which was in existence at the time the offence was committed. We set aside the conviction under ***section 8(1)*** as read with ***section 8(2)*** of the Sexual Offences Act and substitute therefor conviction under ***section 145(1)*** of the Penal Code which was in existence at the time the offence was committed. We also set aside the sentence of life imprisonment imposed by the subordinate court and confirmed by the superior court and in its place, order that the appellant be and is hereby sentenced to imprisonment for a term of eighteen (18) years from 9th July, 2007. To that extent, the appeal succeeds.

Dated and delivered at KISUMU this 5th day of February, 2009.

P. N. WAKI
…….
JUDGE OF APPEAL

J. W. ONYANGO OTIENO
……
JUDGE OF APPEAL

ALNASHIR VISRAM
……
JUDGE OF APPEAL

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

DEPUTY REGISTRAR