



NZIOKI NGONZI.....APPELLANT
VERSUS

REPUBLICRESPONDENT

(Being an appeal against the original conviction and sentence in Makueni Principal Magistrate's Court Criminal Case No. 190/2009 by Hon. F.M. Nyakundi, P.M on 22/10/2009)

JUDGMENT

The appellant, **Nzioki Ngonzi** was charged before the Principal Magistrate's Court at Makueni with the offence of defilement of a girl between the age of 11 and 15 years contrary to section 8(3) of the Sexual Offence Act. The particulars of the offence were that on the 20th June, 2008 in Makueni District within the Eastern Province, the appellant had canal knowledge of **K.M.M**, a girl aged between the age of 12 and 13 years. In the alternative count he was charged with the offence of indecent assault of a female contrary to section 11(1) of the Sexual offences Act. The particulars of the offence were that on the same day and place the appellant indecently assaulted **K.M.M** a girl between the age of 12 to 13 years by touching her private parts. The appellant denied both charges and his trial ensued.

The case for the prosecution was that on 20th June, 2008, the complainant (PW1) **K.M** aged 15 years was at home with her siblings as her mother was away in hospital with another child who had been admitted. While asleep at about 8.00 p.m. she woke up suddenly to find a person in the house who had lit a torch and was hiding by the bed. When she asked him who he was, he told her he wanted to sleep with her and she then identified him as the appellant. The appellant then caught hold of her by the throat like he wanted to strangle her, threw her on the bed and proceeded to defile her and when done, he threatened to kill her should she mention what he had done. She waited until the next day and established that the appellant had gained access into the house after making an opening in the wall and then opened the latch of the door. She went to school and informed her teacher and she was brought to Makueni Police Station where she made a report and was referred to Makueni District Hospital for treatment. PW4, **Boge Eugene**, a clinical officer at the hospital attended to the complainant and upon examination, the only positive finding was in relation to her genitalia as the hymen had been perforated. That these injuries were days old at the time he filled the P3 form and he assessed the injury as harm caused by a blunt object.

PW2, mother to complainant confirmed that she had been at K Health Center on the night in question and on going home the next day at about 4.00 p.m. she found the house had been broken into by having an opening made at the door near the bold and the same removed and that PW1, the complainant had been defiled the previous night by a person whom she identified as the appellant.

PW3, **P.C Samuel Mutavi**, of Kavumbu Police Station and the investigating officer in the case said that on 4th July, 2008 while at Mukuyuni Police Station, following the defilement report made earlier at Makueni Police Station, the appellant who had been arrested in connection with another offence was brought to Kavumbu Police Station and the complainant was summoned and identified him, and both she and her mother recorded statements. Since P3 form had been issued the appellant was charged with the offences.

Upon being placed on his defence, the appellant gave an unsworn statement in his defence and did not

call any witness. He denied committing the offences and stated that the mother to the complainant (PW2) used to work in their house as a house help. PW2 requested and they became lovers. When his parents got to know about it she was relieved of her duties and chased away. Two nights later, PW2 visited him in his house demanding to know what had happened to their arrangement and why he no longer visited her house. He told her that he was no longer interested in the relationship as they were not even age-mates and she should leave. He then left her in the sitting room and went to his bedroom to sleep but as PW2 left, she threatened him that he would regret sending her away. A week later while at the market, he was arrested, taken to the A.P. Camp and later to Kavumbu Police Post and finally to Makueni Police Station where he was released by the police, allegedly because the complainant in the case could not be traced. He was later surprised to be arrested in May 2009 on the charges both of which he denied committing.

The learned magistrate was satisfied that the prosecution had proved their case beyond any reasonable doubt that the appellant defiled the complainant on the night of 20th June, 2008. She proceeded to dismiss the defence by the appellant and found him guilty as charged, convicted him under section 215 of the Criminal Procedure Code and sentenced him to 30 years imprisonment.

Aggrieved by the conviction and sentence, the appellant lodged this appeal on the grounds that:-

§ the prosecution evidence was contradictory and incredible

§ there were no independent witnesses

§ medical evidence was weak

§ the appellant's defence was wrongly rejected, there was infact the shifting of the burden of proof to the appellant; and

§ the sentence imposed was manifestly harsh and excessive.

When the appeal came before me for hearing on 12th June, 2012, the appellant submitted that the complainant did not identify or recognize the perpetrator of the offence, she could not have recognized the appellant by voice since she claimed not to know him, the evidence of PW2 was hearsay, he had surrendered himself to the police after hearing rumours that he had defiled the complainant. He could not have done so if indeed he had committed the offence. Though the offence was committed on 20th June, 2008, it was not until 20th May, 2009 that he was arrested.

The appeal was opposed. **Mr. Mukofu** learned State Counsel, submitted that the appellant was positively recognized as he had a torch, and was in close proximity. The time spent in the act afforded the complainant opportunity to see and recognize the appellant. The issue of mistaken recognition therefore does not arise.

This is a first appeal. As a first appellate court, I have an opportunity and duty to re-evaluate the evidence afresh and determine for myself whether the evidence taken at the trial can sustain the conviction. I draw my matching orders in this regard from the case of **Okeno vs Republic [1973] E.A. 32**.

From a careful reading of the record, I entertain doubts as to whether the complainant was really defiled by the appellant. From her own evidence, she was at the material time in the company of her siblings. Her brothers were present. How was it then possible for the appellant to defile the complainant in the presence of her brothers? It is also instructive that none of these brothers were called to testify to back up their sister's story. There is no explanation whatsoever why they were or one of them not called to testify. There is no evidence that the complainant was removed from the house to another place where she was defiled. As things stand, the complaint was defiled under the watchful eyes of her brothers, which to me is incredible.

From the evidence recorded, following the alleged defilement, the complainant the following day went to school and informed her teacher regarding the events of the previous night and she was taken to Makueni District Hospital. Strangely enough, the alleged teacher who undertook the exercise was never summoned to testify. The only person who testified as to the event was the complainant's mother. However, her entire evidence was hearsay. This witness also stated that on being told by the complainant at about 4.00 p.m that she had been defiled, she went to the complainant's school and spoke to the head teacher about the incident. She was in the company of the complainant. However, in her own evidence, the complainant stated that she went alone to school and talked to the teacher about the incident and she was brought to hospital. There is obvious contradiction here. Who is telling the truth? One of them is obviously lying and what should be the reason for doing so? A frame up may be as the appellant has claimed!

With regard to the evidence of the clinical officer, he could not recall when he examined the claimant. All he could say was that he saw her sometimes in 2008 and filled the P3 form in July 2008. Why was it so difficult for him to be specific as to the date when she examined and filled the complainant's P3 form? Further he observed that the only positive finding was a perforated hymen. However, he could not attribute that perforated hymen to sexual assault. In the absence of such nexus, I do not see how the trial court could have come to the conclusion that the complainant was sexually assaulted. The perforation hymen could as well have been caused by any other activity other than sexual contact.

The complainant claimed to have recognized the appellant through the torchlight and voice. With regard to the torchlight, she stated thus; "...***I saw a person lighting a torch***". This is all that she said with regard to light. Nowhere does she say that the appellant directed the torchlight to himself. That is the only way that she could have been able to see the appellant. She does not say there was any other source of light in the house. Further she does not say that the torchlight lit the entire room. Nor does she give the intensity of the torchlight and where the appellant was vis avis her. If anything an according to her testimony, the appellant was hiding near the bed. If indeed the appellant took the trouble to hide so that he is not seen, could he at the same time have directed the torchlight to himself so that he could easily be identified and or recognized? I have my own doubts. On this score, I am satisfied that the learned magistrate did not test the evidence of a single witness respecting identification/recognition carefully as required in terms of **Maitanya vs Republic [1986] KLR 198**. It has been held that failure to undertake an inquiry of careful testing is an error of law and the resulting evidence cannot safely support a conviction.

The complainant similarly claimed to have recognized the appellant by his voice. Of course evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, care would be necessarily to ensure that it was accused person's voice that the witness was familiar with it and recognized it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who had said it. See **Choge vs Republic [1985] KLR 1**. In the instant case, there is absolutely no evidence that the complainant was familiar with the appellant's voice. She may have known the appellant as she used to see him pass by, however such familiarity does not transform into her knowing and recognizing his voice. There is no evidence that they had talked severally prior to the incident. This is the only way that she could have been familiar with his voice. Having held that earlier on that the conditions obtaining at the time were not conducive for a positive identification and or recognition of the appellant, it is obvious that the purported voice identification of the appellant is equally doubtful.

Accordingly, I allow the appeal, quash the conviction and set aside the sentence imposed. The appellant should be set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED and DELIVERED at MACHAKOS this 30TH day of JULY, 2012.

ASIKE-MAKHANDIA
JUDGE