



LAZARUS MBWIKI NZAMALU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Makueni Principal Magistrate's Court Criminal Case No. 488/2008 by Hon. F.M. Nyakundi -P.M on 25/6/2009)

JUDGMENT

1. According to the judgment dated 25/06/2009 by the Honourable F.M. Nyakundi, then Principal Magistrate at Makueni Law Courts in Criminal Case No. 488, the Appellant, Lazarus Mbwika Nzamalu, was convicted of the offence of defilement of a girl between the age of twelve and fifteen years and was sentenced to twenty years in prison. The Learned Magistrate in her judgment stated that the Appellant was charged “with the offence of defilement of a girl between the age of twelve and fifteen years contrary to section 8(3) of the Sexual Offences Act of 2006.” She proceeded to state that the particulars of the offence were that “on diverse dates between the month of January, 2008 and the 9th day of November, 2008 in Makueni District within Eastern province, had unlawful carnal knowledge of PNO, a girl between the age of twelve and fifteen years.”
2. The Appellant was also charged with the alternative offence of indecent assault on a female contrary to section 11(1) of the Sexual Offence Act of 2006. The particulars of that offence are that on the 9th of November, 2006, at Makueni District within Eastern Province unlawfully and indecently assaulted PN, a girl between the age of twelve and fifteen years, by touching her private parts.
3. The Prosecution case was narrated by five witnesses. PW1 is the Complainant. She testified that she was 15 years old at the time of giving evidence – which was just a year after the alleged offence. She testified that the Appellant was employed by her uncle to work in his shamba and that he approached her; told her he loved her; and the two struck off a relationship of a sexual nature. That, according to the Complainant, began in January, 2008. By around May, 2008, that relationship led to a pregnancy and on 09/11/2008, the Appellant persuaded her to accompany him to his home where he would marry her. They eloped but after sleeping in the houses of various relatives, the authorities caught up with them after the Complainant's mother had reported the matter to the Police.
4. DWO is the mother of the Complainant and she testified as PW2. She testified that she gave birth to the Complainant on 20/02/1994. She narrated that on 09/11/2008, she left the Complainant home at around 4:00 p.m. and went to her shop. However, when she returned home, she found the Complainant missing. After initial inquiries, she also learnt that the Appellant, who was employed by a Mr. Mutua nearby, was also missing. Fearing that the Appellant had abducted her child, she dispatched her daughter to go looking for her and reported the matter to the Police on 12/11/2008. Both the Complainant and the Appellant were later found in Makueni where they were arrested and detained at Makueni Police Station. She testified that her daughter had been pregnant at the time and that she had since given birth to a baby. He son, BKO, testified as PW3 and confirmed the story of going to look for his sister and finding her with the Appellant. He also testified that she was only 14 years old.
5. Catherine Nzomo is a Clinical Officer at Makueni District Hospital and testified as PW5. She testified that she examined the Complainant on 17/11/2008 when she was taken to the hospital by a Police

Officer and her mother with a history of having been sexually assaulted by a person well known to her more than three times “in March 2008 and other occasions she could not recall.” On examination, PW5 concluded that the Complainant was 32 weeks pregnant. She examined the Complainant’s genitals and confirmed that there was no infection. She referred her to ante natal clinic and later on filled the P3 form.

6. The Investigating Officer pretty much confirmed the facts of the arrest and escorting the Complainant for examination.

7. This, then, was the extent of the Prosecution case. Against it, the Appellant gave an unsworn statement in which he said that he and the Complainant had agreed to get married on 09/11/2008 when they left her home to go to her home. The plan all along, he testified, was for her parents to go report the matter to the Complainant’s parents as per the Kamba customs but he was arrested and charged before that could happen. As far as the two were concerned, they were already married and it was a matter of officially reporting.

8. Having heard these accounts, the Learned Trial Magistrate proceeded to convict the Appellant and sentenced him to twenty years in prison. It is against this conviction and sentence that the Appellant has appealed. The Appellant’s Amended Grounds of Appeal contained six grounds. They argued thus:

- a. That the Learned Magistrate erred in law and in fact in convicting the Appellant on a fatally defective charge which did not set out the section and statute which spelt out the offence and provided for the penalty;
- b. That the Learned Magistrate erred in law and in fact in convicting the appellant on a fatally defective charge which did not set out the vital ingredients of the offence and which embarrassed the accused.
- c. That the Learned Magistrate erred in law and in fact in not appreciating the appellant’s defence.
- d. That the Learned Magistrate erred in law in relying on the evidence of PW5, a Clinical Officer who filled a P3 form and who did not treat the complainant;
- e. That the Learned Magistrate erred in law and fact in convicting the Appellant against the weight of evidence and arriving at a conclusion not supported by evidence; and
- f. That the Learned Magistrate erred in law and in fact in meting out a harsh and excessive sentence on the Appellant who was a first offender and in not considering his mitigation.

9. The task of this Court on appeal is to re-hear the case by re-evaluating the whole record of the trial, re-considering all the evidence given and coming up to its own conclusion without being bound by the hypothesis or conclusions of the Trial Court. All the while, however, the Court must recall that it never heard nor saw the witnesses and make appropriate allowance for it. See *Okeno v R* [1972] E.A. 322.

10. When the matter came for hearing, Mr. Kasyoka appeared for the Appellant and Mr. Mukofu appeared for the State. Mr. Kasyoka submitted on only three of the six enumerated grounds of appeal. He concentrated on the ground listed as (a) above. He argued that the appeal should succeed because the charge sheet was fatally defective. It was brought under “Section ((3) of the Sexual Offences Act” – and that this contravened the law as it offends sections 134 and 137 of the Criminal Procedure Code. According to Mr. Kasyoka, the Appellant was charged with a non-existent crime and this violated section 77 of the Old Constitution which applies to the case. Mr. Kasyoka urged that not even the all-cure section 382 of the Criminal Procedure Code could cure the failure to cite the correct section of the law. He further argued that the particulars of the offence do not spell the offence in the terms of Sexual Offences Act. Section 8, argued Mr. Kasyoka, provides “wilfully and unlawfully causing an act of penetration and it defines several methods under the section of how penetration occurs.” Yet, Mr. Kasyoka urged, there was no specification on the charge sheet of how penetration occurred in this case.

11. Next, Mr. Kasyoka attacked the sufficiency of the evidence. First, he pointed out that the evidence by

the Clinical Officer was simply not useful since the medical examination was done more than five months since the last alleged sexual contact between the Complainant and the Appellant. He based his argument on the fact that the P3 form was filled out on 28/04/2009. Still on the evidence, Mr. Kasyoka impugned the conviction on the ground that no evidence at all was adduced to show that the child born by the Complainant was biologically related to the Appellant. In the end, urged Mr. Kasyoka, there was no independent evidence to connect the Appellant with the crime other than the evidence of PW1, a minor. While the Court would be entitled to rely on the evidence of a minor, it would have had to give reasons for such faith in her evidence.

12. Lastly, Mr. Kasyoka faulted the Learned Trial Magistrate for failing to take the Appellant's defence of marriage seriously especially given the circumstances. By circumstances, Mr. Kasyoka was talking of the fact that the Complainant's mother had discovered as early as October, 2008 that the Complainant was pregnant and had done nothing about it.

13. Mr. Mukofu for the State all but conceded the appeal. He agreed that the charge sheet was defective and "left it to the Court" to decide. He, however, reminded the Court that there was an alternative charge of indecent assault – although he paradoxically similarly reminded the Court that it could not convict of this offence if there was penetration – and it seemed there was here.

14. I have looked at the original charge sheet in the lower court. This was the charge sheet that informed the Appellant of the offence facing him. It does not contain the typographical error Mr. Kasyoka spent so much of his time complaining about. It clearly states that the charge is brought contrary to section 8(3) of the Sexual Offences Act of 2006. I believe that moots most of Mr. Kasyoka's arguments in this regard. He would have been on a firmer footing if he were complaining whether section 8(3) standing alone without incorporating section 8(1) can sustain a conviction. For reasons stated later in this judgment, I need not get to this question.

15. In the same vein, I am unsure I understand Mr. Kasyoka's arguments on specification of how penetration occurred. Section 8(3) does not contain a requirement of "unlawfulness" at all. Section 8(1) requires that there be penetration – any penetration; and section 8(3) requires that the penetration be of a child of between twelve and fifteen years.

16. To my mind, the Appellant's salvos directed at the evidence are much more effective. I will begin by noting that the only evidence adduced on the age of the Complainant was the oral evidence of the Complainant and the mother on the dock. The Learned Trial Magistrate made no direct finding on that at all. I think is fatal. The age of the Complainant is a vital ingredient to the charge of defilement and it must be proved beyond reasonable doubt. That did not happen here. This is accentuated by the defence of the Appellant which claimed there was an arrangement of a marriage between him and the Complainant with the tacit acquiescence of the Complainant's mother, which was to be made "official" customarily just before the arrest of the Appellant. As Mr. Kasyoka points out, it is curious indeed that the matter was never reported to the Police even after the Complainant's mother had discovered that her daughter was pregnant.

17. As far as attempts to prove the matter beyond reasonable doubt are concerned, it is equally troubling that no evidence of the paternity of the Appellant was adduced at all. In my view, all these evidentiary shortfalls make it very unsafe to convict the Appellant on the count of defilement. As for indecent assault, Mr. Mukofu is right: the definition of the offence in section 11(1) explicitly excludes penetration. In any event, there is simply no evidence to show that on 09/11/2008, the Appellant indecently assaulted the Complainant. Any evidence which would have tended to support this alternative charge would be at variance with the charge sheet and, hence, incapable of sustaining a conviction.

18. It follows from this analysis that this appeal must succeed. The conviction against the Appellant is hereby quashed and the sentence imposed set aside. The Appellant shall be set at liberty forthwith unless otherwise lawfully held in custody.

DATED, SIGNED and DELIVERED at MACHAKOS this day 20TH day of JUNE 2012.

J.M. NGUGI
JUDGE