REPUBLIC OF KENYA

High Court at Machakos

Criminal Appeal 224 & 228 of 2011

1. MUSEE MUNYAO
2. STEPHEN MUTUA ZAKAYO……...……APPELLANTS

VERSUS

REPUBLIC ...…….RESPONDENT

(Being an appeal from the original conviction and sentence in Kitui Principal Magistrate's Court Criminal Case No. 829/2009 by Hon B.M. Kimemia on 23/11/2011)

JUDGMENT

The appellants were the 2nd and 1st accused respectively during the trial in the subordinate court. They were each charged with defilement contrary to section 8(1) (4) of the Sexual Offences Act. They were also each charged with the alternative count of indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars of the main count were that on 8th July, 2009 at around 9.30p.m. at , M[...] Municipality in Machakos District of the Eastern Province, each appellant unlawfully penetrated **E.K.B** a girl aged 17 years. On the alternative counts it was alleged that each appellant on the same day and place committed an act of indecency with **E.K.B** a girl aged 17 years by touching her private parts namely vagina. The appellants denied all the counts and they were tried soon thereafter.

The prosecution case was that the complainant (PW1) then aged 18 years left school on Monday 6th July 2009 without permission of the school authorities and went to Kitui town where she was told by a relative that her parents were at home at K. She was scared of going home and she called the 2nd appellant who was her friend. In turn the 2nd appellant rented her a room at K and she spent the night there alone. The next day she woke up at 4am since the 2nd appellant was to come for her and she wore school uniform. This appellant was a driver of a matatu called "*flava shuttle*". He came for her and left for Nairobi in the matatu. On reaching Nairobi she changed her mind and wanted to return home. She boarded the same matatu back home at about 12pm. On reaching Machakos the 2nd appellant left her with the 1st appellant. This appellant took her to his rented house at *[Particulars withheld]* . On that night the 1st appellant slept with her and had sex. On the following day he went out and returned with a skirt and told her to wear it. They then went to a hotel for breakfast and later went to a bar and she drank novida. The 2nd appellant came and told them that the motor vehicle had mechanical problems and bought her 2 Guinness beers which she took. Later they went to the house of the 1st appellant who at about 9pm left. The complainant was left at with 2nd appellant. He too had sex with her that night and left in the morning to check on the motor vehicle. The 1st appellant came back and they went to a hotel and had breakfast. At 12pm they went to a butchery and they ate meat and returned to the bar whereat the 1st appellant bought her 2 Guinness beers. Later he took her to the house and the next morning she woke up and found herself naked yet she had slept in clothes. She noticed sperm stains on the bed sheets and she

took a bath. Later she went to meet the 1st appellant in the bar and she drank 3 Guinness beers. They later retired home and slept. On 11th July, 2009, she again found herself naked and she had semen stains on her thighs but 1st appellant had gone out and when he returned he told her that the 2nd appellant had been arrested at Kitui by her father and she should call him because they were looking for her. She did so by cheating her father that she was in Nairobi. Thereafter they went to Machakos Police Station and were placed in cells. Subsequently they were taken to Kitui Police Station

In the meantime, her mother **V. B** (PW2), had earlier escorted the complainant to M Secondary school on 7th May, 2009. However 6th July, 2009 she received a call from the principal of the school informing her that the complaint was missing from school. She immediately informed her husband, **B.M** (PW3) and all her relatives. They launched a manhunt for her. When they did not come by her immediately, she reported her disappearance to Kitui Police Station on 10th July, 2009. At the bus stop however, she met with **Jackson Kimani Musunza** (PW4) and he informed her that he had given the complainant a lift on 7th July, 2009 at 5am. However, before this witness could conclude his evidence he was stood down by the prosecution on the unfounded allegation that he had been compromised. He was never to be recalled again. He was instead replaced by **Cpl Josphat Kinyua,** the investigating officer in the case. Following his investigations he caused the arrest of the appellants. The 2nd appellant was otherwise a tenant of PW2. He went with them to Machakos and arrested the 1st appellant and the complainant. The complainant was born on 19th April, 1992 as per the birth certificate tendered in evidence. He also went with the complainant to hospital where she was examined and treated.

Her father (PW3) had earlier on received a call from his wife informing him that his daughter was not in school. He travelled from Nairobi. He reported to the police and started searching for her. Later he was informed that the appellants had the complainant. He went to Machakos town where he found the 1st appellant and complainant at the police station.

PW4 the investigating officer in the meantime had on 10th July, 2011 at 8.50am received a report of a missing child for 3 days. He commenced investigations and found out that the complainant had been seen with the 2nd appellant. He went to Machakos with PW3 and collected her at the police station. They proceeded to the home of the 1st appellant where he recovered the school uniform of the complainant and confirmed that the appellants had defiled her. PW5, **Martin Ngule Malonza** was the director of the school that the complainant was attending. He had received a call from the principal informing him that the complainant had disappeared from school. He assisted the parents of the complainant to trace her and they found her with the appellants who had defiled her.

PW6, **Martin Njue** a clinical officer filled the P3 form of the complainant. He opined that the complainant was defiled, though she had no tears or bruises on the vagina. However, her hymen was absent. That lab tests were carried out. There were few epithelial cells, no spermatozoa no pathogens, bacteria or fungi and she was HIV negative.

Put on their defence, the 2nd appellant in a sworn statement stated that he was the driver of the alleged motor vehicle plying Kavisuni-Machakos-Nairobi. He had left Kavisuni on 8th July, 2009 for Nairobi. He did the same and returned on 9th but on 10th July, 2009. When he was arrested and brought to Kitui Police Station and placed in custody. He knew nothing about the offence. He however went to Machakos with 2 police officers and found the complainant at the police station. She identified the 1st appellant his friend on the street and he was arrested. The skirt was found in the home of 1st appellant. Otherwise he did not defile the complainant. The case was a frame up, since he was living in the rental house belonging to PW2 and PW3. He had wanted to move out because they had increased the rent and PW2 warned him that he would know who she was. He called **Kimeu Nzuki** as his witness. The witness stated that he was a conductor of a vehicle that was being driven by 2nd appellant. On 8th July, 2009, he picked passengers and the motor vehicle started moving. Suddenly a lady boarded the same. She was the daughter of PW2 and 3. They went with her to Nairobi and to Machakos. Later she was not in the motor vehicle. They went to Kavisuni with 2nd appellant.

His other witness, **Justus Mumo Mutua** a loader in the motor vehicle testified that he was also in the motor vehicle when the complainant entered and they went to Nairobi and Machakos with her and thereafter returned to Kavisuni. He saw her the next day with 1st appellant and she said she was married to him.

As for the 1st appellant, he stated that the 2nd appellant was the driver of the motor vehicle and on 11th July, 2009 he was arrested in Machakos town and found 2nd appellant in the motor vehicle. They proceeded to police station and later to his house at Kariobangi estate and they were brought to Kitui Police Station and charged.

The learned magistrate having carefully considered the evidence on record was of the opinion that the prosecution had proved count I and II against the appellants respectively beyond reasonable doubt. She therefore found both appellants guilty as charged, convicted them under section 215 of the Criminal Procedure Code and sentenced them to 15 years imprisonment each.

Aggrieved by the conviction and sentence aforesaid, the appellants separately and individually lodged appeals to this court. The grounds of appeal by the 1st appellant are captured in his home made memorandum of appeal but popularly referred to by prison authorities as petition of appeal, since inmates are helped by welfare officers thereat to prepare the same. However, the grounds of appeal by the 2nd appellant may be traced in the memorandum of appeal prepared and filed by **Mr. Dixon R.T. Konya, Esq** learned counsel.

The appeals revolve around the issues of the charge being defective, magistrates failure to warn herself of dangers of convicting the appellants in the absence of independent or corroborative evidence to support the complainant's evidence, the complainant was a truant, *alibi* defence set up by the appellant were not given due consideration, failure to treat the complainant as a hostile witness, the complainant had engaged in sex prior which could not be traced to the appellants, there were grey areas in the prosecution case that ought to have been resolved in favour of the appellants, there was no evidence of penetration, burden of proof was shifted to the appellants contrary to law and lastly, the sentence meted out to the appellants was extremely harsh and excessive.

When the appeal came before me on 12th June, 2012, **Mr. Mukofu** learned State Counsel and **Mr. Konya** learned counsel for the appellants agreed to canvass the appeal by way of written submissions. They subsequently filed and exchanged written submission which I have carefully read and considered alongside authorities.

I have re-evaluated the evidence adduced before the trial court before drawing my own conclusions as I am entitled to as a first appellate court. See **Okeno vs Republic (1972) E.A. 32.**

Before the lower court, the prosecution called six witnesses namely PW1 the complainant, PW2 the mother to PW1, PW3 the father to PW1, PW4 who was stood down by court upon allegation by court prosecutor that he had been comprised (*sic*) and was replaced by **Cpl Josephat Kinyua** , the investigating officer of the case. PW5, the official of the school in which the complainant was learning as a border and PW6,the clinical officer.

In my view and as correctly submitted by the appellants they were confronted with a charge sheet that was defective. The act complained of by PW1 is that between, 7th July, 2009 to 10th July, 2009 she was defiled by the two appellants. This amounts to gang rape. Hence the appropriate charge ought to have been gang rape as defined under section 10 of the Sexual Offences Act. Further the complainant talked of repeated sexual assaults by the appellants. Yet the charge sheet talks of only the incident of 8th July, 2009. Yet by her own account it is only the 2nd appellant who sexually assaulted her on that day. There is no mention of the 1st appellant. If the 1st appellant did not sexually assault the complainant on the material day then he ought not to have been charged as such. The evidence as a matter of fact was at variance with the offences charged on these 2 counts. The charge sheet was therefore defective and the trial magistrate ought to have rejected the same under section 89(5) of the Criminal Procedure Code.

In any event the evidence tendered by the witnesses called by the prosecution could not be relied upon to return a guilty verdict. None of these witnesses came in the same vehicle driven by appellant, **Stephen Mutua Zakayo** on the morning of 7th July, 2009 and whatever went on between the appellant and the complainant and the complainant if at all, these witnesses could not have been privy to the same. Hence the trial magistrate grossly misdirected herself by rejecting the defence of *alibi* put up by two appellants.

The record shows that the complainant told the court initially that she did not sleep with appellants. She also out came clearly that she did not infact know the 1st appellant. She further maintained that she was only made to sign the statement by **Kinyua.** This evidence prompted the court prosecutor to have her stood down. No procedural steps were undertaken by the trial court to find out why the complainant was ether repudiating or retracting her own statement. The only option available was for the prosecution to apply to have her treated as hostile a witness. This was not done. Instead the hearing was adjourned for a period of four months and some days. When the hearing resumed, the same witness (PW1) was now completely a changed witness. She was now singing like a parrot to the whims of the prosecutor and or her parents but to the chagrin of the appellants. There can only be one inference from the changed circumstances. Either she had been coached, threatened or coerced into altering her earlier testimony. In my view the subsequent evidences was neither voluntary or credible. Further, during her resumed testimony, she testified afresh. She never continued from where she stopped. In essence, we have 2 sets of evidence on record by the complainant. The 2 pieces of evidence are contradictory to the extreme. Why did the learned magistrate choose to act on one set of evidence as opposed to the other? The contradictions in complainant's evidence ought therefore to have been resolved in favour of the appellants.

Similarly, PW4 was stood down on 20th July, 2010 after the court prosecutor accused him of having been compromised. The court readily accepted the application by the prosecution and released him forever without causing investigations into the allegations in view of the seriousness of the charge that the two appellants were facing. All these goes to show the determination of the prosecution to have a conviction at whatever costs. This could have only been as a result of pressure being applied by the father of the complainant whom I understand is a prison office. This misdirection on the part of the trial magistrate violated the rights of the two appellants regard being had to their entitlement to a fair and just trial.

The crux of the matter before the court was whether there was ample, credible, cogent, weighty evidence to incriminate any of the appellants with the charges preferred against them by analyzing the ordeal of PW1 if at all, from the day she disappeared from school till the date she was traced in Machakos Township through the efforts of her parents, PW2 and 3 respectively. The evidence on record shows that the complainant disappearing from left school on 6th July, 2009 at 6.00pm after allegedly differing with another unknown school mate. No particulars of the girl were given nor was he lined up by prosecution as a witness. On the same day she was booked in a lodging at Kavisuni. No name of the lodging was given. Neither was an attendant of the lodging in court as a witness. In Machakos town she was treated and received well by her friend, the conductor, a **Mr. Muli** and the 2nd appellant. She slept in the house at Kariobangi allegedly belonging to the 2nd appellant, **Stephen Mutua Zakayo.** The appellants and her boyfriend by name **Muli** apparently treated her with drinks as well as food before they returned to have sex with her in turns between 7th July, 2009 to 10th July 2009. Nobody was interrogated in Machakos town to confirm these escapades.

This is, that slept in any of the house or lodging mentioned by PW1 in her evidence. Nor that she ate nyama in a butchery and had drinks in the bars. All this evidence was omitted out by the investigation officer. Nobody came forward to corroborate her story.

Where in her judgment did the trial magistrate warn herself against the danger of proceeding to convict the appellants on mere circumstantial evidence ? One thing that I have not been able to come to terms with is the learned magistrate's finding that PW1 was truthful in her testimony though had some fear at the beginning. I cannot appreciate how a witness who had previously testified and given a totally different scenario as to what had transpired back 4months later and gives a totally different trajectory of what happened to her. Such witness cannot pass the test of truthfulness. In my view, her evidence was

untrue and wholly unreliable as exhibited by her demeanor of changing her story midway through her initial evidence.

It is now settled law that in sexual offences like the one which the appellants faced, the trial court should warn itself against the danger of convicting the accused when the only evidence is that of the complainant. However, in cases where a minor is a victim, the court may proceed to convict on such evidence if it is satisfied that the victim is telling the truth. In this case, the victim was not a minor as she was aged 17 years and not subject to section 19 of the Oaths and Statutory Declarations Act. And even if she was such a victim, the learned magistrate did not put it on record that she was satisfied that the complainant was telling the truth. See section 124 of the Evidence Act.

Penetration is one of the essential ingredients of either defilement or rape. In this case there was no such evidence. The clinical officer based his opinion regarding penetration because the hymen was missing. The complainant must have engaged in sex prior. She never testified as to having pain during the alleged ordeal with the appellants and or that she bled during the encounter. This would have been the tell tale signs that complainant was engaging in sex for the first time and had indeed been defiled as claimed. Therefore the non presence of the hymen cannot be the nexus that connects the appellants to the crime. The hymen may have been lost due to other normal activities other than sexual banters. Therefore the learned magistrate erred in holding that;-

"… the medical evidence shows that is clear there was penetration as the hymen was absent…"

The trial magistrate further misdirected herself by saying that PW1 had taken bath and examination was done on 13th July, 2009 at Kitui General Hospital. This was her own theory. There was no such evidence by the complainant. In every criminal trial a conviction can only be based on the weight of the actual evidence adduced and it is dangerous and inadvisable for a trial magistrate to put forward a theory not canvassed in evidence or in counsel's submissions. See **Oketh Okale vs Republic [1965] E.A. 555.** In the circumstances, this case the trial magistrate was not possessed of forensic knowledge in this area so as to come to the aforesaid conclusion. It was based on her own theory.

On all these grounds, I will allow the consolidated appeals as there was no cogent, watertight evidence nor credible evidence that the trial magistrate could rely on to convict the duo. The evidence was marred with incredible testimonies and lies (sic). Those convictions are accordingly quashed and sentences imposed set aside. The appellants shall be set at liberty forthwith unless otherwise lawful held

DATED, SIGNED and delivered at **MACHAKOS** this **15TH** day of **OCTOBER, 2012.**

ASIKE-MAKHANDIA
JUDGE