(From original conviction and sentence in criminal case No.579 of 2008 of the Chief Magistrate court at Malindi Before Hon. J. M. Kituku - RM)

MWAKAMUSHA KAZUNGU …..………......….………APPELLANT
-VRS-

REPUBLIC ……………………......…………...………RESPONDENT

JUDGMENT

MWAKAMUSHA KAZUNGU was charged before the Chief Magistrate`s Court Malindi with the offence of Defilement of a girl contrary to section 8 (3) of the Sexual Offences Act. In the alternative he faced the charge of Compelled or induced indecent act contrary to section 6(a) of the Sexual Offences Act. The complainant was a 9 year old girl, BGK. The offence was alleged to have occurred in Malindi on 2nd May, 2008.

2. Following a full trial the appellant was found guilty, convicted and sentenced to 30 years imprisonment on the main count. His appeal to this court is based on 8 amended grounds. Grounds 2, 3 4-6 attack the quality of evidence used as a basis for his conviction. Ground 1 was to the effect that the charge was defective while in ground 8 the appellant complains that his defence was unfairly rejected by the trial magistrate. The appellant put in lengthy submissions in support of his appeal.

3. The state, through MR NAULIKHA opposed the appeal. He outlined the prosecution evidence, and countered the grounds of appeal as follows;-

a. The charge as framed complies with section 134 Criminal Procedure Code and is therefore not defective

b. Ground 3- the evidence of the doctor(Pw 6) was valid and based on treatment notes

c. Grounds 4, 5, 6- the prosecution evidence was overwhelming; quality not quantity, matters (Section 143 CPC); voire dire procedure was complied with in respect of minor witnesses.

4. As a first Court of appeal, this court is obliged to consider afresh the evidence adduced at the trial and make its own conclusions. **(see R vs Okeno [1972]EA 322).** Briefly, the prosecution evidence was that on 2/5/08 BGK (Pw 1) and her younger siblings R (Pw 4) and H were at home alone, their parents having gone to work. About 6.00Pm the appellant a neighbour known to the children came to their house riding on a bicycle and inquired where the children`s parents were. He engaged them in a conversation eventually offering to go buy chapatti and beans for H who was hungry. He asked BGK to go with him. She mounted his bicycle but the duo did not go to a hotel. Instead the appellant rode a distance. At a place called Alaskan which is of a sort field he dismounted allegedly to answer a call of nature in a nearby thicket. He then called BGK to go "see something". When she did, he grabbed her hand, clamped her mouth and proceeded to defile her. Passersby heard BGK`s screams and came to her rescue. The appellant was caught and nearly lynched but eventually handed over to police.

5. By this time BGK`s mother who had started a search for her daughter caught up with the duo. BGK who had sustained injuries to her private parts, was treated at Malindi District Hospital. The appellant gave a sworn statement in defence. He said the charges were fabricated. He said he operated a boda boda taxi. Two ladies, one carrying a child approached him at 6.00Pm to take them home. After the trip he went home but at 8.00Pm the mother of the girl he met at the home of his customers came and said their daughter was missing for 3 days. The said daughter she later appeared claiming to have been with a relative at Maweni. But the relative, an aunt disputed her claims and the accused was arrested.

6. The main evidence tendered against the appellant came from the complainant and her sibling, Pw 4. Both are minors but after due examination the court found them competent to give sworn evidence. Although the voire dire examination was brief and not in the ideal format of question-and-answer, the record of the examination as well as the judgement clearly indicate that the trial magistrate was alive to his role under section 19 of the Oaths and Statutory Declarations Act. He was aware of the provisions of section 124 of the Evidence Act, taking care to analyse the evidence of the minors and even seek corroboration, before reaching the conclusions that the minors` testimony was truthful.

7. One key corroboration was the evidence by Pw 2, the victim`s mother and Pw 6 the clinical officer as to the injuries seen on Pw 1 that evening. Their evidence leaves no doubt that indeed the child had been freshly defiled. The appellant`s attack on Pw 6`s evidence had no clear basis. The other independent corroboration was the fact that the appellant was detained with the victim by members of public at the scene of offence until Pw 2 arrived. Members of public escorted him to the police station. To explain this circumstance, the appellant gave a rather uncanny statement about taking a certain girl home on her bicycle, being snubbed by the mother and later learning of the girl’s disappearance for 3 days and eventually being arrested. If these unnamed persons were Pw1 and Pw 2, the allegations were not put to them during cross-examination.

8. The above notwithstanding the trial court which had opportunity to see and hear the witnesses believed the testimony of the minors and was entitled to come to the conclusions it did. The trial court also tested and correctly dismissed the defence offered. The appellant has complained that the charge against him was defective because it does not include “vital ingredients” such as time and the word “unlawfully”.

9. The offence defined in section 8 (3) of the Sexual Offences Act does not include the ingredient of unlawfulness. The charge particulars as drawn before the Lower Court gave the date of the alleged offence. Under section 134 of the Criminal Procedure Code, the particulars given are sufficient for purposes of informing the appellant the nature of the charges facing him. The record of the trial indicates that the appellant understood the charge. The only irregularity I see regards the use of section 8 (3) rather than section 8 (2) of the Sexual Offences Act as the victim was proved to be aged 9 years at the time of the offence.

10. No prejudice was occasioned to the accused by being charged and convicted under section 8(3), which is a cognate offence attracting a more lenient punishment. He got a lighter sentence of 30 years as a result, rather than the life sentence prescribed in section 8 (2) of the Sexual Offences Act. I see no reason to interfere with the sentence as it is not illegal as such, or manifestly inadequate.

In conclusion, I have not found any merit in the appeal before me and dismiss it accordingly. The conviction and by sentence by the lower are Lower Court are hereby confirmed.

Delivered and signed at Malindi this **11th May, 2012** in the presence of Mr. Kemo for the State, and the appellant, [cc Evans].

C. W. MEOLI
JUDGE