



MBATHA KANGETHE.....APPELLANT

**VERSUS
REPUBLIC.....RESPONDENT**

(Being an appeal against both conviction and sentence in Resident Magistrate Cr. Case No. 135 of 2011 in Judgement delivered on 5th day of July 2011 by Hon J.W Gichimu, Resident Magistrate at Tawa Law Courts)

JUDGMENT

The appellant, **Mbatha Kangethe** was charged with the offence of Defilement of a girl contrary to section 8 (1) (4) of the Sexual Offences Act and an alternative charge of committing an indecent act with a child contrary to section 11 (1) of the same in Criminal Case No. 135 of 2011. The matter was heard and determined by the Resident Magistrate's Court at Tawa, where the appellant was convicted and sentenced to twenty (20) years in prison for the 1st count and (2) years in prison for the 2nd count, the sentences were ordered to be served concurrently.

In order to prove it's case, the prosecution called a total of six (6) prosecution witnesses. The first witness to testify as PW1 was **Geofrey Mutia** a clinical officer at Kisau sub- district hospital. He stated that on 18th April 2011, he filled a P3 form in respect of the complainant. He used the treatment notes. The complainant had been treated on the same day that the offence was committed which was on the 15th of April 2011. He stated that on examination he established that the hymen was broken, there was a whitish vaginal discharge and a high vaginal swab showed spermatozoa. The offence had lasted 12 hours. The complainant further had a wound on the left thumb which she claimed the appellant used a panga to inflict it and she further had a post nail scratch on the side of the neck with tenderness. A blunt and sharp object was used to injure the complainant. He opined that there was penetration. He knew the appellant as he had previously testified in another case where the appellant had been charged for assault.

It was the evidence of Pw2, the complainant, **M.K**, that on the material day she was asleep with her grandmother **M. K** on the same bed when she heard someone in the house. He told them to keep quite or he would kill them. She woke up and sat on the bed. Her grandmother lit up the torch and she recognized him as the appellant herein. The appellant said he wanted to have sexual intercourse with her and was armed with a panga. When she refused the appellant jumped onto the bed and came between them and held her. She struggled with him and in the process he cut her using the panga. He strangled her and forced her to lie where he removed her skirt and underpant and proceeded to insert his penis into her vagina. He defiled her for around 5 minutes. He thereafter left the panga behind after warning them not to tell anyone. The complainant further stated that the appellant had accessed their house through an opening in the door and the roof. She thereafter reported to the Mbumbuni Police Station and was treated at Kisau sub district hospital.

PW3, **M.K** was the complainant's grandmother. On the material day she was asleep in bed with the complainant when she heard someone touching her. She sat on the bed and lit the torch towards the intruder whom she recognized as the appellant. The appellant told them that if they said anything, he would cut them into pieces. She knew the appellant as he was their neighbor. He was holding a panga that

belonged to her and he said he wanted to have sex with PW2 by force. The appellant then jumped over her and went to where Pw2 was sleeping. They struggled and the appellant overpowered her and in the process he cut her on the thumb with the panga. He then proceeded to defile her and thereafter told them never to mention his name and he left. In the morning she noted that the panga had blood stains. Meanwhile, PW4, **MM**, was at home on 15th April 2011 at 6. a.m when he heard the complainant knocking on the door. She was bleeding from the hand. She told him that the appellant had defiled her that night. He called the village elder and went to the complainant's house and saw the jerrican that the appellant had used to access the house. They thereafter went to Mbumbuni police station where they were received by **CPL Davis Sugei** who recorded their statements and took the panga.

The appellant was put on his defence after a *prima facie* case was established. He elected to give a sworn statement and called one witness. In his defence the appellant claimed that he had been framed by Pw4 who had also framed his brother. He did not defile Pw4 at that hour which he said one is supposed to be asleep.

He called a witness Dw2, **Kenyatta Mulwa** who stated that he took the appellant to the police station after he created disturbance when he found that the appellant was being charged for the defilement offence. He however did not know anything about the offence. On cross-examination he said that he was not present when the appellant committed the offence and that the appellant lived in a separate house and cannot therefore know whether or not the appellant committed the offence.

The learned magistrate having considered and evaluated the evidence on record was satisfied that the prosecution had proved its case against the appellant to the required standard. Accordingly she convicted him and sentenced him to (20) years imprisonment on the 1st count and (2) years in prison for the 2nd count, the sentences to run concurrently.

The Appellant was aggrieved by the conviction and sentence aforesaid and hence preferred this appeal on the grounds that a torch light was not good enough for identification purposes, that Pw2 and Pw3 evidence was not accurate, that the trial Magistrate did not consider the age of the appellant, that the doctor's evidence was not corroborated and failure by the magistrate to consider the appellants statement of defence.

When the appeal came before me for hearing on 10th July 2012, the appellant opted to canvass the same by way of written submissions.

On his part, **Mr. Mukofu**, learned State Counsel orally submitted that the appellant was positively identified when Pw3 directed a torch on the appellants face. He further stated that the appellant engaged Pw2 and Pw3 in conversation and they both knew him as he was their neighbor and they were in close proximity with the appellant. Pw1 examined Pw2 12 hours later and found that there had been penetration and the injury on her left thumb was caused by a blunt and sharp object. He classified the injury as harm. The trial court found that Pw2 and Pw3 had no reason to frame the appellant. It further concluded that Pw4 could not have framed the appellant as he was an eye witness; he was only informed by Pw2 and Pw3 of the happenings of the previous night.

I have considered the evidence on record, the judgement of the learned Resident Magistrate, grounds of appeal, written and oral submissions of the appellant and the learned State Counsel respectively. This is a first appeal, the appellate court is by law enjoined to revisit the evidence that was before the trial court and analyze it, evaluate it and come to its own independent conclusion. In the case of **Ajode –vs- Republic Criminal Appeal No. 87 of 2004** the Court of Appeal sitting at Kisumu held that:-

“In law it is the duty of the first appellate court to weigh the same conflicting evidence and make its own inferences and conclusions but bearing in mind always that it has neither seen nor heard the witnesses and make allowance for that.”

The offence was committed during the night, Pw2 and Pw3 narrated how the appellant came to their house and they directed a torch light towards him and they were able to identify him. The appellant

announced his intentions while holding a panga, jumped over the Pw3 and went ahead to defile the complainant despite her resistance. Neither Pw2 nor Pw3 screamed for help, could it be because the he was holding a panga and the threats that followed. Pw2 and Pw3 knew the appellant very well as they were neighbours. He further engaged them in talks while declaring what his intentions were as such considering he was a neighbor to the complainant and Pw3, they were able to recognize his voice and they further through the help of a torch recognized who the appellant was. The complainant did not in any way disguise his face. There is therefore no question of mistaken recognition of the complainant. See **Kamanja –vs- Republic Criminal Appeal No. 5 of 1990** the Court of Appeal sitting at Kisumu held that:-

“On the evidence the court came to the right conclusion and was justified in convicting the appellant and rejecting his evidence. The witnesses had more than enough opportunity in seeing the appellant and recognizing his voice.”

The evidence of the complainant was complimented and or corroborated by that of Pw3 who was in the room from the time the appellant walked in and defiled the complainant until he left. She was able to identify the appellant as he was her neighbor and she knew him well.

The appellant, in his defence stated that he was framed by Pw4 for reasons that are not clear. He further stated that he could not have defiled the complainant at that hour which one is supposed to be asleep, this does not necessarily mean that he was asleep.

The Appellant further called a witness Dw2 which witness in my opinion was not credible as he was not with the appellant at that particular time that he committed the offence. A defence witness is supposed to cast doubt as to the whereabouts of the accused person at the time of the commission of the offence, which was not the case here.

In his submissions, the appellant raises the issue of his entering the house without being heard, the same is misconceived. I believe it's possible for a person to enter a house and not be heard especially if people living there are asleep.

From the totality of the evidence on record there is no doubt at all that it is the appellant who defiled the complainant and assaulted her by cutting her thumb with a panga. This was verified by Pw1 the clinical officer who examined the complainant, though he did not adduce evidence showing that the spermatozoa he found in the complainants vagina was the appellants, Pw2 and Pw3 evidence puts the appellant at the scene of the crime. I find the evidence of Pw2 and Pw3 to be very accurate. The appellant should know that the evidence of a doctor or any one acting in the capacity of a doctor does not require collaboration as they are considered experts in their field of business.

In regard to the ground of appeal raised by the appellant that he was seventeen (17) years old during trial and when he was sentenced, he never raised the age issue in his defence in the Lower Court. Had he raised it at that point, the Magistrate would have taken the necessarily steps to establish his age. He cannot therefore raise the issue at this juncture.

As a result I find that the appeal has no merit and I dismiss it in its entirety and uphold the conviction and sentence imposed.

JUDGMENT DATED, SIGNED and DELIVERED at MACHAKOS, this 28th day of SEPTEMBER 2012.

ASIKE- MAKHANDIA

JUDGE