



IN THE COURT OF APPEAL OF KENYA

AT ELDORET

CRIMINAL APPEAL 69 OF 2006

MARK WANJALA WANYAMA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kitale (Karanja, J) dated 16th February, 2006

in

H.C. Criminal Appeal No. 48 'A' of 2005)

JUDGMENT OF THE COURT

This is a second and last appeal. The appellant, **Mark Wanjala Wanyama**, was charged in the subordinate court with the offence of defilement of a girl contrary to **section 145(1)** of the Penal Code. The particulars of the offence were:

“Between the nights of 15th and 16th November, 2003 at H[particulars withheld]Farm in Trans-Nzoia District within the Rift Valley Province, unlawfully had carnal knowledge of WN, a girl under the age of sixteen years.”

He pleaded not guilty but after full hearing, the learned Senior Principal Magistrate (H.I. Ong’undi) found him guilty as charged, convicted him and sentenced him to life imprisonment. He was not satisfied with that conviction and sentence and so he appealed to the superior court against both conviction and sentence. That appeal was heard by a single Judge of the superior court (W. Karanja J.) who after hearing it, dismissed the appeal on conviction but sustained the appeal on sentence and reduced the sentence to that of imprisonment for a period of 25 years. He was still dissatisfied and hence this appeal premised on three grounds set out in a supplementary memorandum of appeal filed by the appellant’s advocates on 22nd September 2008. The original memorandum of appeal filed by the appellant in person and the supplementary memorandum of appeal filed on 2nd April 2008 were both abandoned at the time of hearing the appeal on 23rd September 2008. The three grounds relied on by the appellant read as follows:

“1. The first appellate court failed to reconsider the evidence, reevaluate it and draw its own

conclusions.

2. **The first appeal was heard in contravention of section 359(1) of the Criminal Procedure Code Chapter 75 of the Laws of Kenya.**

3. **The appellant was detained in police custody in excess of 24 hours in contravention of section 36 of the Criminal Procedure Code Chapter 75 of the Laws of Kenya as well as section 72(3) of the Constitution of Kenya.”**

Brief facts as can be deciphered from the record are that the victim, WN (PW 1) a minor, who in evidence gave her age as 12 years, and her cousin SN, aged 11 years, were on 15th November 2003 asleep in their father's house. Their parents had gone away to a funeral. They had locked the door from inside. That house in which they were sleeping had three rooms and three windows. As they slept, the appellant entered their room through one of the windows which he had broken. The appellant positioned himself between the two young girls. He had a knife. He warned WN that he would kill her if she screamed. He removed WN's pants and his pants and then held WN's legs apart and had sexual intercourse with WN. WN felt a lot of pain as the appellant had sex with her for a long time. SN (PW 2) was woken up by WN as WN was still being raped. SN attempted to go outside but the appellant restrained her threatening to kill her if she did so. At one time, the appellant held WN hands and they went outside as the appellant wanted to relieve himself. They then went back to the house. They went to bed together and the appellant fell asleep. WN sneaked out and ran to her grandmother's house where EN (PW 4) accommodated her for the remaining part of that night. The following morning EN and WN reported the incident to the appellant's father. WN said the appellant was well known to her prior to that incident. She knew him very well and could recognize him even by voice. On that day, WN claimed to have recognized the appellant when they went outside when the appellant went to relieve himself. When WN's mother JM (PW 3) returned, WN told her what had happened. JN in her evidence confirmed having received information about the alleged offence on her daughter. She checked Winnie's private parts and saw mucus-like substance in her vagina. She took her to hospital but the doctor was not there. She reported to the Chief, Patrick Kibieno Bosire (PW 6) who looked for the appellant and arrested him on that day and took him to Cherangani Police Station. Meanwhile, on 17th November 2003, WN was taken to Kitale District Hospital where she was examined by Chrisantus Masinde (PW 5) a clinical officer at that hospital, who, on examining WN, found bruises on *labia minora* and *majora*, torn hymen which was still fresh, white foul smelling discharge and also bacteria was present. He formed the opinion that WN had been defiled.

On being charged with the offence and after the prosecution witnesses had been heard, the appellant in his defence stated that the complainants are related to his step-mother, who, together with his father, did not like him. It was his father who, as a result of hate for him, arranged for the complainant's uncle to arrest him and was forcing him to admit the charge but he refused. In short, he traced his tribulations to his father and step mother's dislike for him and felt he was being framed.

The above facts were analysed and evaluated by both the trial court and the superior court and both courts reached concurrent conclusion that the appellant was guilty of the offence as charged. We are of the firm view that WN properly recognised the appellant whom she had known very well and whom she saw when she was taken out by the appellant when the appellant went out for a call of nature. However, before us, Mr. Otieno, learned counsel for the appellant, raised several legal issues in support of the appellant's contention that he was entitled to acquittal. These were mainly, that the learned Judge should not have heard the appeal as a single Judge as she had no authority to do so in law; that as whoever investigated the case was not called to testify at the trial, the case was not investigated and thus not presented to the court; that the medical evidence should not have been admitted as it was evidence given by a clinical officer who, in law, had no authority to examine the complainant for purposes of prosecution of the appellant and that the appellant's constitutional rights were violated as he was not produced before any court of law within the time prescribed by law contrary to **section 36** of the Criminal Procedure Code as this was a bailable offence and contrary to **section 72(3)** of the Constitution.

Mr. Omutelema, the learned Senior Principal State Counsel, on the other hand, while conceding the

appeal, did so on a different ground altogether. In his submission, the conviction and sentence cannot stand mainly because the learned trial Magistrate did not comply with the provisions of **section 19** of the Oaths and Statutory Declaration Act, Chapter 15 of the Laws of Kenya as the complainant, on whose evidence the appellant was convicted, was affirmed after the court had made a finding that the complainant did not understand the seriousness of an oath. In doing so, he contended, the learned Magistrate failed to appreciate that in law, affirmation is the same as an oath except that affirmation according to the law takes place under certain circumstances such as when a witness does not subscribe to any religion e.t.c. On the issue of delay to take the appellant to court in time, Mr. Omutelema's position was that the issue was brought late in time and therefore no proper investigation could be done to ascertain the reason for the delay to take the appellant to court. He, however, agreed that there was delay in presenting the appellant to court. On whether evidence by a clinical officer should be admitted or not in such a case as the one before us, his view was that clinical officers handle patients and are therefore competent to give evidence on their findings on such patients and, lastly, he argued that as the learned Judge admitted the appeal to hearing by a single judge and she proceeded to so hear the appeal, it can be assumed that she had authority to do so.

We have anxiously considered the record of appeal, the judgment of the trial court and the superior court, the able submissions by the learned counsel both for the appellant and for the State as well as the law obtaining. For the reasons that will be apparent hereafter in this judgment, we do not intend to delve into the issues as to whether the learned Judge of the superior court had authority or not to hear the appeal as a single judge; whether the failure to avail the investigation officer as a witness affected the case as a whole or not; whether the evidence of a clinical officer is admissible in cases such as the one before us and whether the evidence of the complainant should have been relied on for conviction of the appellant, it having been obtained through affirmation after the court found the complainant not fit to give evidence on oath. We observe, however, that the learned Judge admitted the appeal from the subordinate court on 12th September 2005. However, in so admitting the appeal, the learned Judge of the superior court was silent as to whether the appeal should have been heard by a single Judge or by two Judges as is the requirement under **section 359(1)** of the Criminal Procedure Code. This rightly resulted into confusion and we appreciate Mr. Otieno's concern as, going by what the learned Judge recorded when admitting the appeal to hearing, it became difficult to know whether she had authority as provided under that section or not to direct the appeal to be heard by a single Judge. We are of the view that whenever a judge of the superior court is admitting an appeal to hearing, the judge should be specific as to whether the appeal is to be heard by a single judge or not. Having said so, we note that Mr. Otieno alleged that the learned Judge had no authority to admit the appeal to be heard by a single judge, but he was not able to authenticate that allegation. That being the case, we cannot conclusively say she had no such authority and that issue cannot be taken further. Secondly, we also observe that although the investigating officer was not available in court to give evidence, this omission may have mainly affected the case as to the non availability of the reasons for delay in taking the appellant to court. We will deal with that aspect more in details hereafter. However, in our view, the mere fact that the investigation officer was not called as a witness could not have affected the entire case if there was enough evidence upon which the court could have convicted the appellant – see the case of **Bukenya and others vs Uganda (1972) EA 549**. In any case, the appellant was in court through a process of law which was not challenged. That ground, in our view, cannot advance the appellant's case save for (as we have said) what we will state later in this judgment. As to whether the clinical officer's evidence should have been admitted, we observe that that evidence was on the medical condition of the complainant when she was handled by the clinical officer. It was based on facts and on the expert knowledge of the witness. The weight of evidence attached to such evidence could be different from the weight attached to the evidence of a qualified doctor but that is beside the point. That evidence, whatever weight was given to it, could not, in our view, be ignored merely because it proceeded from a witness covered by a different Act from that under which the doctors are specified. If the evidence of the clinical officers were to be declared inadmissible in law, then we are at a loss as to how many such cases of rape, and assault, would see justice done to them in Kenya? We say so because we take judicial notice of the fact that in Kenya, very few medical facilities are manned by qualified doctors. We do not see any merit in that ground.

We now turn to the third and final ground in support of this appeal. We have reproduced it above. It states as we have stated above, that the appellant's constitutional rights were violated as he was detained

in police custody in excess of 24 hours in contravention of **section 36** of the Criminal Procedure Code Chapter 75 of the laws of Kenya as well as **section 72(3)** of the Constitution of Kenya. The charge sheet in the record shows that the appellant was arrested on 16th November 2003 and was produced in court on 20th November, four days after arrest. Mr. Omutelema concedes that much. Chief Patrick Kibieno Bosire said he arrested the appellant on 20th November, 2003. That cannot be true because the same chief said he acted on the matter on the same day it was reported to him by the mother of WN, and the mother of Nelima JN(PW 3) said in her evidence that she was informed of the incident on 16th November 2003 at 4.00 p.m. and reported the matter to the chief that same evening. In any case, the chief could not be right because it was on 20th November 2003 the record shows the appellant was produced in court and that was probably in the morning of that day. Thus, the factual position is as accepted by both counsel that the accused was kept in custody for four days before being produced in court. **Section 72(3)** is one of the provisions in Chapter V of the Constitution. Chapter V is headed:

“Protection of Fundamental Rights and Freedom of the Individual.”

Section 72 states at the foot note that it is dealing with “protection of right to personal liberty.” **Section 72(3)** states:

“A person who is arrested or detained –

(a) for the purpose of bringing him before a court in execution of the order of a court: or

(b) upon reasonable suspicion of his having committed, or being about to commit a criminal offence, and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within twenty four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provision of this subsection has been complied with.”

The fact that the appellant was facing an offence that does not carry death sentence is not in dispute. In that case, the provision of the constitution is that he should have been brought to court within twenty four hours of his arrest. He was not brought within that time. He says through his counsel that the provisions were not complied with i.e. that notwithstanding that he was not brought to court within twenty four hours, he was also not brought to court as soon as possible. Who then is saying he was brought to court as soon as possible? Though Mr. Omutelema is not saying so in specific words, we understand him to be saying that in order to be able to say so, the complaint needed to have been brought earlier, say before the trial court. At that time, matters would have been fresh and he would have been able to show that notwithstanding the delay beyond twenty four hours, nonetheless, as a result of various circumstances, he was brought to court as soon as reasonably practicable. But because the matter has been raised too late in time, the prosecution is no longer in a position to respond positively.

In our view, when a person is arrested, records are kept for his movement from the time of his arrest to the time the case is finalized. Those records, such as the occurrence book (OB), should exist at the police station just like the other records. If the matter is raised and the prosecution feels it is raised late in time, and when it is not prepared to address reasons to show the appellant was brought to court in time, or as soon as practicable, then all the prosecution needs to do is apply for time to be able to go through the records and help the court establish that notwithstanding the twenty four hours or the fourteen days, as the case may be, nevertheless, the appellant, on circumstances, was brought to court as soon as practicable. In that way, the prosecution will have discharged the burden placed upon it, if it is the one claiming that the appellant was brought to court as soon as reasonably practicable. The question of deprivation of a constitutional right is a matter of law and this Court cannot stop an appellant from raising it in his last appeal simply because it was not raised at the trial court or at the first appellate court. Neither can this Court down its tools on the mere reason that a legal point is being raised before it for the first time. That

would be abdication of our powers. The issue was raised, and the prosecution, which produced the appellant in court after twenty four hours, is not able to show that that was as soon as reasonably practicable. That being the case, this Court has no reason to reject the appellant's contention that his rights were violated. It does appear to us that the Legislature was aware that the period of twenty four hours stated in the Constitution for bailable offences, such as the matter before us, was too short and did not allow for fair and full investigations. It is however noteworthy that all it did was to provide, through an Act of Parliament, namely Criminal Procedure Code, what would be done in such circumstances. **Section 36** of the Criminal Procedure Code provides as follows:

“36. When a person has been taken into custody without a warrant for an offence other than murder or treason, the officer in charge of the police station to which the person has been brought may in any case and shall, if it does not appear practicable to bring that person before an appropriate subordinate court within twenty-four hours after he has been so taken into custody, inquire into the case, and, unless the offence appears to the officer to be of a serious nature, release the person on his executing a bond, with or without sureties, for a reasonable amount to appear before a subordinate court at a time and place to be named in the bond, but where a person is retained in custody he shall be brought before a subordinate court as soon as practicable:

Provided that an officer in charge of a police station may release a person arrested on suspicion on a charge of committing an offence, when, after due police inquiry, insufficient evidence is, in his opinion, disclosed on which to proceed with the charge”

In this case, there was a delay of about three days as the appellant was arrested on 16th November 2003 which Mr. Otieno says was a Sunday and was due to be produced in court on Monday 17th November 2003 but he was produced in court on Thursday 20th November 2003. No reason has been given to demonstrate that although he was not produced in court within twenty four hours, he was nonetheless produced in court as soon as was reasonably practicable. In the now well known case of **Albanus Mwasia Mutua vs. Republic – Criminal Appeal No. 120 of 2004** (unreported), this Court stated (with Githinji J.A dissenting) as follows:

“The jurisprudence which emerges from the cases we have cited in the judgment appears to be that an unexplained violation of constitutional right will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced in support of the charge. In this appeal, the police violated the constitutional right of the appellant by detaining him in their custody for a whole eight months and that, apart from violating his rights under section 72(3) (b) of the Constitution, also amounted to a violation of his rights under section 77(1) of the Constitution which guarantees to him a fair hearing within reasonable time. The appellant's appeal must succeed on that ground alone.”

In the case of **Gerald Macharia Githuku vs. Republic – Criminal Appeal No. 119 of 2004** (unreported), the delay was for only three days like in our case although the charge in **Githuku's** case was robbery with violence and so he could be held in custody upto fourteen days, whereas in this case, the period specified is twenty four hours, nonetheless, this Court followed **Mutua's** case and the appellant was acquitted on the ground of inordinate and unexplained delay. Lastly, in the case of **Paul Mwangi Murunga vs. Republic - Cr. Appeal No. 35 of 2006** (unreported), this Court stated (with Githinji J.A dissenting) that:

“So long as the explanation proffered is reasonable and acceptable, no problem would arise. Again, the Court might well countenance a delay of say one or two days as not being inordinate and leave the matter at that. In this appeal, we are of the view that a delay of some ten days which remains totally unexplained was too long in the circumstances and we must follow the decision of the Court in **MUTUA's case.”**

Likewise, in this case, where the appellant was to be produced in court within twenty four hours of his arrest on 16th November 2003 but was not produced in court till 20th November 2003, and no reasonable

explanation has been offered to demonstrate that 20th November 2003 was the most reasonable practicable date when he could have been produced, we think his constitutional rights were violated and, much as we are completely unhappy with his alleged actions that landed him in court, he nonetheless is entitled to his liberty.

The upshot of the foregoing is that we allow this appeal, quash the conviction recorded against the appellant and set aside the sentence imposed on him. We order that the appellant be and is hereby set at liberty forthwith unless otherwise lawfully held.

This judgment has been delivered pursuant to rule 32(2) of the Court of Appeal Rules. The Hon. Lady Justice Aluoch has not signed it.

Dated and delivered at Eldoret this 7th day of November, 2008.

E.O. O’KUBASU

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

J. ALUOCH

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR