



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**CRIMINAL APPEAL NO 220 OF 2008**

**Eustace Mugo Maina.....Appellant**

**Versus**

**Republic.....Respondent**

*(Appeal against Judgement conviction and sentence imposed in Criminal Case Number 696 of 2006, Republic vs Eustace Mugo Maina at Karatina,(Judgement of Kimemia B.M, R.M. delivered by L. Mbugua AG P.M. on 20.8.2008).*

**JUDGEMENT**

The appellant herein seeks to quash the conviction and sentence passed against him by the Learned Acting Principal Magistrate in criminal case number **696 of 2006 at Karatina** delivered on 20.8.2008. In the said case the appellant was charged with the offence of defilement of a girl contrary to section **145 (1)** of the Penal Code.<sup>[1]</sup>

The particulars of the offence were that on the **19<sup>th</sup>/20<sup>th</sup>** day of June 2006 at [particulars withheld] village in Nyeri District of the Central Province Province had carnal knowledge of a girl namely **C W M** under the age of 14 years.

The appellant faced a second count of indecent assault of a girl contrary to Section **144 (1)** of the Penal Code.<sup>[2]</sup> It was alleged that on 19<sup>th</sup>/20<sup>th</sup> day of June 2006 at [particulars withheld] village in Nyeri District of the Central Province unlawfully and indecently assaulted **C W M** by touching her private parts a girl under the age of 14 years.

The prosecution called a total of five **(5)** witnesses whose evidence is summarized below. In determining this appeal, this court fully understands its duty as stated in the case of **Okeno v. R.**<sup>[3]</sup> In other words, the first appellate court must itself weigh conflicting evidence and draw its own conclusions.<sup>[4]</sup> It is the function of this court as a first appellate court to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.<sup>[5]</sup>

I now turn to the evidence adduced before the trial court:-

**PW1, C W** aged 12 years at the time of giving evidence. Her testimony was that on 19.6.06 she was coming from school with a one **A W**, then in class one when she met the appellant, that she had not met him before, he told her that her mother was cultivating his shamba, and asked her wait for her. He asked her to enter his mud house, a single room with a bed; she sat on the bed that they slept in the same bed

with the appellant. He removed her clothes and did bad manners to her and asked her not to tell anyone including her teacher and threatened to pierce her with a knife if she told anyone. She spent the night there, and the next day she went to school, her mother came to school, reported to the teachers that the girl did not sleep at home and upon being asked where she slept, she informed said “*at another lads place.*” She was taken to the Police Station and the Hospital where she was given medicine. She said the person was the accused before court.

**PW2, J N M**, the complainants’ mother testified that on 19.6.06 PW1 did not come back home from school, that she found her in school the next day, the head teacher asked her where she slept and she said behind the classroom. That they took her first to the hospital, then later she led them to the place where she slept.

**PW3 No. 51858 Lucy Macharia** attached to Karatina Police Station at the material time. On 20.9.06 was at the station when the report was made. The child said she was able to identify him. The assailant was arrested after one month of hiding and the child identified him. She confirmed that the P3 was filled and completed at the Hospital.

**PW4 Joseph Njoroge Mwangi** the local assistant chief apprehended the appellant after he was implicated in the offence and handed him over to the police.

**PW5 Doctor George Kiere Njatha** produced the P3 form. Findings on examination were that genitalia had bleeding or abrasion or injury. Hymen was broken and discharge was noted, and redness of the vaginal wall and concluded a possibility of several assault.

After evaluating the above evidence and submissions made by the defence counsel the trial magistrate was satisfied that a *prima facie* case had been established and put the accused on his defence and complied with the provisions of Section **211 C.P.C.** The accused elected to give un-sworn evidence and denied that he knew the complainant and denied defiling her.

The learned magistrate in her judgement analysed the evidence of all the witnesses and the above defence and concluded that the appellant was guilty as charged and convicted him on the first count. There is no finding on the second count in the judgement. The said judgement was recorded by the trial magistrate but was delivered by **L. Mbugua** in conformity with the provisions of Section **200 {1} (a)** of the Criminal Procedure Code.<sup>[6]</sup> The Magistrate proceeded to sentence the appellant to **10 years in jail**.

Aggrieved by the above verdict, the appellant appealed to this court seeking to quash the conviction and sentence. The appellant advanced **7** grounds of appeal. In my view, the said grounds can be summarized into two, namely **(a)** whether the evidence was sufficient to sustain a conviction; **(b)** whether the identification was free from error.

Defence Counsel **Mr. Gori** filed written submissions, he adopted the submissions made at the close of the prosecution case and the final submissions made in the lower court and maintained that the learned magistrate erred by finding that the prosecution had proved its case. He cited several inconsistencies in the prosecution evidence and maintained that there was no proper identification and recalled the inconsistencies on the names of the alleged assailant as provided by the witnesses.

The learned State Counsel **Festus Njue** also filed written submissions and urged the court to uphold the conviction and submitted that the offences were properly brought under the Penal Code<sup>[7]</sup> which was the correct statute then since as at the time of the commission of the said offence the Sexual Offences Act<sup>[8]</sup> had not come into force and that the criminal justice system does not allow a statute to operate retrospectively a position I fully agree with.<sup>[9]</sup> Learned state counsel explained that the glaring inconsistencies as to where the child slept can be attributed to fear by the child of possible repercussions of alleged threats issued by the assailant a position I respectively find hard to believe.

Counsel also concedes the inconsistencies in the names provided by **PW2** of the alleged assailant and the evident omission by the prosecution to explain the said inconsistency and or failure to sufficiently connect

the alleged assailant with the said name but explained that in spite of the said inconsistency, the complainant was able to identify the assailant. Counsel held the view that there was sufficient identification since the alleged assailant spent considerable time with the complainant. I will revisit this issue later.

Learned State Counsel also submitted that the offence was sufficiently proved.

In my view, the following are the issues for determination in this appeal, namely:-

- i. *Whether the identification was free from error.*
- ii. *Whether the evidence adduced was sufficient to support a conviction.*

With regard to identification, even though a fact may be proved by the testimony of a single witness there is a need for testing with greatest care the evidence of a single witness.<sup>[10]</sup> *Identification evidence* is defined as evidence that a defendant was or resembles a person who was present at or near a place where the offence was committed, or an act connected with the offence was committed. It is an established principle that there is a special need for caution before accepting identification evidence. In *Anil Phukan vs State of Assam*<sup>[11]</sup> it was held as follows:-

*“A conviction can be based on the testimony of a single-eye witness and there is no rule of law or evidence which says to the contrary provided the sole eye witness passed the test of reliability in basing conviction on his testimony alone”*

A similar position was reiterated by the Court of Appeal of Tanzania in *Ahmad vs The Republic*.<sup>[12]</sup> Also discussing the same issue, the Court of Appeal of Uganda in *Okwang Peter vs Uganda*<sup>[13]</sup> held as follows:-

*“Subject to certain well-known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness in respect to identification especially when it is known that the conditions favouring correct identification were difficult. In such circumstances what is needed is other evidence, whether it is circumstantial or direct, pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from possibility of error”*

The Supreme Court of Zambia in *Mwansa vs The People*<sup>[14]</sup> citing previous decisions had this to say:-

*“it is always competent to convict on evidence of a single witness if that evidence is clear and satisfactory in every respect, where the evidence in question relates to identification there is the additional risk of an honest mistake, and it is therefore necessary to test the evidence of a single witness with particular care. The honesty of the witness is not sufficient; the court must be satisfied that he is reliable in his observations.”*

*“.....The witness should specify by what features or unusual marks if any he alleges to recognize the accused and the circumstances in which the accused was observed, the state of light, the opportunity for observation, the stress of the moment should be carefully canvassed.”*

In the case of *Charles O. Maitanyi vs Republic*<sup>[15]</sup>, it was held *inter alia* that it is necessary to test the evidence of a single witness respecting to identification, and that great care should be exercised and absence of collaboration should be treated with great care. The court in the said case added as follows:-

*“.....There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his assailants, to those who come to the complainant’s aid, or to the police...if the witness received a very strong impression of the features of an assailant; the witness will be able to give some description..”*

In *Kariuki Njiru & 7 others vs Republic*<sup>[16]</sup>, the court held *inter alia* that the “law on identification is well settled, and this court has from time to time said that the evidence relating to identification must be scrutinized, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error.”

In the case of *Wamunga vs Republic*,<sup>[17]</sup> the court of appeal held as follows:-

*“.....Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of identification.”*

I must add that the law is not concerned with the number of witnesses called to prove an issue, but with the quality of the evidence submitted. A guilty verdict is permitted only if the evidence is of sufficient quality to convince a court beyond doubt that all the elements of the offence have been proven and that the identification of the accused is both truthful and accurate. With respect to whether the identification is truthful, the court must evaluate the believability of the witness who made the identification.

With respect to whether the identification is accurate, that is, not an honest mistake, the court must evaluate the witnesses' intelligence, and capacity for observation, reasoning and, and determine and satisfy itself as to whether the witness is reliable, and whether the witness had the ability to observe and remember the person in question. Further, the accuracy of a witness's testimony identifying a person also depends on the opportunity the witness had to observe and remember that person. Thus, in evaluating the accuracy of identification, the court ought to consider such factors as lighting conditions under which the witness made his or her observation, distance between the witness and the perpetrator, whether the view was obstructed, whether the witness had an opportunity to see and remember the facial features, body size, hair, skin colour and clothing, period of time the observation was made, direction the witness and the perpetrator were facing and whether the attention of the witness was distracted and if the witness had an opportunity to give the description of the offender before he was arrested and if so, to what extent did the description match those of the accused. The mental and the emotional state of the witness at the time of the offence is also relevant and more important to what extent the said conditions affect the witnesses ability to observe and accurately remember the perpetrator.

The *Zambian Supreme Court* in the case of *L. Chipulu vs The People*<sup>[18]</sup> cited with approval the *Zambian Court of Appeal* decision in the case of *Chimbini vs The People*<sup>[19]</sup> where the court says as follows in relating to single identifying witness cases:-

*‘ It is always competent to convict on the evidence of a single witness if that evidence is clear and satisfactory in every respect; where the evidence in question relates to identification there is the additional risk of an honest mistake, and it is therefore necessary to test the evidence of a single witness with particular care. The honesty of the witness is not sufficient; the court must be satisfied that he is reliable in his observation. Many factors must be taken into account, such as whether it was daytime or night time and, if the latter, the state of the light, the opportunity of the witness to observe the appellants, the circumstances in which the observation was alleged to have been made.....’*

In *R vs Turnbull and Others*<sup>[20]</sup> it was authoritatively stated:-

*‘Recognition may be more reliable than identification of a stranger, but, even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.’*

As correctly held in the various cases cited above from several jurisdictions, evidence based on identification in criminal cases can bring about miscarriage of justice and that it is of vital importance that

such evidence is examined carefully to minimize this danger. The court must warn itself of the special need for caution before convicting the defendant.

**PW1** testified that she did not know the accused before and in her own evidence she never gave any features that could lead to identifying the appellant. **PW2** evidence as that the child told her she slept behind the classroom and gave the name of the alleged assailant as Maina Kibuchi and that the accused was identified by her husband who was not called as witness to explain how he identified the accused. I am not persuaded that the evidence adduced in the lower court positively identified the Appellant and accordingly I find that it was totally unsafe to base the conviction on such evidence. Accordingly with regard to issue number one, my answer is that identification was not free from error.

I now turn to the second issue, whether the evidence adduced was sufficient to sustain a conviction. The legal burden of proof in criminal cases never leaves the prosecution's backyard. **Viscount Sankey L.C.** in the celebrated case of **Woolmington vs. DPP**[21] in a subtle and masterly fashion stated the law on legal burden of proof in criminal matters, that;

*“Through the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception...No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”*

The question that follows is whether the prosecution in this case established its case beyond reasonable doubt. This calls for close scrutiny of the evidence on record and also an examination of the defence advanced by the accused. In **Uganda vs. Sebyala & Others**,[22] the learned Judge citing relevant precedents had this to say:-

*“The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts”*

The prosecution case was largely premised on the identification evidence and having found that the evidence of identification was totally unreliable, I also find that the remaining evidence is weak to support the conviction. Thus my answer to the second issue is in the negative.

Accordingly, I find no basis to allow the conviction and sentence to stand, hence I allow the appeal. I hereby quash the conviction and set aside the sentence and order that the appellant be released forthwith unless otherwise lawfully held.

Dated at Nyeri this 27 th day of November,2015

**John M. Mativo**

**Judge**

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