No. 318

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL NO.72 OF 2010

JOSEPH MANGESI KWANYE.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

(Being an appeal from the Resident magistrate's court at Kilgoris criminal case no. 127 of 2007 W.N.Kaberia-RM)

Joseph Mangesi Kwanye, the appellant faced a charge of defilement of an Imbecile contrary to section 7 of the **Sexual Offences Act** before the Resident magistrate's court at Kilgoris. The particulars in the charge sheet were that on 20th February, 2007 in Transmara District within Rift valley Province, the appellant had unlawful carnal knowledge of **N.N** an imbecile girl under the age of eighteen years. The appellant entered a plea of not guilty.

The brief facts of the case were that on the 20th February, 2007 the complainant one, **N.N** was grazing cattle in the field, when she was grabbed and sexually assaulted by the appellant. The complainant's sister **S** went to check on the straying cattle when she found the appellant in the act and she screamed. This attracted the mother of the complainant (PW2) who went and found the appellant standing besides the complainant with his trousers down the knees with a maasai shuka. The complainant was crying as well as her sister **S**. The complainant was said to be 14 years old and an imbecile. Her torn bloomer was tendered in evidence. The appellant's trouser was also produced in court as evidence. The medical evidence by the clinical officer confirmed that the complainant was defiled and that she was mentally retarded. The appellant on being found in the act became a victim of mob justice. He was beaten senseless. He was later rescued by his brother and taken to hospital from where he was arrested and

charged.

When put on his defence the appellant confirmed that he was beaten and injured by a crowd on the 20th February, 2007. However he denied committing the offence. The brother whom he called to testify in his defence also confirmed that appellant was beaten and that he took him to hospital then later he was arrested.

Being satisfied that the prosecution had proved its case against the appellant, the learned magistrate convicted him and sentenced him to the minimum sentence of ten years imprisonment.

The appellant was aggrieved by the conviction and sentence. He therefore lodged the instant appeal complaining that the prosecution case was not proved beyond reasonable doubt, the evidence tendered was contradictory doubtful, inconsistent and that the sentence imposed was manifestly harsh and excessive. That the learned magistrate failed to consider the long standing dispute between the appellant and the complainant's family and finally, that his defence was not properly appreciated.

When the appeal came up for hearing before me on 23rd November, 2010, all that the appellant said was that he graved for a retrial since he was sick during the trial having been assaulted previously.

The appeal was opposed. **Mr. Mutuku**, Senior Principal State counsel submitted that the appellant was found red handed in the act. The conviction was thus safe.

This is a first appeal. It is my duty to re-evaluate the evidence, make my findings and draw my own conclusions on the evidence which was before the trial court. In doing so, I must give allowance to the fact that, unlike the trial court, I did not have the advantage of hearing and seeing witnesses testify. See **Okeno.v. Republic(1972)E.A 32**.

The appellant has asked for a retrial on the grounds that he was not well during the trial as he had been assaulted. That cannot be the basis of a retrial since it is well nigh impossible to establish from the record before me that indeed the appellant was sick during the trial. The appellant should have raised the issue

with the trial court for appropriate recourse. Indeed I note that the case was adjourned severally at his request on the grounds that he was sick. The hearing only commenced after the appellant himself confirmed that he was fit for trial. Indeed a close scrutiny of the record reveals that at no time was the appellant compelled to proceed with the trial despite his protestation as to the state of his health. In any case the trial was not concluded in a single day. It was heard over a period of time and it cannot be that on each of these occasions, the appellant was constantly sick because of being assaulted. I think the plea for a retrial is an afterthought and should not be entertained at all.

From the record, it is quite clear that the appellant was caught red handed in the act. Apparently on 20th February, 2007, the complainant was grazing her family cattle. When they strayed into a neighbours maize farm, the complainant's sister, **S** rushed there to contain them. In the process she came across the appellant in the act. She screamed and attracted the attention of her mother (PW2), who is also a mother of the complainant. PW2 rushed to the scene and found appellant in the process of pulling up his trousers. Other people attracted by the screams came to the scene and snatched the trouser from him. He was literally left naked. PW2 checked the complainant and saw a discharge from her private parts consistent with spermatozoa. The appellant was beaten senseless by members of the crowd. The offence was committed in broad daylight. The appellant was a person well known to the complainant's mother (PW2). The appellant talks of frame up. I do not see how that is possible considering that he was caught red handed in the act. He could not have been beaten unconscious for no apparent reason. His own witness, a brother confirmed in his evidence that he heard that the appellant had been beaten for sexually assaulting the complainant. He also confirmed having taken him to hospital as a result. The complainant was subsequently examined and medical evidence confirmed sexual assault. I do not think that the complainant would deliberately have set herself up for sexual assault in order to frame the appellant. In any case, the appellant did not even amplify on the basis of the alleged grudge between the two families if at all. To my mind this story of the grudge simply does not add up. How does the appellant explain the possession of his long trouser by the prosecution?. According to the prosecution, when the appellant was found in the act, he was forced to hand over the long trouser that he was in the process of pulling up. The appellant did not deny that the trouser belonged to him. It can only be assumed that the long trouser came into the possession of the prosecution in the manner suggested by the prosecution witnesses.

On the evidence on record, I am satisfied just like the learned magistrate that one, the complainant was an imbecile; she was sexually assaulted and was so assaulted by the appellant. The defence advanced was clearly displaced by the overwhelming prosecution evidence. The learned magistrate crafted a one page terse judgment. I do not think she did justice to both the defence and prosecution case. She could have done much better than that. However, as a first appellate court, I have re-examined and re-appraised the evidence on record. Despite the shortcoming in the judgment aforesaid, the conviction of the appellant cannot be faulted.

That being my view of the matter, I find the appeal to be unmeritorious and is accordingly dismissed in its entirety.

Judgment dated, signed and **delivered** at Kisii this 17th Day of January, 2011.

ASIKE-MAKHANDIA

JUDGE