**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**Criminal Appeal 83 of 2010**

**BONIFACE MUENDO MWANTHI…………………….. APPELLANT**

**VERSUS**

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

(*Being an appeal from original conviction and sentence in Makueni Principal Magistrate's Court Criminal Case No. 429 of 2007 by Hon. F.M. Nyakundi - P.M on 24.02.2009*)

**JUDGMENT**

1. The Appellant, Boniface Muendo Mwanthi, was presented before the Senior Resident Magistrate's Court in Makueni on 19/09/2007 charged with one count of rape contrary to section 3(1)(1) of the Sexual Offences Act, 2006. The particulars of the offence were that on the 12/05/2007, at {*particulars withheld*} in Makueni District within Eastern Province, he unlawfully had carnal knowledge of M.K. ("Complainant") without her consent.

2. The Appellant also faced an alternative count of indecent assault contrary to section 11(1) of the Sexual Offences Act 2006. The particulars were that at the same place, time and date, he unlawfully and indecently assaulted the Complainant by touching her private parts.

3. There was a fully-fledged trial in which the Prosecution called six witnesses including the Complainant. At the end of the Prosecution case, the Learned Trial Magistrate found that the Appellant had a case to answer and put him on his defence. He, in turn, gave an unsworn statement. The Learned Trial Magistrate dismissed the defence and convicted the Appellant. She proceeded to sentence him to twenty years imprisonment.

4. The Appellant is dissatisfied with both the conviction and sentence and has appealed to this Court. Through his attorneys, he raised six grounds of appeal:

1) That the Learned Magistrate erred both in law and facts when he failed to find and hold that there was no enough evidence to support the charge and to connect Appellant with the offence beyond reasonable doubt.

2) That the Learned Magistrate erred both in law and facts when he failed to find and hold that the prosecution has faield to prove their case beyond reasonable doubt and as such give the benefit of doubt to the appellant.

3) That the Learned Magistrate erred both in law and facts when she failed to consider the issue of corroboration of the evidence of the Complainant and instead shifted the burden to the accused to prove his innocence from the alleged offence and as such reached a wrong decision.

4) That the Learned Magistrate erred both in law and facts when she convicted the appellant against the weight of evidence.

5) That the Learned Magistrate erred both in law and facts by imposing an excess sentence which was excessive in the circumstances (sic).

6) That the Learned Magistrate erred in law and fact by failing to find and hold that the appellant's constitutional rights had been violated by being held beyond 24 hours at the Police Station on 16/09/2007 after the arrest before being taken to court on 19/09/2007.

5. Before analyzing whether the trial record supports the conviction and sentence, I will begin by observing that as a first appellate court, I have an obligation to re-evaluate all the evidence given at trial and come to my own independent conclusions. As a first appellate court, I am not to merely confirm or disconfirm particular hypothesis made by the Trial Court. Even then, I must be acutely aware that I never saw nor heard the witnesses as they testified and, therefore, I must make an allowance for that. See **Okeno v R [1972] EA 32** and ***Kariuki Karanja v R [1986] KLR 190***.

6. The Complainant testified as PW1. She recalled that on 12/05/2007, she was coming from the dam to fetch water and had a can of water on her head when she met the Appellant in a deserted part along the path to her home. She further testified that the Appellant, who was well known to her, brandished a knife and ordered her to remain quiet or suffer injury. The Complainant then narrated that the Appellant proceeded to remove the can from her head, pulled her into the bushes by the path, wrestle her to the ground and sexually assaulted her – first with his fingers, then with his penis. When he was finished, the Complainant testified, the Appellant kicked her and left her there.

7. The Complainant's father testified as PW3. In his testimony, he confirmed that the Complainant left to fetch water on the material day at around 10:00 am. However, when he (PW3) returned home from the shamba at around 1:00 pm, the Complainant wouldn't come out of the room and started crying when PW3 attempted to speak with her. Dismayed by her reactions, PW3 called for PW2, a female relative. It was PW2 who learnt for the first time that the Complainant complained of having been raped by the Appellant. At PW3's request, PW4 accompanied the Complainant to the Area Chief to report the matter. The Area Chief, in turn, referred them to the Police, who, after taking initial report issued a P3 form which was later filled out at the local health centre by a clinical officer who testified as PW6. PW5 was the one who took the report and became the Investigating Officer in the case and directed the arrest of the Appellant. By the testimony of PW5, the Appellant was arrested on 16/05/2007 by a Police Constable Kege who was in the company of some Administration Policemen.

8. The other witness to testify on behalf of the Prosecution is PW6, a clinical officer who examined both the Complainant and the Appellant. It is not clear when the Clinical Officer examined the Appellant. The P3 form indicates that the Appellant was sent to the hospital for examination on 23/05/2007. In examination-in-chief, the Clinical Officer says he signed the P3 form on 23/05/2008 but in cross-examination he says he saw both the Appellant and the Complainant on 16/05/2007. PW5 had testified earlier that he had escorted the Appellant to the hospital on 16/05/2007. I will return to this confusion in dates in a brief while. For now, suffice it to say that upon examination, the Clinical Officer found that the Complainant had micro-organisms showing she had gonorrhoea and *trichomoniasis vaginalis*. On the other hand, the Clinical Officer detected no micro-organisms or illness on the Appellant. He explained, however, that it was possible that the Appellant could have received treatment which could have wiped out the signs of infection. The Learned Trial Magistrate accepted this explanation for the discordance in infection between the Complainant and the Appellant.

9.On appeal, the Appellant has strenuously attacked this theory. In particular, he has argued that the Appellant was in Police Custody and could not, therefore, have received any treatment for the infections. However, I believe counsel's arguments in this regard are misplaced. Evidence shows that the Appellant was arrested and medically examined on the same day, that is, 16/05/2007 (if we are to believe one version of the Prosecution case).

10.The Appellant is in firmer footing when he questions the import of the Learned Trial Magistrate's stance on the medical evidence. In his counsel's view, accepting the Prosecution's theory amounts to shifting the burden of proof to the Appellant when the law is quite clear that an accused person bears no burden to prove his innocence; it is the singular and sempiternal duty of the Prosecution to prove guilt beyond reasonable doubt. That duty never shifts to the accused person. It would appear that crafting a theory to explain the discordance of infection without basis in fact comes very close to shifting the burden of proof to the Appellant. In my view, that burden is finally shifted to the Appellant when the Learned Trial Magistrate complains that she did not see the note which was allegedly written by the Complainant to the Appellant. This is problematic for two reasons: First, it is on record that the note was shown to PW1 during cross examination. Second, PW5, the Investigating Officer, also concedes that he saw the note during his investigations. It is unclear why he did not produce it in evidence. The Prosecution is duty-bound to consider and produce all evidence in its possession even if it is adverse to its case. Further, in a case where a party is not represented by counsel, the Trial Court should be more proactive in getting evidence which is availed in Court into the record. Here, we have evidence that the note surfaced in Court at one point yet the Learned Trial Magistrate remarked in her judgment that she was never given an opportunity to see the note to test the veracity of the Appellant's story.

11.Apart from the discordance of the infections, there are number of other aspects of this case which, cumulatively, raise serious doubts. First, the only other physical evidence in the case – namely, the clothes worn by the Complainant which were allegedly blood stained – were never produced in evidence. The explanation was that the Complainant washed them after the incident. While not completely out of the realm of possibility, this explanation appears implausible. Third parties were involved in the matter as soon as two hours after the incident, and the Complainant was taken to the Area Chief only a few hours after the incident. It seems odd that none of the people involved inquired about the blood-stained clothes. In addition, the Complainant does not really say at what point she washed the clothes: she was at the Area Chief's office the afternoon after the incident; and at the Police Station the following morning by which time she reported having washed the clothes. In any event, the absence of the clothes considerably weakens the case for the Prosecution.

12.Then, there is the unexamined and un-interrogated testimony of the Investigating Officer, PW5, who testified that an older sister of the Complainant had made similar allegations against the Appellant but the criminal case instituted was dismissed when the Complainant failed to attend Court. PW5 conceded that "there might be a grudge" between the Appellant and the Complainant's family. The fact that there appears to be a pattern of making allegations coupled with the straightforward concession by PW5 that the present charges might be a product of ill-will between the families of the Complainant and the Appellant puts a serious dent on the Prosecution's attempts to establish a case beyond reasonable doubt.

13.Finally, the amount of time it took to bring the Appellant to Court after his arrest is simply unacceptable. The accused person was arrested on 16/05/2007. He was not presented in Court until 19/09/2007. He was in police custody for more than four months. No explanation was given for this inordinate delay in charging the Appellant. In my view, even without anything more, this failure to safeguard the rights of the Appellant to present him to Court promptly is serious enough to render the whole trial a nullity. I have to note that this is not a case of venal inattention involving a few days or even weeks. This is a delay of more than four months. There can be no reasonable explanation other than a deliberate attempt to subvert the Appellant's constitutionally protected rights for this delay.

14.I have considered the case of ***Julius Kamau Mbugua v R [2010] eKLR*** and its application to the present set of facts. In that case, the Petitioner sought a declaration that the unlawful detention for a period of 107 days and the subsequent criminal charge amounted to a gross violation of his constitutional rights guaranteed by Sections 72 (1) and (3); 77 (1) and 81 (1) of the Old Constitution. The Court of Appeal held that the constitutional violation was not trial-related and, therefore, did not entitle the Petitioner to an automatic acquittal.

15.My reading of ***Julius Kamau Mbugua Case*** is not that delays in presenting suspects to Court will now be tolerated by Courts and will have no bearing on the trial. Rather the Court of Appeal simply stated that such a delay will not lead to an automatic acquittal because one can be adequately compensated by way

of monetary damages. However, a correct reading of this case is that the Courts would not excuse a deliberate attempt to delay the presentment of an accused person with the conscious intention of suppressing his rights or prejudicing his ability to defend himself. Where there is a long delay such as the present case, the Prosecution has an affirmative duty to offer an explanation for the delay. In the absence of such an explanation, the Court is entitled to infer that there was a deliberate attempt to frustrate the accused person’s right to free trial. This appears to be the case here.

16.We have, therefore, come to the inevitable point at which I must do what the record and analysis commands me to: for all the reasons stated above, I hereby quash the conviction and set aside the sentence imposed. The Appellant shall be set at liberty forthwith unless otherwise lawfully held.

**DATED** and **DELIVERED** at **MACHAKOS** this **28TH** day of **SEPTEMBER, 2012.**

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**J.M. NGUGI**
**JUDGE**