



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT MOMBASA

(CORAM:OMOLO, GITHINJI & DEVERELL, JJ.A.)

Criminal Appeal 131 of 2004

BETWEEN

PENGINEPO HASSAN KUVUAAPPELLANT

AND

REPUBLIC RESPONDENT

(Appeal against the Judgment of the High Court of Kenya at
Mombasa (Khaminwa, J) dated 20th July, 2004

in

H.C.CR.A. NO. 15 OF 2004

JUDGMENT OF THE COURT

In his second appeal to this Court, Penginepo Hassan Kuvua, the appellant hereinafter, raises two issues of law against his conviction and sentence by a Senior Resident Magistrate at Kwale on two counts of defilement under **section 145 (1)** of the Penal Code. In the first count, it was alleged that on 22nd day of November, 2002 at [*particulars withheld*] Village, Diani Location, in Kwale District, the appellant had unlawful carnal knowledge of M.A., a girl under the age of fourteen years while in the second count it was alleged that on the same day at the same place, the appellant had unlawful carnal knowledge of M.M., a girl under the age of fourteen years. At the time of the alleged offences, the girl named in the first count and who testified on oath before the Magistrate as P.W.1 was only eight (8) years old while the second girl in the second count was only five (5) years old. She gave unsworn evidence as P.W2. The trial Magistrate accepted the prosecution’s version of the case, convicted the appellant on the two counts and sentenced him to a term of twenty years imprisonment on each count, the sentences being ordered to run concurrently. The appellant appealed to the High Court at Mombasa, and by her Judgment dated and delivered on 20th July, 2004, Khaminwa J. dismissed the appeal against the conviction but reduced the prison sentence to fourteen years on each count to run concurrently. The appellant now appeals to us a second time and that being so, the Court can only deal with issues of law.

The first issue of law raised by the appellant and which Mr. Monda, learned State Counsel, conceded on behalf of the Republic was that the appellant’s trial before the Magistrate was a nullity. The appellant asked us to acquit him on that basis while Mr. Monda asked us to order a retrial of the appellant. The issue arises in this manner.

The appellant first appeared in Court on 28th November, 2002 and the record of the trial court shows that the Magistrate before whom the appellant appeared was one S.S. Maindi , District Magistrate II. The court prosecutor before the said Magistrate is shown as police constable Yegon. The two charges of defilement were read out to the appellant by the Magistrate and the appellant pleaded not guilty to each one of them. The matter was then adjourned and subsequently mentioned on several occasions, one such mention being on 16th December, 2002 before the same Magistrate who had purported to record the appellant's plea and the prosecutor being Constable Yegon. The other mentions were before a different Magistrate L. N. Mbatia, before whom the trial of the appellant eventually started on 30th January, 2003. L.N. Mbatia was then a Senior Resident Magistrate and the prosecutor in her court is shown as Police Inspector Mutangili. Now, the Magistrate who recorded the appellant's plea, being a District Magistrate II, did not have jurisdiction to try a charge of defilement. Section 8(1) of the Magistrates' Courts Act, Chapter 10 of the Laws of Kenya, which deals with the criminal jurisdiction of District Magistrates provides:-

“A district magistrate’s court shall have and exercise such jurisdiction and powers in proceedings of a criminal nature as are for the time being conferred on district magistrates’ courts by:-

(a) the Criminal Procedure Code; or

(b) an order under sub-section (2) of this section; or

(c) any other written law.”

Sub-section (2) mentioned in paragraph (b) of section 8(1) deals with the power of the Chief Justice to confer jurisdiction on third class district magistrates to deal with certain offences. Then section 7(3) of the Criminal Procedure Code, Chapter 75 Laws of Kenya, provides as follows in respect of the criminal jurisdiction of a District Magistrate II:-

“7(3) A subordinate court of the second class may pass the following sentences in cases where they are authorized by law:-

(a) imprisonment for a term not exceeding two years;

(b) a fine not exceeding ten thousand Shillings

(c) (repealed).”

Next is the 1st Schedule to the Criminal Procedure Code which shows what offences are triable by what courts and the sentences which can be imposed by such courts. The offence under **section 145(1)** of the Penal Code is shown as being triable by a subordinate court of the first class. A District Magistrate II is a subordinate court of the second class. So Mr. Maindi who took the plea, of the appellant had no jurisdiction to do so. Police Constable Yegon, under the authority of **ELIREMA & ANOTHER V. REPUBLIC {2003} 1 EA 50** had no power to conduct any prosecutions. So there was really no valid plea taken from the appellant when he first appeared before the court on 28th November, 2002. M/s Mbatia who tried him did not take any plea from him on the various dates the appellant appeared before her for mention and even on 30th January, 2003 when the trial of the appellant commenced before her. It is on this basis that the appellant contended and Mr. Monda agreed with him that his trial was a nullity. Is that contention correct?

We must admit that the matter caused us very considerable anxiety, but in the end, we have come to the conclusion that the appellant's trial in the subordinate court was not a nullity. No trial took place on the 28th November, 2002. What went on in court on that day, was all a nullity. The Magistrate did not have power to try the appellant, and his purported recording of the plea must be ignored as a nullity. That Magistrate subsequently mentioned the case on 16th December, 2002, 31st December, 2002 and on 14th January, 2003. But no one can seriously treat the mention of a case as being the same thing as the trial of

the case. The proper trial of the appellant opened before M/s Mbatia on 30th January, 2003 and she herself had jurisdiction to try the appellant and Inspector Mutangili was entitled to prosecute the case. True M/s Mbatia did not formally record any plea from the appellant but it is clear to us that the appellant was not admitting the offences against him. Witnesses were called and testified in the appellant's hearing; he cross-examined them and in the end he himself gave sworn evidence denying his involvement in the crimes charged against him. In those circumstances, it would be unreasonable and wholly artificial to hold that the failure by the trial Magistrate to record a formal plea of not guilty from the appellant invalidated his trial. It is clearly implicit from the record that the appellant would have pleaded not guilty to the charges had M/s Mbatia read them out to him. The position would have been totally different if the appellant had purported to plead guilty before the first Magistrate and M/s Mbatia then merely took over to record the facts in support of the charges without having herself read out and explained the charges to the appellant. If in those supposed circumstances she had purported to find the appellant guilty on his own plea, the conviction arising from such proceedings would have inevitably been quashed. But in the circumstances prevailing in this case which circumstances clearly show that the appellant denied the offences, we are unable to agree with the appellant and Mr. Monda, that the failure by M/s Mbatia to formally read out the charges to the appellant and record his answer to those charges rendered his trial before M/s Mbatia a nullity. The failure, in our view, is an irregularity curable under section 382 of the Criminal Procedure Code. Accordingly, we reject the first point of law raised by the appellant and conceded by the Republic, that the trial of the appellant was a nullity. It was not.

The second issue of law raised by the appellant was of course that the charges against him was not proved as required by law. While conceding before us that there was ample evidence that the two young girls had been sexually molested, the appellant nevertheless contended that there was no corroborative evidence to support that of the young girls that it was him who sexually molested them. The second girl was found to be suffering from some sexually transmitted disease and the appellant contended before us that he also ought to have been medically examined to determine if he was suffering from a similar ailment. It is clear from the record that the appellant raised this issue before the trial court, for in his cross-examination by Police Constable Nancy Karanja, (P.W.6) , that witness was forced to state as follows:-

“We took you to hospital but did not find a doctor. There are documents to show you were also examined. They are in the office. You were examined in Msambweni Hospital. Dr. Ochieng examined you. I am sure.”

Then the appellant stated:-

“Accused: I would like documents to show a DNA Test was conducted on me.

P.W.6: I can produce the evidence.

Pros: In that case I apply for adjournment to enable witness produce that evidence.

Court: Adjournment granted. Further hearing 21st March, 2003.”

When the hearing resumed, Constable Nancy had no documents to produce and in further cross-examination by the appellant, the witness stated thus:

“I had not understood your question that is why I said the Tests had been done. I thought your question was on venereal diseases or HIV not DNA. The doctor confirmed the offence had been committed. Only the doctor could say whether you are the one who had defiled the girls. No one threatened you. I have no grudge against you.”

What is clear from the foregoing is that the appellant was not examined by a doctor to find out if he was suffering from a disease similar to that found with the second girl. We doubt very much if any doctor would have been in a position to say that it was the appellant who had defiled the girls as constable Nancy appeared to think but the truth of the matter is that even in the absence of a medical report on the appellant's health, there was other evidence which supported the prosecution's contention that it was the

appellant who had sexually molested the two young girls. The first girl M. M. who gave evidence on oath narrated how the appellant met them at a water hole, filled their jericans for them and asked them to go home with him. They agreed and on the way, he sexually molested them. He was their neighbour and they knew him well. In his own evidence the appellant agreed that he found the two girls at the bore-hole, helped them fill their jericans with water, but pointedly left out the issue of whether he left them at the borehole or walked home with them as the girls stated. The girls were found to have been sexually molested on that day and there was no evidence of any other man having been with them that day. This evidence was accepted by the trial Magistrate and confirmed by the High Court. There can be no legal basis for our finding otherwise. The admission by the appellant that he had been in the company of the two girls at about the time they were sexually assaulted corroborated the evidence of the two girls that it was the appellant who was guilty of the assault upon each one of them.

In our view, the appellant was correctly convicted on the two charges and we see no reason for interfering. We dismiss his appeal against the conviction on each count.

The sentence of fourteen years imprisonment imposed on him by the High Court is lawful except that the learned Judge failed to order that the sentence be served with hard labour as required by the law. We accordingly order that the sentence of fourteen years imprisonment is to be served with hard labour. Except for that amendment, the appeal against the sentence is also dismissed.

Dated and delivered at Mombasa this 29th day of July, 2005.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

W.S. DEVERELL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.