



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MALINDI

Criminal Appeal 70 of 2009

JULIUS THETHE KOI.....APPELLANT

VS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant, JULIUS THETHE KOI, was charged, tried and convicted by the Learned Resident Magistrate sitting in Malindi, for the offence, preferred in the alternative being Compelled Indecent Act contrary to section 6 (a) of the Sexual Offences Act. He was sentenced to 7 years imprisonment on 12th June 2009.
2. He has now appealed against the conviction and sentence on grounds that the former was not supported by the evidence adduced and that the sentence was excessive. He made written submissions in support of the grounds. The appeal was opposed by the state.
3. As a first Court of appeal I am mandated to reconsider the evidence of the trial and make my own conclusions (**See OKENO VS R 1973 EA 522**).
4. The prosecution case in the lower court was that E.M, the complainant (Pw 2) was aged 19 years in 2008 and resided with her family at M[...] Malindi. On 28.9.08 the appellant who was a neighbour approached M.M(Pw 2) the complainant`s father at about 2.00Pm claiming that he had been sent by a certain hospital proprietor to scout for a person to be employed as a messenger.
5. He offered to introduce the complainant to the said proprietor. Pw 3 agreed and the complainant was also willing to take up the offer. The complainant left home in the company of the accused but never got to meet the alleged potential employer, the appellant giving the excuse that he was too busy. He put the complainant in a house in Malindi town and collected her at 8.00Pm purportedly to take her to spend the night at his sister`s home. On the way, he knocked her down and raped her in a thicket before fleeing.
6. The complainant spent the night there and returned home the next day to report the incident to her father. The matter was eventually reported to police. The complainant was examined at Malindi hospital but the results only confirmed that the hymen had been broken earlier.
7. When he was called upon to make his defence, the appellant elected to remain silent though his rights under section 211 Criminal Procedure Code were explained to him. Through his grounds and written submissions, the appellant has attacked the quality of evidence upon which his conviction was based. He has also attempted to bring out issues of fact which rightly belong to the trial.

8. The evidence of complainant concerning the attack was not shaken during cross-examination. Pw 2 admitted she had no injuries, a fact confirmed by the medical evidence tendered by Pw 1 and the reason in part for the accused's conviction on the lesser charge. The circumstances described by Pw 1 suggest strongly that the accused's real intention was other than he had professed to the father of the complainant. When the complainant returned home the next day, she immediately reported to her father. Her father said she was crying when she got home. Pw 2's evidence is corroborated by her father's evidence as the transaction began when the accused first approached him to release Pw 2 to go with him in search of the job that never was.

9. The appellant complains that certain witnesses were not called. There is no requirement here to call any particular number of witnesses (see section 143 of the Evidence Act). At any rate the material witnesses were called in this case.

10. The appellant was within his rights to remain silent at the trial. In so doing however, he lost the opportunity to put forth his version of the incident. Yet the evidence tendered against him was overwhelming. It is too late now for him to claim he was an "ignorant typical Giriama man". The trial magistrate carefully considered the evidence before him and came to the conclusion that the alternative count had been proved. I cannot find any reason to fault his findings. In my considered view the conviction is safe and must be upheld.

11. Concerning the sentence, the appellant's complaint that it is excessive has no merit either. In the case of **WANJEMA vs R (1971)EA 443**, the court stated;-

".....(The) appellate court should not interfere with the discretion which a trial court exercised as to sentence unless it is evident that it overlooked some material factors, took into account some immaterial factors, acted in wrong principle or the sentence is manifestly excessive in the circumstances of the case"

12. The sentence prescribed for an offence of Compelled indecent act is "a term which shall not be less than five years" (See section 6 of the Sexual Offences Act). The appellant was a first offender. The trial court noted that in the notes on sentence. The court also observed that the appellant's behaviour was "bestial and inhumane" strong words these. But certainly the fact that the appellant took advantage of a young girl's joblessness to exploit her sexually is reprehensible. In the circumstances of this case, I think the sentence meted out was proportionate to the offence.

13. In conclusion, the court finds no merit in this appeal and it is dismissed in its entirety.

Delivered and signed at Malindi this 20th day of June, 2012 in the presence of;-

C.W.MEOLI
JUDGE