



REPUBLIC OF KENYA

High Court at Machakos

Criminal Appeal 161 of 2007

PAUL THUKU APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal from the judgment of the Senior Resident Magistrate E.K. Makori delivered on 31/3/2010 in Kitui Principal Magistrate Criminal Case No. 1149 of 2003)

(Before George Dulu JJ)

J U D G M E N T

The Appellant **Paul Thuku** was charged in the subordinate court with **raping** an imbecile contrary to **section 146** of the **Penal Code**. The particulars of offence were that on 23rd July 2003 at **Kanyangi** village, **Kanyangi** sub-location in **Kitui** district of the **Eastern** Province unlawfully had carnal knowledge of **M.M** knowing her to be an imbecile. He was tried together with one **Zacharia Maina** who was charged separately with committing a similar offence on the same victim on the same day.

The appellant pleaded not guilty. After a full trial, he was convicted and sentenced to serve **20 years imprisonment** with **hard labour**. Being dissatisfied with the decision of the learned magistrate, he has now appealed to this court. His grounds of appeal are firstly, that the language which of the court was not the language which he understood contrary to **section 198(1)** of the **Criminal Procedure Code** and **section 77(2)** of the **Constitution**. Secondly, that the prosecutor was not qualified contrary to **section 85(2)** and **88(1)** of the **Criminal Procedure Code**. Thirdly, that he was kept in custody beyond the time allowed by section **77(3)**, **77(1)** and **88** of the **repealed Constitution**, and **Article 49** and **50** of the **Constitution 2010** before being brought to court. Fourthly, that he was wrongly convicted on contradictory evidence. The appellant also filed written submissions. At the hearing of the appeal, he stated that the medical report was not filled by a qualified doctor, and that he did not understand the language used in court.

The learned State Counsel **Mr Mwenda**, opposed the appeal. Counsel argued that the learned magistrate directed his mind to the two important issues for decision. Firstly, whether PW2 was raped and secondly, whether the appellant was one of the culprits.

Counsel submitted that, though PW2 was an imbecile the trial magistrate found her to be a reliable witness. The magistrate applied the provisions of **section 125(1)** of the **Evidence Act (Cap 80)**. Counsel further submitted that the evidence of the complainant (PW2) was corroborated by that of PW3 who found the appellant at the scene on top of the complainant and apprehended him. Counsel emphasized that the time was about 11 a.m. Further, counsel argued, the contents of the P3 form produced by the **Clinical Officer (PW1)** who medically examined the complainant a day after the incident, established that there

was vaginal bleeding, a venereal disease, and evidence of the presence of spermatozoa.

On the language used in court, counsel argued that, though during reading the charge it was only recorded that the charge was read and explained without indicating the language used, the appellant and the co-accused fully participated in the proceedings and asked questions which showed that they understood the proceedings.

In response to the State Counsel's submissions, the appellant stated that he was not found on top of the complainant. He was merely walking on the road while his colleague was the one in the bush. He stated that he did not understand the language used in court. He stated further that he was the one who went to the police post when he learnt that the public suspected him. He stated that him, it was his colleague who had disappeared and had to be sought for.

In brief, the facts of the prosecution case are as follows. The prosecution called four (4) witnesses.

On 23/7/2003 at 11 a.m. PW2 **M.M**, an imbecile female aged 25 years, was walking home from a visit to a neighbouring home. She met two people whom she knew. One was called **Zacharia** and the other she only knew only by appearance. These two people held her and she screamed. They each had carnal knowledge of her without her consent. PW3 **John Muia** was attracted by the screams. When he arrived at the scene, he saw the appellant standing. He saw the other person (described in the trial court as 1st accused), on top of the complainant (PW2) raping her. On being seen, the person ran away holding his trousers. The appellant, who was the 2nd accused in the subordinate court, was arrested at the scene and taken to the chief's office. The other person was also later arrested.

The complainant PW2 went home. She was escorted by her mother (who did not testify) to **Kitui** District Hospital on 24/7/2003. The complainant was treated by PW1 **Stephen Kitili** a Clinical Officer who also filled and produced the P3 form. The medical findings were that there was vaginal bleeding and the hymen was torn. A HVS examination showed the presence of spermatozoa and venereal infection on the complainant.

The appellant and his co-accused were then charged in court with the respective offences.

In his defence, the appellant elected to give an unsworn statement. He stated that he was a turnboy and their vehicle (with the co-accused) had a puncture. When he went to a hotel about 3 – 4 km from the place where they got a puncture, two people came and told him that he had raped someone. He was taken to the chief, beaten, and later his co-accused was brought. They were taken to **Kitui** Police Station and charged in court.

The co-accused **Zacharia Kimani** also gave an unsworn defence. He stated that he was a casual worker. That on the material day, they had come from buying charcoal. The motor vehicle they used had a problem and they repaired the same. They slept in town. He was sick and went to buy medicine and then went into a thicket. He was then pushed by a group of people who arrested him and told him that he was going to be explained the reason at the chief's camp. There he met the co-accused (the appellant) and they were taken to the police with an allegation of rape which was all lies. The public stole all their money.

Faced with this evidence, the learned magistrate convicted both of them and stated in the judgment as follows:-

“For the said reasons, I do propose which I hereby do to what the accused persons severally as charged (sic) prosecution has proved its case on beyond reasonable doubt basis.”

The trial court convicted each of them as charged and sentenced them. The appellant herein has appealed. The co-accused does not appear to have appealed presently.

This being a first appellate court, I have to start by reminding myself that I am bound to re-evaluate

the evidence afresh and come to my own conclusions and inferences – See **Okeno –vs– Republic (1972) 32.**

The appellant claims that the language of the proceedings was not recorded. I have perused the entire proceedings. They were recorded in English. At this appeal stage, the appellant talked in Kiswahili. At the hearing before the trial court, both the appellant and the co-accused, participated in the proceedings by cross-examining witnesses, and also by giving their unsworn defences.

If the failure to record the language used in the subordinate court was only with regard to the proceedings, I would have found it not to have prejudiced the appellant. However, even at plea stage, there is no record of the language used or whether the appellant understood the language used in explaining the charge. **Section 77(2) (b)** of the then **Constitution** provides:-

77 (2) Every person who is charged with a criminal offence.

(a)

(b) Shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence with which he is charged.

In my view, it is mandatory for the court at least to record that the charge was read in a language that an accused understands, if the language used is not so specifically indicated. This is important in the magistrate’s court, as the language used in that court could be Kiswahili or English, and one cannot know by assumption that the language used is either one or the other. In my view, the failure of the magistrate to record the language used or that the appellant understood the language used to charge him could mean that the appellant did not understand the charge he is answering to. In effect he could not be able to defend himself. Cross-examining witnesses, in my view, does not cure this defect because an accused might not ask relevant questions if he does not understand the charges leveled against him. I give the benefit to the appellant. For this reason, the appeal will succeed.

The appellant complains that the prosecutor was not qualified, that the prosecutor should have been at least an Assistant Inspector of Police. The record shows that the prosecutor was a full Inspector of Police. Therefore, the complaint of the appellant is misplaced and has no substance. I dismiss this ground.

The appellant complains that he was kept in custody for more than 24 hours before being brought to court contrary to provisions of the **repealed Constitution**, and the **Constitution 2010**. The jurisprudence on the remedy for this violation has been changing. Such violation, if proved, can now only result in monetary compensation. The **Constitution 2010** has adequate provisions on reliefs for violations to fundamental rights under **Chapter 4**. It is not a ground for acquitting an appellant.

On the issue of whether the evidence is adequate to sustain a conviction, the burden is always on the prosecution to prove an accused person guilty beyond any reasonable doubt – See **Sawe –vs- Republic (2003) KLR 364** in which the Court of Appeal stated that the prosecution must prove the case beyond reasonable doubt. Suspicion however strong is not a basis for sustaining a conviction. PW3 **John Muia** merely found the appellant standing on the road. There was no evidence that he was doing anything that could connect him to the crime. There is no indication as to how far he was from the scene. The evidence of his participation in the crime is that of the complainant (PW2) who was an imbecile. In my view, it is quite dangerous to convict on only the evidence of the complainant. She was not mentally stable. She could be honest but mistaken, taking into account the nature of her mental handicap. I give the benefit of the doubt to the appellant.

Consequently, and for the above reasons, I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.

Dated and delivered at Machakos this **26th** day of **November** 2012.

George Dulu
Judge

In presence of:-

Appellant present in person

N/A for State

Nyalo – Court clerk