



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT KISUMU

Criminal Appeal 320 of 2007

BENARD OMARI KIGWARO APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kisii (Bauni, J.) dated 11th October, 2006

in

H.C.CR.A. NO. 147 OF 2005)

JUDGMENT OF THE COURT

The appellant in this second appeal, **Bernard Omari Kegwano**, was arraigned before Senior Resident Magistrate's Court at Nyamira with the offence of Defilement of a girl contrary to **Section 145(1)** of the Penal Code. The particulars of the offence read as follows:-

“On the 10th June, 2005 at M sub-location in Nyamira District within Nyanza Province, unlawfully had carnal knowledge of SG, a girl under the age of sixteen years.”

In the alternative, he was charged with the offence of indecent assault on female contrary to **Section 144(1)** of the Penal Code, the particulars of which were that:-

“On the 10th June, 2005 at M sub-location in Nyamira District within Nyanza Province, unlawfully and indecently assaulted SG, by touching her private parts.”

He pleaded not guilty to the main charge and to the alternative charge, but after full hearing, the learned Senior Resident Magistrate, in a judgment dated and delivered on the 3rd day of November, 2005 found him guilty of the main charge of defilement of a girl contrary to **Section 145(1)** of the Penal Code, convicted him of the offence and sentenced him to serve a term of imprisonment for **thirty (30) years**. In finding him guilty, the learned Senior Resident Magistrate stated inter alia as

follows:-

“To this point there is no doubt that the complainant was defiled on that day. It is also not on doubt (sic) that it is the accused who defiled her. She knew him well as he is her cousin.

The evidence of PW3 her mother corroborates that of the complainant. She told the Court she pointed out the accused at Nyamira town and he was arrested. The Accused still had a bag he had when he defiled her. PW4 the investigating officer said the complainant was badly injured and her clothes were stained with blood and faeces. Though the birth certificate was not produced, I had the opportunity of seeing the girl. She is about twelve years old. There is no doubt that she is under the age of sixteen years. The evidence against the Accused is overwhelming. His statement amounts to a mere denial. He was positively identified.

I find that prosecution have (sic) proved their case against the accused person beyond reasonable doubt. I find him guilty of the offence of defilement of a girl under the age of sixteen years contrary to section 145(1) of the Penal Code and is convicted accordingly, under section 215 of the Criminal Procedure Code. I make no finding on the alternative charge.”

The appellant felt dissatisfied with the conviction and sentence. He moved to the superior court and filed an appeal against that conviction and sentence. That appeal was placed before the superior court (Kaburu Bauni, J.) who after hearing and considering it, dismissed it in a judgment dated and delivered on 11th October, 2006, stating inter alia as follows:

“This being the first appellate court I have the duty to analyse and consider the evidence and make a conclusion. This I have carefully done and I am satisfied that the learned magistrate properly convicted the appellant. The evidence was overwhelming. The incident happened during the daytime. PW2 the complainant candidly narrated to Court how the appellant lured her to the bush and defiled her. The complainant knew the respondent well as she said he was her cousin. She gave his name to her mother soon thereafter and to the clinical officer and the police. There was no chance of mistaken identity. The appellant is the person who defiled her. Indeed she is the only one who testified to the fact of defiling but they were the only two when he defiled her. Section 124 of the Evidence Act was amended and provides that evidence of a minor can be relied to convict one even if there is no corroboration if the court is satisfied that she has told the truth I therefore find that the conviction was proper as there was ample evidence. As for sentence, appellant was sentenced to 30 years. True he had pleaded for leniency but the sentence was not harsh. The offence carries a maximum sentence of life imprisonment. Appellant defiled a girl of 12 years possibly ruining all her life. Stiff custodial sentence was warranted and it is clear the court took into account all the prevailing circumstances. There is therefore no good reason to interfere with the sentence.”

The appellant was still not satisfied with that decision. He filed what he called Notice of Appeal on 25th October, 2006, some fourteen days after the superior court's judgment. In that Notice of Appeal, the appellant also cited seven grounds of appeal. When the matter first came up for hearing before the Court on 24th March, 2009, the appellant, who is conducting his appeal in person, intimated that he wanted to rely on two supplementary grounds of appeal. Those grounds were not formally filed into the Court and so the hearing of the appeal could not proceed. The appellant applied for, and was granted the adjournment to enable him file supplementary grounds of appeal. However, on 16th June, 2009 when this matter came up before us for hearing, the appellant had not complied with the court order of 24th March, 2009 and there is no supplementary Memorandum of Appeal in the record of appeal as had been ordered. The appellant however decided and was allowed to proceed and argue his appeal. In his submissions before us, the appellant raised two matters, none of which was in his original home-made grounds of appeal. These two issues were raised in written submissions which the appellant read to us. They

were, in a summary, first, that the appellant's Constitutional rights in law were breached as the appellant was not produced before court within twenty four hours of the time of his arrest as is required by the provisions of **Section 72(3)** of the *Constitution of Kenya*, in that he was arrested on *10th June, 2005* and was never produced to the Court until *14th June, 2005*. This ground of appeal was not raised at the trial and was not a ground of appeal in the superior court. Second point the appellant raised was that there was no documentary proof of the complainant's age and that being the case, the trial court and the first appellate Court had no business convicting the appellant on the offence of defilement of a girl under the age of sixteen years. This ground was also not in the original and final grounds of appeal before us. As the appellant was not represented by an advocate and as he insisted that he wanted to proceed with the appeal, notwithstanding that he had not complied with the ruling of the Court as stated above, we allowed him to argue these points. Mr. Musau, the learned Senior Principal State Counsel, opposed the appeal stating that provisions of **Section 72(3)** of the Constitution were not breached as the record shows that the appellant was arrested late afternoon of *10th June, 2005*. which was a *Friday* and was produced in court on *Monday 13th June, 2005*, and plea taken on *Tuesday 14th June, 2005*. When it is considered that Courts in Kenya do not operate formally on Saturdays and Sundays, the deadline of 24 hours for the production of a suspected person into the court as provided by **Section 72 (3)** was beaten. As to age, Mr. Musau submitted that the complainant was **12 years old** and there is no doubt she was below the age of sixteen.

The record shows that the complainant, **SG, (PW2)** is appellant's cousin. On *10th June, 2005* at about 8:00 a.m., the complainant went to look for firewood. She was alone. The appellant approached her, held her throat, covered her mouth, held her buttocks and took her to the bushes in the lower side of where she was collecting firewood. He took her to a place near the river, more specifically, described as Ariga's land. The appellant then laid the complainant down on her back, held her throat until she became unconscious, removed all her clothes, removed his long trousers, tore complainant's dress buttons, removed his penis and inserted it into the complainant's vagina. The complainant felt pain and bled a lot from her private parts. She tried to scream for help but her throat was held. After the appellant finished with her, he left her there. She started crawling home. **J, (PW3)**, complainant's mother went to the river at about 1:00 p.m. to wash clothes. She saw her daughter approaching home. She asked her what was wrong as she had no firewood and had finger marks on the neck and was bleeding from the legs. Her underpants were bloody and her other clothes were also soiled and blood-stained. She told her mother that **Bernard** had defiled her in the bushes. **J** took the complainant in the house and examined her further and found that she was bleeding profusely in her vagina and also in her anus. **J** screamed for help and many people responded. She (**J**) reported the matter to the Assistant Chief and the complainant was taken to the District Hospital at Nyamira and a report was made to the police. **PC. Jonathan Ndagili (PW4)** received the report and arrested the appellant for the offence on the same day *10th June, 2005* after the appellant was pointed out to the police by the complainant as he was at a stage where women sell fruits in Nyamira Township. **Alloys Ongoto Nyagoto (PW1)** examined the complainant on *11th June, 2005* at Nyamira District Hospital. He found the complainant to be 12 years old. She had a *swollen and tender right eye; swollen and tender neck; swollen and tender cheeks; teary labia minora and majora*. There was discharge from her vagina. Laboratory results showed presence of spermatozoa. Alloys certified the degree of injury as harm and confirmed that she had been defiled. A P3 form was prepared and was produced by Alloys at the trial. The appellant was charged with the offences as stated. His defence was short. It was as follows:-

"I left home early in the morning. I went to Kibirigo. I left Kibirigo at about 5:00 p.m. When I reached Nyamira, I met some people from home. They sell things at the stage. I sat with them. Later we went home. I was arrested by a police officer. He took me to Nyamira police station. Later I was charged with an offence I didn't know. I deny the offences. That's all."

The above are a brief summary of the facts that gave rise to the case that was before the trial court and to the first appeal in the superior court. As we have stated, the appellant raised only two grounds of appeal which were not in the grounds of appeal

before the Court. Strictly, as these two grounds were not in the Memorandum of Appeal, the court is not obliged to consider them but in this case as the appellant was allowed to argue them, we will proceed on the ground that they were validly before this Court for consideration and will give them consideration deserved by any ground of appeal validly raised by way of a valid memorandum of appeal.

On the first complaint, **Section 72(3) (b)** of the Constitution provides that a person who is arrested and detained upon reasonable suspicion of his having committed, or being about to commit, a criminal offence shall be brought before a court as soon as is reasonably practicable and when he is not brought to Court within *24 hours* in a case such as is before us, which is not punishable by death, the burden of proving that he has been brought to court as soon as reasonably practicable is on the prosecution. This is the provision the appellant alleges has been violated. We have considered the complaint and we are of the considered view that it is baseless and nothing turns on it. The offence took place on the morning of *10th June, 2005*. That day was a **Friday**. The appellant was arrested at about 5:15 p.m. He confirms in his defence that he was arrested about that time. Courts in Kenya do not hold formal sittings on Saturdays and Sundays and that being the case, the police could not produce him in Court on those days. In our view, time started running from **Monday** at **8:00 a.m.** when courts would formally sit to take pleas and conduct hearings. In our view, looked at from another position, it goes without saying that the soonest practicable date for taking the appellant to Court was *24 hours* from the time the Courts started formal sittings and that was from *Monday 13th June, 2005*. The record shows that he was produced in the Court on *Tuesday 14th June, 2005*. That was within *24 hours* from the practicable date. We thus see no genuine complaint. We may add here, that when it is so clear like in this case that the intervening days between the time and date of arrest are the dates that the courts can take judicial notice of as being days like Saturday, Sunday or public holidays, when no courts do sit, then the prosecution need not endeavour to prove the fact that the date the accused is produced to court is the soonest practicable date. All the prosecution needs to record is that these are days when the courts do not sit formally, the court will take judicial notice of that fact as we do in this appeal. Nothing turns on that ground.

As to the second ground, the complainant's age was entered in the *P3* which was before the trial Court. The age as given in evidence by **J** the mother of the complainant who said she gave birth to the complainant in 1993 was not challenged in cross examination. Alloys also mentioned the age in his evidence and that was not challenged. Finally, and of importance, the matter of age is a matter of fact. Trial court dealt with it. First appellant had opportunity to deal with it and by dint of **Section 361(1)**, we have no jurisdiction to consider it as it is a matter of fact. For all these reasons, that ground also fails. We have considered the record as a whole apart from the two grounds above and we have no reason to disturb the conviction of the appellant.

The sum total of all the above is that the appeal against conviction cannot stand. It is dismissed.

That leaves us with the appeal against sentence. The law governing the offence was in **Section 145(1)** of the Penal Code as amended by the **Criminal Law (Amendment) Act No. 5/2003** to read 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.”

The learned trial magistrate, sentenced the appellant to serve **30 years imprisonment** on grounds that the offence is serious as the complainant would be traumatized for life so there is need to remove the appellant from society. He, however, acknowledged that the appellant was a first offender but did not indicate what benefits he gave the appellant on that account. The superior court confirmed that decision. In the case of **FRED MICHAEL BWAYO VS. REPUBLIC** *Criminal Appeal No. 130 of 2007*, where the appellant was charged with committing a similar offence in *July of 2005* (almost during the same period), this Court discussed at length the question of sentences bearing in mind that **Section 361** of the Criminal Procedure Code

confines our jurisdiction to the matters of law only and states that severity of sentence is a matter of fact. In that case, the appellant was sentenced to serve *20 years imprisonment*, unlike this case where the appellant was sentenced to serve *30 years imprisonment*. After detailed consideration of our jurisdiction on such matter, we stated in pertinent parts as follows:-

“It should be noted, however that punishment provided for the offence is mandatory and there is clear discretion for the court to consider the appropriate sentence depending on the circumstances and antecedents of each case and accused person. The appellant in this case was thus liable to imprisonment with hard labour for life.”

The Court then considered the law as regards what constitutes life sentence in respect of various jurisdictions and the inconsistency in our jurisdiction in respect of the sentences being meted out in substitution for life sentence, and then sated:-

“Nevertheless, what is exceedingly rare, as we are unable to find any, is a sentence of twenty years or more in substitution for life imprisonment even in sexual offences as the law stood before July 2006. If the ends of justice were served by imposing lesser sentences at the time, it would be unjust to the appellant in this case to depart so fundamentally from the principles of sentencing which obtained when the offence was committed. That view in no way diminishes the gravity of such offences but pays homage to certainty and consistency in the law. We think the learned trial Magistrate and the Judge of the Superior Court were unduly influenced by the new Act and applied sentencing standards which did not apply to the case before them. This reflects on the lawful nature of the sentence and thus entitles this Court to intervene.”

In short, much as on matters of severity of sentence in respect of second appeals, we have no jurisdiction, when it comes to matters of the principles of sentencing so as to ensure certainty and consistency of the sentencing in the country, this Court must accept that these are matters of law and hence we are in law entitled to intervene.

In the case before us, we think these principles were not adhered to by the trial Court and by the superior court. That being the case, this Court is obliged to intervene. We set aside the sentence of *30 years imprisonment* imposed on the appellant and substitute therefor a term of imprisonment for ***eighteen (18) years*** with hard labour from the date of his conviction by the trial Court which was *3rd November, 2005*. To that extent only, shall this appeal succeed. It is otherwise dismissed.

Dated and delivered at Kisumu this 19th day of June, 2009.

E.O. O’KUBASU

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR