REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 144 OF 2009

MUTEMI KITAU .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Kitui Senior Principal Magistrate's Court Criminal Case No. 127 of 2009 by Hon. T.M. Mwangi. RM on 6/8/2009)

JUDGEMENT

1. **Mutemi Kitau,** the appellant is charged with the offence of defilement of an imbecile contrary to Section 146 of the Penal Code. Particulars of the offence being that on 16th day of January, 2007 at around 6.00pm in Kitui District of the Eastern Province unlawfully had carnal knowledge of **M M** while knowing that she was an imbecile.
2. In the alternative count, the appellant was charged with the offence of indecent assault on female contrary to Section 144(1) of the Penal Code. The particulars of the offence being that on the 16th day of January, 2007 at around 6.00pm in Kitui District of the Eastern Province, unlawfully and indecently assaulted **M M** an imbecile by touching her private parts namely vagina.
3. He was tried convicted and sentenced to 13 years imprisonment on the main count.
4. Being aggrieved by the conviction and sentence he appealed on the grounds that the prosecution did not prove beyond reasonable doubt that the spermatozoa found in the genital organ of the complainant were from his sexual organ and that the trial magistrate erred in law by shifting the burden of proof to him.
5. The case as presented by the prosecution was that PW2, **R M** sent her daughter **M M** who is mentally challenged to the shop at about 6.00pm to buy vegetables. She encountered the appellant who carried her on a bicycle. He went and defiled her. She went home and told her mother. She reported the incident to the District Officer who in turn notified the area Chief. PW1, **Joel Sammy,** the Assistant Chief, Kauwi arrested the appellant. She was examined by PW4, **Darius Nyamai,** a clinical officer who found that she was mentally retarded. The vagina was reddened and painful on touch. The vagina discharge was tested in the laboratory. It had epithelial cells though spermatozoa were not seen. He formed an opinion that the trauma was caused by penetration of a blunt object. PW5, **No. 65730 P.C. Abdi Ibrahim** re-arrested the appellant, and issued the complainant with a P3 form that was filled.
6. When put on his defence the appellant said that on the material day he was at home doing work assigned to him by his employer. At 4.30 pm after he left the farm the chief and his assistant went and inquired if he was **Mutemi.** He was arrested and taken to the Chief's Camp. Later he saw the complainant with her mother. A motor vehicle arrived and took them to the police station. He demanded that he be examined but the complainant's mother objected. He was detained in custody from 16/1/2007 upto 2/2/2007 when he was arraigned in court. He stated further that he was a lover to the complainant's mother and when he ended their relationship she vowed to teach

him a lesson. It was for that reason that she trumped up the charges. He denied knowing how to ride a bicycle.

7. In his submission he called upon the court to acquit him on grounds that he was held in custody for more than the stipulated time and no explanation was given by the prosecution. Secondly, he argued that there was a misdirection as the complainant was alleged to be 10 years old yet per the P3 form filled, **M M** was a person aged 18 years whereby the nature of offence was indicated as rape. He faulted the trial magistrate for reaching a finding that the appellant had failed to call evidence to show that he had not defiled the complainant.
8. **Mr. Mukofu,** learned State counsel opposed the appeal. He submitted that the appellant had been seen carrying the complainant on the bicycle and there was evidence of defilement and the complainant had identified him as her assailant. He called upon the court to find that the defence put up was doubtful.
9. This being the first appeal I do remind myself of the duty to analyse and re-evaluate the evidence which was presented before the trial court and to come up with my own conclusions on the evidence bearing in mind that I neither heard nor saw witnesses who testified (***see Okeno versus Republic [1972] E.A. 32).***
10. With regard to the issue of violation of constitutional rights of the appellant, according to the charge sheet the appellant was arrested on the 17th January, 2007 and arraigned in court on the 2nd February, 2007. The law requires a person to be produced in court within 24 hours. It is however settled that if any constitutional rights of an accused person is violated, the remedy lies not in acquittal but an action in Civil Suit for damages. In the case of ***Julius Kamau Mbugua versus Republic Criminal Appeal No. 50 of 2008,*** it was held that;-

> "***The breach of a right to personal liberty of a suspect by police perse is merely a breach of a civil right, and Section 72 (6) of the constitution (former) expressly provides that such breach is compensable for damages."***

11. In this case, per the evidence of PW2 she was told by some children that the appellant had carried of the complainant on the bicycle. She was also allegedly told by a lady who worked at a salon that **Mutemi** a person she did not know before worked for one **Funguo Musee.** None of these people were called as witnesses. This was hearsay evidence that was inadmissible. As correctly noted the only witness to the sexual assault was the complainant.
12. In reaching its findings the trial court stated thus;-

> ***"Section 124 of Evidence Act states that a court giving reasons while handling a sexual offence case can convict if the only evidence on record is that of the alleged victim of the offence. In this case the prosecution has gone further and provided other material corroborative evidence. I note that PW3 was the only witness to the offence and that PW2 and PW3 were close relatives of another and as soon as witnesses they were not independent of each other but having warned and cautioned myself accordingly I find the prosecution's case unimpeachable."***

13. The proviso to Section 124 of the evidence Act reads 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".***

14. The learned trial magistrate did not record in proceedings if he was satisfied that the child was telling the truth. Other than being a child this was a complainant said to be mentally retarded. The court had to satisfy itself that what she stated was true. It is important to note that when cross-examined she said that her mother asked her to say that **Mutemi** did bad things to her
15. In her testimony the complainant said she was 10 years old. PW2 did not tell the court her age. Looking at the P3 form filled the person examined was **M M** aged 18 years. That is what is

indicated on part 1 of the document. A perusal of section 'C' of the document that was filled by the clinical officer indicates the estimated age of the person examined was 18 years old. Had the trial magistrate analysed this evidence he could have concluded that the P3 form filled was definitely for an adult but not a minor. This was a doubt that would have resulted into an acquittal of the appellant.

16. Having re-evaluated and analysed the evidence on record, I find the appeal having merit. It is allowed. The appellant shall be released forthwith unless otherwise lawfully held.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **21ST** day of **NOVEMBER, 2013.**

L.N. MUTENDE

JUDGE