



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 174 OF 2007

MWANZIA MUSEMBI APPELLANT

VERSUS

REPUBLIC

(Being an appeal from the conviction and sentence of Hon. J.O. Omburah Senior Resident Magistrate delivered on 4/10/2007 in Kitui Principal Magistrate Criminal Case No. 1021 of 2005)

(Before Hon. B. Thurairaja J)

J U D G M E N T

1. The Appellant, **Mwanzia Musembi** was charged and convicted of the offence of defilement of a girl under the age of sixteen years contrary to **section 145 (1)** of the **Penal Code**.

The particulars of the offence were that on the 18th day of June 2005, at about 1.30 a.m. in **Kitui District** of the **Eastern Province**, had carnal knowledge of **KJ**, a girl under the age of sixteen years.

2. After a full trial, the Appellant was sentenced to serve twenty (20) years imprisonment.
3. The prosecution case was that on the 19th day of June 2005 at about 1.30 a.m., thugs who posed as police officers broke into the home of PW1 **JM**. They attacked him with a panga and robbed him of Kshs.11,000/=, PW1's daughter, PW3 **KJ** the complainant herein was also robbed of a wrist watch. PW1 and his wife were tied up and left behind. The assailants then commanded their daughter PW3 to walk away with them. They walked for about twenty minutes in the neighbourhood then PW3 was told to lie down and her underpants were removed. That the Appellant who was identified as one of the assailants removed his head cap and placed it over the complainant's face while his accomplice tied the complainant's hands. The two then defiled the complainant, one after the other.
4. After the assailants left, the complainant ran to a neighbour's home and called for assistance. She explained what had befallen her and was escorted home. The complainant was issued with a P3 form and escorted to **Kitui District Hospital** for examination and treatment. A report was made to the police and the Appellant who was a neighbour was arrested.
5. In his defence, the Appellant gave sworn evidence. No witnesses were called. The Appellant described himself as a mason. He stated that on the night in question, he slept at his home and was with his wife and child. That the following day he left his house to go to town to carry out some work at a construction site. At about 10.00 a.m. he was arrested by police officers who

- escorted him to **Kitui Police Station**. The Appellant who did not know the reasons for his arrest was placed in police custody and later arraigned in court. The Appellant denied the offence.
6. The Appellant was aggrieved by both the conviction and sentence and appealed to this court. During the hearing of the appeal, the Appellant opted to rely on his amended grounds of appeal and written submissions. The grounds of appeal can be summarized as follows:-
 - v. **That the prosecution case was not proved beyond reasonable doubt.**
 - v. **That there was no opportunity for the complainant to see the molesters during the defilement.**
 - v. **That the origin of the complainant's bacterial infection was unknown.**
 7. During the hearing of the appeal the Appellant emphasized that the moonlight was not sufficient light for positive identification without any error; that crucial witness were not called; that the complainant did not mention his name to the neighbours where she ran for assistance and that the complainant's evidence lacked corroboration.
 8. The learned counsel for the State opposed the appeal. It was submitted that this was a case of recognition and that there was sufficient moonlight outside. That the prosecution case was proved and there was no reason for a frame-up.
 9. This being a first appeal, this court is duty bound to re-evaluate the evidence and the record afresh and come to its own conclusions and inferences – *See Okeno –vs- Republic (1972) EA 32.*
 10. The complainant, **KJ (PW3)** testified in court that she was a thirteen year old school girl at the material time. The complainant described her ordeal during the robbery at their home and her being abducted by the robbers who later defiled her repeatedly. It was the complainant's evidence that the assailants had spent about 1½ hours at their home and that she walked with the assailants for a period of about twenty (20) minutes up to the scene where she was defiled. The complainant described the source of light as moonlight, stating that she saw the Appellant who she knew as a neighbour. According to the complainant, the Appellant had once carried out some construction work at their home and she even knew his home.
 11. The complainant's evidence left no doubt that she was defiled. According to the complainant, she was instructed to lie down then her underpants were removed and the Appellant and his accomplice "**raped**" her in turns. Although the complainant's evidence was that a head cap was placed on her face, she had sufficient opportunity to see her assailants during the attack at their home and during the long walk to the scene where the defilement took place. It is noteworthy that the head cap was only placed on her face during the actual defilement.
 12. The complainant's evidence was corroborated by that of her father PW1 **JM** and her mother PW2 **JK**. The parents' evidence confirmed that the robbery took place and the robbers abducted the complainant and left with her. That the complainant immediately after being released reported that she had been defiled and mentioned the Appellant. The matter was reported to the police and the complainant taken to hospital. It is also clear from the evidence that the Appellant was a neighbour.
 13. The evidence of PW7, **PC (W) Veronica Kapoko** confirmed that a report was made at **Kitui Police Station** and the complainant issued with a P3 form and taken to hospital and the Appellant later arrested by members of public. The Clinical Officer, PW9 **Charles Mutuku** examined the complainant. His evidence was that the complainant's hymen was broken. His conclusion was that there was vaginal penetration. The Clinical Officer filled in the P3 form and assessed the complainant's age as sixteen (16) years.
 14. The defence by the Appellant that he was at home at the material time with his wife and child did not create any doubts on the prosecution evidence. There are no reasons that emerge from the record why the complainant would frame him up. The trial magistrate who had the advantage of observing the complainant's demeanour believed her evidence. I have found no reason to doubt the same. The complainant's encounter with the Appellant was in close proximity for about two hours. According to the complainant the moonlight was sufficient and it was clear. I am satisfied that the circumstances were favourable for recognition without any possibility of error. As stated by the Court of Appeal in the case of **Anjononi & Ano –vs- Republic 1980 KLR :-**

“A case of recognition, not identification is more satisfactory, more assuring and

more reliable than that of identification of a stranger because it depends on the personal knowledge of the assailant in one form or the other.”

15. From the evidence on record, it is clear that the Appellant was arrested by members of public and escorted to the police station. The members of public who arrested the Appellant and the neighbours to whom the complainant rushed for assistance are not crucial witnesses. The failure to call them as witnesses was not fatal to the prosecution case.
16. One of the grounds of appeal is that the complainant’s evidence lacked corroboration. However, the proviso to **section 124 of the Evidence Act Cap 80 Laws of Kenya** stipulates as follows:-

Provided that where in a Criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

17. The Appellant also raised the issue of the lack of proof of the source of the bacterial infection that the Clinical Officer testified that the complainant had. However, the **Court of Appeal** in the case of **Kavoi Kiilu –vs- Republic (2010) e KLR** the stated as follows:-

“Under section 2 of the Clinical Officers Act (Training, Registration and Licensing Act Cap 260 (LOK) a clinical officer means:-

“a person who, having successfully undergone a prescribed course of training in an approved training institution, is a holder of a certificate issued by that institution and is registered under the Act.....”

Section 7(4) of the Act States:-

“A person who is registered by the council shall be entitled to render medical or dental services in any medical institution in Kenya approved for the purposes of this section by the Minister by Notice in the Gazette.”

The Act goes further to provide that such officers may engage in private practice “in the practice of medicine, dentistry or health work for a fee.” It follows that the clinical officer did testify in this case on his area of competence.”

18. Having evaluated the case from both the prosecution and the defence, I am satisfied that the prosecution case was proved beyond reasonable doubts. The sentence is within the law. The appeal has no merits and I dismiss the same and uphold the conviction and sentence.

B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 30th day of October 2014.

B. THURANIRA JADEN

JUDGE