



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: GICHERU, BOSIRE & OWUOR, JJ.A.)

CRIMINAL APPEAL NO. 71 OF 2000

BETWEEN

JUMA KALIO APPELLANT

AND

REPUBLICRESPONDENT

Appeal from a conviction and sentence of the High Court of Kenya at Mombasa (Waki, J.) dated 26th November, 1999

in

H.C.CR.A. NO. 53 OF 1998)

JUDGMENT OF THE COURT

The appellant Juma Kalio was charged with the offence of defilement of a girl contrary to section 145(1) of the Penal Code and a second count of unnatural offence contrary to section 162(a) of the Penal Code. He was convicted of the offence of defilement and sentenced to eight years imprisonment plus two strokes of the cane by Aburili (Senior Principal Magistrate) on 12th March, 1998.

His first appeal was dismissed by the superior court (Waki, J.) on 26th November, 1999 but the sentence varied only to the extent that the imprisonment would be served with hard labour. He has appealed to this Court, his appeal being a second appeal, it can only be on a point of law in terms of section 361(1) of the Criminal Procedure Code. Appellant appeared before us in person as was the case in the superior court and as opposed to him having been represented in the trial court. Apart from the issue of severity of sentence imposed on the appellant and which does not lie for our consideration since it is a matter of fact, the appellant's appeal was mainly canvassed on ground (3) of his Memorandum of Appeal which was couched in the following terms:

"The 2nd Judge erred in law in failing to address his judicial mind to the fact that the medical report was not presented to court by the doctor who authorised it and this denied the appellant a chance of cross - examination or of examining him."

In order for us to consider the second limb of the above ground of appeal, which in our view amounts to the assertion by the appellant that he was prejudiced by the failure to call the author of the P3 form that was produced in evidence, it is necessary to consider the evidence albeit briefly that was adduced and led

to the concurrent finding by the two lower courts that the appellant was guilty as charged.

The complainant K.K (PW 1) a young girl aged about 10 years was staying with her aunt N.N (PW 2) at [particulars withheld], Changamwe in Mombasa District.

On the material day 8th August, 1997 at about 3:30 p.m. she left her aunt's house to visit her father in the same village. On the way to her father's house she met the appellant, Juma, whom she knew well as a neighbour and grandson of their landlady. Juma engaged her in a conversation and sweet-talked her into going to his brother's home allegedly to carry some maize. Once inside the brother's house the appellant forcefully tore her dress, removed her knickers and sexually assaulted her by defiling and sodomizing her several times. At the trial the learned Magistrate found that there was no sufficient evidence to sustain the charge of unnatural offence. He acquitted the appellant on that count.

Upon Juma releasing K.K he warned her not to tell anybody. She went home to her aunt's house bleeding and crying. Her aunt N.N (PW 2) came back home to find a child injured, bleeding from her private parts and crying. K.K reported to N.N that she had been defiled by Juma. N.N took her to a private doctor, but on 10th August, 1997 she took the child to Changamwe Police Station and reported the matter to P.C. Musyoka (PW 4), who took the report, filled a P3 form and took K.K to Coast General Hospital for Medical Examination.

The appellant was arrested by a neighbour M.N (PW 3) and taken to the Police Station. P.C. Musyoka produced the P3 form in evidence in his capacity as the Investigation Officer. He merely stated in court

"I have a P3 I wish to produce Court P3 Form - Exh1."

The record does not indicate that there was any objection or demand by the appellant to cross-examine the author of the P3 Form. Nor is it indicated that the court notified the appellant of his right to do so if he so wished.

In his unsworn statement the appellant testified that he did not defile K.K. Differences had arisen between him and K.K and N.N when he asked her to vacate the room she was occupying for the same to be repaired. His denial notwithstanding, several meetings were held between the families in order to reach a settlement. He was surprised when he was arrested on 9th September, 1997. As correctly observed by the learned judge of the superior court families in particular custodians of children of tender age have no business in-law to settle or enter into negotiations in cases of criminal nature involving sexual assaults upon children. The negotiations that went on in this case were outrightly unlawful.

The learned Magistrate as required of him and being sensitive to the fact that he was receiving evidence from a child of tender years examined the child and satisfied himself that she was a competent witness. He recorded his finding as follows

"Accused (meaning the complainant w e believe) is 10 years. She does not go to school. Appears reasonable in speech."

The Magistrate was equally alive to the fact that the complainant being a child of tender years her evidence could not be relied on to form a basis for conviction unless the same was corroborated, **Section 124 of the Evidence Act Cap 80.**

The trial court warned itself that it was dealing with the evidence of a child of tender age and it was incumbent upon it to seek and find corroboration upon which to base the conviction. It found corroboration in the unrebutted evidence of N.N, that the appellant admitted defiling the complainant but blamed it on the devil in him. Secondly his willingness and participation in the so called meetings with the clan to solve the matter at home and finally the clear medical evidence that the complainant was indeed sexually assaulted and her private parts injured in the process. In our view the learned Magistrate and the judge of the superior court properly found that there was sufficient corroboration in the evidence on record.

As we have indicated before, the main complaint in this appeal is that the medical report, P3 form was tendered into evidence by P.C. Musyoka who was not the author. In that regard the appellant was denied an opportunity to cross-examine the author. The record indicates that the appellant did not challenge the finding of the trial court that the complainant was defiled. His complaint is, we believe, on the contravention of section 77(3) of the Evidence Act (Cap 80) in that the author was not summoned and availed before him for cross-examination.

The report on P3 form subject matter of the complaint is such document which under section 77 of the Act may be produced in evidence, in an appropriate case by a person other than the maker of the same. This Court has however held in earlier decisions see in particular **Boniface Karere Nderi v Republic** Criminal Appeal No. 39 of 1990, and **Njoroge Ndungu v Republic** Criminal Appeal No. 31 of 2000(un reported):-

"That the trial court is obliged after admitting the report in evidence to inform the accused particularly where he is unrepresented of his right to require the maker of the report be called to be cross -examined on its contents."

In this particular case as we have intimated the appellant was not so informed. However taking the particular circumstances of this case into consideration in that the appellant was represented by Counsel, secondly he did not dispute the fact that the complainant had been defiled and injured in the process, we are unable to find that the appellant was prejudiced in any manner.

Our view of the matter is that there is no ground upon which to depart from or interfere with the findings of the two lower courts. The appellant was properly convicted, his first appeal was properly dismissed and there is no merit in this second appeal against both convictions and sentence. We order that it be dismissed.

Dated and delivered at Mombasa this 25th day of January, 2001.

J. E. GICHERU

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JUDGE OF APPEAL

S. E. O. BOSIRE

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JUDGE OF APPEAL

E. OWUOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR