REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 318 OF 2010

BENSON MUTISYA KISAVI .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Kitui Principal Magistrate's Court Criminal Case No. 748 of 2008 by Hon. T.M. Mwangi, SRM on 11/11/2010)

JUDGMENT

1. **Benson Mutisya Kisavi**, the appellant was charged with the offence of defilement contrary to Section 8(1) (2) of the Sexual Offences Act, No. 3 of 2006. Particulars of the offence being that on the 7th day of November 2008 at about 1.00pm at ***[particulars withheld]*** village, Mulango location in Kitui District within the Eastern Province, unlawfully had carnal knowledge of **R J** a girl aged 13 years. In the alternative he is charged with the offence of committing an indecent act with a girl child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. Particulars thereof being that on the 7th day of November. 2002 at ***[particulars withheld]*** village, Mulango location in Kitui District of the Eastern Province, committed an act of indecency with **R J** a girl aged 13 years by touching her private parts namely vagina.
2. To prove the case the prosecution called seven (7) witnesses.
3. PW1, the complainant stated that on the 7th November, 2008 at 8.00am she had been sent by her mother to cut a broom when it started raining. She shielded herself under a mango tree. While in the act of cutting the broom, the appellant went armed with a panga and demanded that she goes to his house. He threatened to cut her if she screamed. She screamed once but he pulled her inside the house. It drizzled. He locked his house. He removed her clothes and asserted that a woman was a woman irrespective of the age. He had sex with her. Her mother went to the house and found her prior to wearing her clothes. The appellant insulted them.
4. PW2, **J M K,** the complainant's mother was informed by one **Priscilla's** worker that the complainant had been locked up in the appellant's house. She went to the house with **P M M,** PW6. The door was locked from inside. When the door was eventually opened the complainant was still on the appellant's bed. The appellant asserted that a woman was a woman irrespective of the age. They reported the matter to the Administrative Authority then the police. They arrested the appellant with **PW3, No. 225027 APC Kimanzia Musyoki**. He was taken to Kitui Administration Police Camp.
5. PW4, **No. 87952 P.C. (W) Monica Aoko** caused the complainant to be taken to hospital where she was examined and discharged. She also issued her with a P3 form. PW5, **Martin Njue**, a clinical officer at Kitui District Hospital examined the complainant on the same day. He noted that she had whitish discharge from the external genetalia and her hymen was absent. Sperms and epithelial cells were seen. The laboratory test carried out confirmed the presence of spermatozoa.

He concluded that the child had been sexually abused. **PW7, Mumo Mbindyo,** the village elder confirmed having seen the complainant and the appellant under a mango tree. Thereafter he was tasked by the chief to search for the appellant. He was one of the persons who arrested the appellant.

6. When put on his defence the appellant said the charge was a frame up. He said he was working at **Katunge's** place from 5.30am to 12.00 noon when he was arrested.
7. The appellant was tried, convicted and sentenced to 15 years imprisonment on the main charge. Being aggrieved with the conviction and sentence he now appeals on the grounds that the learned trial magistrate erred in both law and fact by holding that the prosecution had proved the case beyond reasonable doubt and failed to evaluate the entire evidence on record in light of the defence statement he presented.
8. In his written submissions he stated that it was not established that he was at his house with the complainant; it had not been established where the spermatozoa emanated from; and making a finding that the presence of spermatozoa was proof of PW1 having been defiled was misdirection on the part of the trial magistrate.
9. In a response thereto, the learned State Counsel, **Mr. Mukofu** opposed the appeal. He argued that identification of the appellant was not questionable as the offence was committed at 8.00am in broad day light. Evidence of the complainant having been defiled was indeed confirmed by the clinical officer. The defence of alibi raised had not been raised in cross-examination and that the court complied with Section 124 of the Evidence Act. He asked the court to dismiss the appeal.
10. The appellant having come to this court, being a first appellate court he is entitled to have evidence adduced in the lower court examined exhaustively afresh. Prior to any decision being made. As I discharge that duty I must bear in mind the fact that I did not have the advantage of hearing and seeing witnesses who testified (see ***Okeno versus Republic [1972] E.A. 32*** *and* ***Mwangi Versus Republic [2006] 2KLR 28).***
11. The complainant herein was said to be a girl aged 13 years. According to the P3 form filled by the clinical officer who examined her, the age was estimated to be 13 years. The issue of her age was not in dispute and/or raised.
12. To prove a charge of defilement there must be penetration. The complainant herein was examined on 7th November, 2008 the same day the offence is said to have been committed. Laboratory test carried out revealed presence of spermatozoa and discharge. Her hymen was absent. This was evidence of having been penetrated on that day. Being a child she had been defiled.
13. The appellant gave an *alibi* defence. He claimed that he was working at **Katunge's** place from 5.30am to12.00 noon when he was arrested. The prosecution on the other hand called evidence of the complainant who told the court that prior to the appellant taking her to his house and eventually the bedroom, she had been sent by her mother to cut what she called a broom. PW2 confirmed having sent her. PW7 had been at the appellant's house at 8.00am and as she walked on he saw the appellant with the complainant under a tree.
14. PW6 was told by her employee that the complainant was at the house of the appellant. She accompanied PW2 to the house and indeed they found her there. Other than the allegation that he was working for one **Katunge,** when cross-examining PW6, he suggested to her that the girl was simply sheltering from rain at his house which elicited the answer that she could have sheltered in the houses that were on the upper side. This suggestion indicated that indeed it was within the appellant's knowledge that the complainant was inside his house.
15. The appellant's allegation that he was working at Katunge's place was an intimation that he could not have committed the offence because he was elsewhere. In other words he could not be guilty. This was an alibi defence. The trial court had a duty of weighing the defence adduced (**see Karanja versus Republic 1983** (**KLR) 501.** The trial magistrate considered the alibi defence and stated that it was raised at the first instance at the defence stage and hence dismissed it as an afterthought. The investigating authority had not been given an opportunity of challenging it. This is a case where the trial magistrate tested the defence put up appropriately, weighed it against evidence adduced and reached a correct finding.
16. The learned trial magistrate in accepting the evidence of the complainant as to who defiled her cautioned himself that it was evidence of a single witness as there was no eye-witnesses who saw what transpired. In relying on such evidence as stated in the case of ***S verses Chabalala 2003(1) SACR 134 (SCA***) which is persuasive, all the court has to do is to weigh all the elements which

point towards the guilt of the accused against all that are indicative of his innocence, taking proper account of the inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so to decide whether the balance weighs so heavily in favour of the State to exclude any reasonable doubt about the accused persons guilt.

17. The learned trial magistrate having applied the cautionary rule found the single witness, the complainant was honest. He had this to state;-

> ***"PW1 gave a sworn statement and was steadfast in her cross-examination. She spoke the truth that she was forcibly defiled by DW1"***

18. In this case PW2 and PW6 found the complainant on the appellant's bed. The appellant was in the house with her. She was taken straight to hospital and found with whitish discharge from external genetalia. The evidence of PW2 and PW6 that was not challenged in cross-examination strengthens the evidence of PW1 as to who her assailant was. With this kind of evidence I find the learned trial magistrate having not misdirected himself in reaching his findings as to who defiled the complainant.
19. From the foregoing, it is apparent that the learned trial magistrate as a whole reached a correct decision in holding that the prosecution had proved its case beyond reasonable doubt.
20. With regard to sentence, the appellant was sentenced to 15 years imprisonment. Looking at the section under which he was charged, he ought to have been sentenced to life imprisonment.
21. Accordingly, for reasons stated I find no merit in this appeal and order that the appeal be and is hereby dismissed in its entirety. The conviction and sentence thereof are confirmed.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **9TH** day of **DECEMBER, 2013.**

L.N. MUTENDE

JUDGE