N0. 222/2014

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 198 OF 2011

JUSTUS MUMO MUSAU..... APPELLANT

VERSUS

REPUBLIC ….....…..... RESPONDENT

(B*eing an appeal from the original conviction and sentence in Tawa Resident Magistrate's Court Criminal Case No. 1 of 2011 by*

Hon. J.W. Gichimu - R.M. on 28/10/2011)

J U D G M E N T

1. The appellant was charged with defilement of a child contrary to Section 8(1) as read with subsection 3 of the Sexual Offences Act No. 3 of 2006. Particulars of the offence being that on the 2nd day of January 2011 at ***[particulars withheld]*** village, [particulars withheld] location in Mbooni East District within the Makueni County, did cause his penis to penetrate the vagina of **T M N**, a child aged 14 years.

   In the alternative he is charged with Indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. Particulars of the offence being that on the 2nd day of January 2011 at ***[particulars withheld]*** village [particulars withheld]location in Mbooni East District within the Makueni County, intentionally and lawfully did an indecent act to **T M N** a child aged 14 years by touching her private parts.

2. He was tried, convicted on the main count and sentenced to serve twenty (20) years imprisonment. Being dissatisfied by the conviction and sentence he now appeals on the grounds that:

i. The learned trial magistrate erred in law and fact by relying on the evidence of a single witness that was grossly contradicted by the evidence adduced by witnesses and by failing to appreciate that the burden of proof in criminal cases was on the prosecution.
ii. The learned trial magistrate erred in law and fact by relying on hearsay evidence, uncorroborated evidence and disregarded concrete medical evidence that conclusively exonerated the appellant from the commission of the offence.
iii. The learned trial magistrate erred in law and fact by dismissing the watertight alibi defence raised by the appellant.

3. Facts of the case as presented are that on 02/01/2011 **T M N** was on her way from the market when she met the appellant. He followed her, held her blouse from behind tearing it. He covered her mouth using a scarf she had. He carried her into the bush, removed her skirt and pants then forced her to lie down. He then pushed his pair of trousers down, removed his penis and inserted it into her vagina. On finishing the commission of the act he told her to run to her home. She dressed up and said she would notify people of the eventuality. He gave her 1000/= and asked her not to tell anyone otherwise he would kill her. She declined to accept the money, went home and informed her brother's wife.
4. PW2, **F M** the mother of PW1 produced a child health card issued to her. She was born on the 18/04/1996. On learning of what had befallen her daughter she reported the matter to the administration police post. The appellant was arrested. PW1 was taken to hospital for examination. PW4, **Geoffrey Mutia** the clinical officer who examined PW1 found her genitalia normal. There was no discharge. The HIV and pregnancy test carried out were negative. She however could not control her urine. She was found suffering from fistula therefore admitted in hospital. He also examined the appellant, he had pus cells which was evidence of a bacterial infection.
5. On cross examination he said he looked at the inner wear and there were no blood stains. The hymen was missing. It was however not clearly explained as there were no blood stains. He said the hymen could have been raptured by any other thing not necessarily sexual intercourse. He did not see defilement on the complainant. The penetration was not very recent and there was no deposit of semen. Further he said that in the case of rape there is a lot of force used. The complainant was referred to Makueni District Hospital for a vaginal swab which was to identify if spermatozoa were in the inner part of the vagina. Excess friction or pregnancy could cause fistula but the complainant had been suffering from the condition for a long time. When re-examined he said he could not say if there was transmission of the pus cells because such an analysis could only be done at level 6 hospital. The appellant was arrested by PW5, **No.940828587 APC Stanley Koech**. PW6, **No. 64523 Stephen Onchari** investigated the case and charged the appellant.
6. When put on his defence the appellant gave sworn evidence. He stated that on the 2nd January 2011 he was in Nairobi. He travelled home, arriving at about 2.00 p.m. In company of his mother and aunt they went to Mukuku primary school for a board meeting as he was the organizing secretary. It turned out to be a feast therefore he excused himself as he had been invited by a friend, **Peter Maithya**. He was at the function until 8.00 p.m. He went back home at 9.00 p.m. He went to his mother's house where he was arrested. He said that he was framed up because his uncle M and the complainant's father had disagreed. He denied having known the complainant prior to his arrest.
7. He called a witness, **Peter Musyoka Maithya** who said that he had a party, the appellant was in attendance having arrived at 4.30 p.m. He argued that the appellant could not have committed the offence as he was at his home.
8. The appellant filed written submissions that he relied upon. The learned state counsel **Mrs. Abuga** submitted that it was established that the hymen was absent. It indicated that there was penetration though not recent. The offence was however committed according to her since it happened in daylight. The court observed that the complainant was truthful and confident. She argued that the presence of injuries was not a condition precedent to the offence being proved. What was important was penetration whether partial or incomplete, ejaculation or lack of it did not matter. She called upon the court to dismiss the appeal.
9. This being the first appellate court, I am duty bound to analyze and re-evaluate the evidence which was adduced before the trial court and came up with my own conclusions bearing in mind the fact that I did not have an opportunity of hearing and seeing witnesses ***(See Okeno -vs- Republic (1972) E.A 32).***
10. In this case evidence of the child health card was adduced which proved that indeed the complainant was 14 years old. Further medical evidence adduced revealed that at the time of examination, the complainant's hymen was missing. The complainant was suffering from fistula and had been undergoing treatment for that condition. This was evidence of some tissue damage. The clinical officer who examined her referred her to Makueni District Hospital where further investigations could be done. The complainant said she was treated at Makueni District Hospital but no such evidence was adduced. Therefore, there was no evidence whatsoever as to the cause

of the vaginal fistula.

11. The issue we therefore have to determine is whether the appellant defiled the complainant on the 2nd day of January 2011. Evidence on record indicates that the complainant was alone when it happened. She stated that when the appellant penetrated her she felt pain and it was her first time to engage in sexual intercourse. She however said she had been attending Mbagathi hospital for treatment as she had a problem of urine incontinence since her childhood. It was the evidence of PW2 that PW1 had a problem of controlling urine since 2002. She was admitted for two (2) months at Mbagathi hospital. She did not have a problem until the time she was defiled.
12. Soon after the incident per the complainant she dressed up. The clinical officer looked at her inner pant, it did not have any blood stains. He did not see any torn clothes. Although the hymen was missing the penetration was not recent. He did not see defilement on the complainant.

13. In reaching his finding the learned trial magistrate states thus:

"***On my part, having considered the evidence on record, I am convinced that there was penetration into the complainant's genitalia. I observed the demeanor of the complainant. She was confident even during cross examination. Her evidence was clear and consistent. I am satisfied that the complainant told the court the truth."***

14. The proviso to Section 124 of the Evidence Act, Cap 80, Laws of Kenya is clear. The court being satisfied of the truthfulness of the victim may convict following reasons recorded in proceedings. With the kind of evidence adduced the question begging is whether the trial magistrate misdirected himself?
15. This is a case where the complainant was penetrated forcibly according to her testimony but medical evidence adduced contradicted that assertion as there was no evidence of some doubt of force used. There was no evidence of defilement six (6) hours after the allegation. This evidence should have introduced a doubt to the prosecution's case. Even without considering the evidence adduced by the appellant of alibi, the prosecution had not proved beyond doubt that the complainant was defiled on the 2nd of January 2011 and by the appellant herein. The finding made by the trial magistrate was therefore a misdirection.
16. In the premises I find the appeal having merit. I do quash the appellant's conviction. I set aside the sentence meted out. Accordingly, the appellant shall be released forthwith unless otherwise lawfully held.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **25TH** day of **MARCH, 2014.**

L.N. MUTENDE

JUDGE