REPUBLIC OF KENYA

High Court at Machakos

Criminal Appeal 85 of 2009

ALEX MUTISO MUTUA ……..……..…..… APPELLANT

VERSUS

REPUBLIC ……..……. RESPONDENT

(Being an appeal from the judgment of the Principal Magistrate S.A Okato Ag. PM delivered on 15/10/2008 in Kangundo Criminal Case No. 189 of 2008)

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(Before George Dulu J)

J U D G M E N T

The appellant **Alex Mutiso Mutua** was charged in the subordinate court with defilement of a girl aged 13 years contrary to section 8 (3)of the Sexual Offences Act No. 3 of 2006. The particulars of charge were that on 11th March 2008 at **Mukengesya** sub-location, **Komarock** Location in **Kangundo** District within Eastern Province intentionally and unlawfully by the use of his genital organ namely penis had carnal knowledge of **RNM** a girl aged 13 years. In the alternative, he was charged with indecent act with a child contrary to **section 11 (1)** of the **Sexual Offences Act No.3 of 2006**. The particulars of offence were that on the same day and place unlawfully and indecently assaulted **RNM** by touching her private parts namely vagina. He denied the charges. After a full trial, he was convicted on the main count and sentenced to serve 30 years in prison.

Being aggrieved by the decision of the subordinate court, he appealed to this court. His grounds of appeal are three. Firstly, that the learned trial magistrate erred in relying on untrustworthy evidence. Secondly, that the prosecution failed to prove its case beyond reasonable doubt and that the case was a frame up. Thirdly, ground was that the sentence is harsh and excessive.

With the leave of the court, the appellant tendered written submissions to court and opted not to make verbal submissions. I have perused the written submissions.

The learned State Counsel **Mr Mwenda** opposed the appeal. Counsel submitted that the learned magistrate addressed two important issues. Firstly, whether there was defilement. Secondly, whether the identification was positive. On the first issue, counsel contended that the learned trial magistrate properly relied on the evidence of PW4 the medical officer who filled and produced the P3 form. In counsel's view, the evidence on record established that there was forcible penetration as the hymen was torn and there were also signs of lacerations and injuries. In addition, a vaginal swab showed presence of sperms. In counsel's view, the medical evidence corroborated the evidence of the complainant PW1.

On the second issue of identification, counsel submitted that the complainant PW1, who was 13 years old, clearly identified the appellant as the culprit. The incident occurred in broad daylight at 1 p.m. PW2 a

minor, also saw the appellant who chased him away.

Counsel emphasized that though PW1 and PW2 were minors, their evidence was consistent and believable. It was infact PW1 who led the public to the arrest of the appellant.

The facts of the prosecution case in brief are as follows. On 11/3/2008 at 1 p.m., the complainant **RNM** (PW1) aged 13 and **MM** (PW2) aged 9, a sister and a brother (both minors), went to a thicket belonging to a teacher **Mwalimu M** (PW3) to fetch firewood. They met the appellant who was an employee of PW3. The appellant was armed with a panga and had a dog. The appellant told PW1 that his employer (PW3) had instructed him that whoever was found cutting firewood in the thicket would be required to cut firewood for PW3. He gave PW1 his panga to cut firewood, while PW2 fled because of fear of the dog. Before PW1 started cutting the firewood, however, the appellant grabbed her, knocked her down, removed her bikini and pant and defiled her. PW1 and PW2 then screamed and **AM** and **KM,** both of whom did not testify, came to the scene. Other people also came to the scene and PW1 directed them to a place where they saw the appellant grazing cows owned by PW3. The appellant was then arrested by members of the public.

PW1 informed her mother about the incident and was taken for treatment. PW4 **Dr Jackline Ochieng** treated the complainant (PW1). She filled the P3 form which she produced as an exhibit. It was the evidence of PW4 that the complainant's hymen was broken. There were lacerations on the posterior (bottom) of the vulva. There were traces of dried stains of whitish fluid in the inner aspect of the thighs. There were pus cells and proteins in the genitals of PW1.

The appellant was then charged.

When put on his defence, the appellant gave an unsworn statement. His defence statement was very short. He stated:-

"I am Alex Mutiso Mutua **from** Matetani**, I am a farmer. I know nothing about this case."**

Faced with this evidence, the trial court found that the prosecution had proved its case against the appellant beyond any reasonable doubt.

This is a first appeal. As a first appellate court, I have to remind myself that I am duty bound to re-evaluate all the evidence on record and come to my own conclusions and inferences – *See* **Okeno –vs- Republic (1972) EA 32**.

The conviction of the appellant is based on the evidence of two witnesses who are minors. These are the complainant PW1 who was 13 years of age, and her brother PW2 aged 9 years. In convicting the appellant, the learned magistrate stated thus in the judgment:-

"I have considered the evidence on record and find that the prosecution has proved its case against the accused beyond reasonable doubt. Since the evidence I have relied on is uncorroborated evidence of children of tender age, I warn myself of the danger of convicting on uncorroborated evidence of children of tender age and proceed to convict the accused as charged in the main count."

Indeed, the evidence of the eye witnesses is of the two children. One of the children is not of tender years as she was above 10 years. **Section 2** of the **Children Act No. 8 of 2001** provides as follows with regard to tender age:-

"child of tender years" means a child under the age of ten years."

In effect, the complainant (PW1), who was 13 years old, was not a child of tender years. However, it must be stated that both the witnesses (PW1 and PW2) were minors, in that they had not attained the age of 18 years. Though there is no legal requirement that evidence of children should be corroborated, the court

must direct itself as to whether the evidence is believable.

The screams of PW1 and PW2 were said to have been heard by the members of the public. In particular, one **AM** and **KM** came to the scene. The appellant was also said to have been arrested by members of the public. None of these crucial witnesses was called to testify. Even the mother of the complainant, who took the complainant to the police and to hospital, was not called to testify. No reason was given for the failure of the prosecution to call these crucial witnesses. From the medical evidence, it cannot be doubted that the complainant was defiled. The medical report P3 form, and other evidence clearly confirm this. However, was it the appellant who was the culprit? The involvement of the appellant in commission of the offence had to be established beyond reasonable doubt. The burden was on the prosecution to do so.

In the case of **Bukenya & Others –vs- Uganda (1972) EA 549 at page 550** the Court of Appeal for **East Africa** stated:-

"It is well established that the Director has a discretion to decide who are the material witnesses and whom to call, but this needs to be qualified in three ways. Firstly, there is a duty on the Director to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. Secondly, the court itself has not merely a right but also the duty to call any person whose evidence appears essential to the just decision of the case. Thirdly, while the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled under the general law of evidence, to draw an inference that the evidence of those witnesses if called would have been or would have tended to be adverse to the prosecution case."

In our case, not only were the two witnesses who were mentioned above not called to testify, the medical evidence is not conclusive that the defilement was committed by the appellant. The doctor did not state what process they carried out to determine that the dried white substance on the thighs of the complainant was semen with spermatozoa. No evidence was tendered on whether the source of that spermatozoa was the appellant. This is a case where the prosecution failed to bring to court the crucial evidence which would prove the appellant guilty beyond reasonable doubt. Since the burden is always on the prosecution to prove the guilt of an accused beyond reasonable doubt, they are duty bound to do so.

There is evidence from the prosecution suggesting that the appellant attempted to escape. The suspect behavior of the appellant in attempting to escape from arrest, *per se*, does not prove his guilt – *See* **Sawe –vs- Republic (2003) KLR 364** in which the Court of Appeal stated that suspicion however strong cannot be a basis for sustaining a conviction in a criminal case.

Considering all the facts and evidence placed by the trial magistrate by the prosecution, I find that the prosecution left open such gaps in the evidence they tendered that resulted in their failure to prove their case against the appellant beyond reasonable doubt. I find merits in the appeal and will allow the same.

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 **18th** day of **December** 2012.

George Dulu
Judge

In presence of:-

Appellant present in person

Mutinda – Court clerk