



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CRIMINAL APPEAL NO. 206 OF 2007**

**JOSEPH KAMUNYA RUKWARO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an Appeal from the original conviction and sentence by R.A.A. Otieno, Senior Resident Magistrate, in the Chief Magistrate's Criminal Case No.3782 of 2004 delivered on 10<sup>th</sup> August 2007 at Nyeri)*

**JUDGMENT**

**Joseph Kamunya Rukwaro**, the appellant herein, was tried on a charge of defilement of a girl contrary to *Section 145(1)* of the Penal Code. In the end he was convicted for the offence under *Section 8* of the Sexual Offences Act No. 3 of 2006 and was sentenced to life imprisonment. Being dissatisfied with the aforesaid decision, the Appellant filed this appeal whereupon he put forward the following grounds in his Petition:

- 1. The learned trial Magistrate erred in law and fact in failing to find that the prosecution had not proved their case beyond reasonable doubt, thereby occasioning a miscarriage of justice to the detriment of the appellant.***
- 2. The learned trial Magistrate misdirected herself to both facts and law in not finding that the circumstantial evidence against the accused was not conclusive and safe in the circumstances to convict for the very serious offence.***
- 3. The learned trial Magistrate erred in law and fact in failing to find that the prosecution's evidence consisted of grave and material contradictions.***
- 4. The learned trial Magistrate misdirected herself to the facts by failing to find that there was a male worker at the home where the alleged offence occurred.***
- 5. The learned trial Magistrate erred in law in considering and giving undue weight to irrelevant facts, to the detriment of the appellant.***
- 6. The trial Magistrate erred in law and fact in rejecting in totality the defence evidence without giving cogent reasons for doing so.***

**7. The learned trial Magistrate erred in law in basing her judgment on her own opinion rather than the evidence on record.**

**8. The learned trial Magistrate erred in law and fact in failing to find that P.W.1 the complainant did not identify him at the scene and she was only faced to le that it was the Appellant who committed the offence.**

**9. That the learned trial Magistrate erred in law and fact in dismissing the appellant's alibi defence without giving any good reason for doing so and when the testimony of the complainant supported the same.**

**10. The learned trial Magistrate erred in law in shifting the burden of proof on the Appellant thereby occasioning a miscarriage of justice.**

Before considering the merit or otherwise of the appeal, let me set out in brief the case that was before the trial court. The prosecution's case was supported by the evidence of six witnesses. **M.W** (P.W.1) the complainant herein, told the trial court that on 20<sup>th</sup> September 2004 she, with her cousin M.N, went to get potatoes from her aunt's home at I. The duo found Joseph Kamunya Rukwaro, the appellant, at that home. The Appellant is said to have assigned the duo some work at the shamba. Between 4.00 and 5.00 p.m. P.W. 1 said the Appellant sent her to fetch a hammer from the bedroom of her aunt. At the same time, the Appellant sent M.N to get maize from the shamba. P.W.1 said that while she was removing the hammer under the bed, someone entered that bedroom, pulled her out and covered her head with a blanket. That intruder is said to have placed the Complainant (P.W.1) on the bed, removed her underpants and defiled her. The intruder slapped the Complainant when she screamed. It is said the intruder left her in that bedroom after defiling her. P.W. 1 said she did not recognise her assailant because her head was covered. P.W. 1 said she explained to M.N what happened to her. The duo then returned to their home at K. The Complainant was taken to Nyeri Provincial General Hospital for examination and treatment the next day. The Complainant said that she did not go to school for two days and that during that period some women visited her and prodded her to implicate her uncle, the Appellant herein, as the culprit. It is said the area assistant chief came and took her to report the incident to the Police. P.W. 1 said she did not see her uncle again after he sent her to collect a hammer for him. She said the Appellant had instructed her to fetch the hammer and place it on the table to enable him use it the next day. P.W. 1 further said that there was a worker at her uncle's place who worked with them in the farm and left at 2.00 p.m. to a place she did not know. She said her uncle told her he was going to buy some cigarettes. It is the evidence of **R.W** (P.W.2) that on 26<sup>th</sup> September 2004, the Appellant left for their farm at I to harvest maize and potatoes and later followed by P.W.1 and her cousin. P.W.2 said she was told by P.W.1 that she had been defiled by a tall brown man. She said she was reprimanded by the Appellant and ordered to take the Complainant for treatment. **Lilian Wanjugu Kibira** (P.W.3), the area assistant chief, told the trial court that she, together with **Peter Kimita** (P.W.4), took steps to arrest the Appellant after she was informed by two women of the complainant's defilement. **Dr. Macharia Matu** (P.W.5) said he examined P.W.1 and found her libia majora and libia Minora and hymen torn.

When placed on his defence the Appellant gave sworn testimony in which he denied the offence. The Appellant confirmed that the Complainant and her companion had visited his farm at Ihururu on 26<sup>th</sup> September 2004 to collect potatoes for roasting. He said he instructed his farm worker to take the Complainant to the farm where they worked upto 2.30 p.m. when they broke for lunch. He alleged that he instructed the farm help to repair a fence while he sent the Complainant to fetch a hammer from the house for the worker after which he left for K. At 6.30 p.m. the Appellant, said he came back and found the Complainant had already left for home. He said his wife (P.W.2) told him that the Complainant had been defiled and that is when he gave her instructions for the Complainant to be taken to hospital for treatment. The Appellant said he suspected his worker may have defiled the Complainant. He said he was arrested by P.W.4 who had a grudge against him because he owed him some money.

Having set out in brief, the case that was before the trial court, let me now consider the merits of

the appeal. It is the submission of Mr. Muchiri, learned advocate for the Appellant, that there was no credible evidence to sustain a conviction. It is the submission of Mr. Makura that there was sufficient evidence which established the case against the Appellant beyond reasonable doubt. The trial magistrate formed the opinion that there was no worker on the Appellant's farm because it would have been easy for P.W.2 and the Appellant to report him as a prime suspect. She concluded that the Appellant was the culprit. I have re-evaluated the evidence on record. The evidence of the victim is that she did not see her assailant because her face was covered with a blanket. It is the evidence of P.W.4 that she caused the Appellant to be arrested upon receiving some information from certain women that the person who defiled the Complainant was the Appellant. It is important to note that those women were not summoned to testify for no good reasons at all. In any case the complainant stated that the same women had prodded her to implicate the Appellant as the culprit. The other weakness which emerged from the case is that M.N, the Complainant's cousin was not summoned to testify in support of the prosecution's case. The prosecution did not give any convincing reasons as to why such a crucial witness was not availed yet the Police have the resources to do so. The medical report produced by P.W.5 indicated that the Complainant's hymen was torn. It was incumbent upon the Police to present the Appellant for medical examination to create the nexus. It is obvious that the Complainant was defiled but there is no cogent evidence connecting the Appellant with the offence. The Court of Appeal in the case of JOHN MWASHIGADI MUKUNGU =VS= REPUBLIC CR. A. NO. 227 of 2002 (unreported) at P.3 stated as follows:

***“The complainant was medically examined. Her urine and a vaginal swab were analysed. Some pus cells and spermatozoa were noted. Those confirmed she had recently had sexual intercourse. The Appellant was not however, medically examined. So medical evidence did not connect him to the alleged offence.”***

In this appeal, I have already stated that there was no medical examination of the Appellant. The medical report itself was not conclusive. It is therefore difficult to pin down Appellant as having committed the offence. In the circumstances of this case, serious doubts have emerged. The benefit of doubt should have been given in favour of the Appellant. To begin with, the Complainant said she did not see her assailant because her face was covered. The Appellant said that the Complainant could have been assaulted by his farm help. The trial magistrate did not believe that there was a farm worker because the Appellant was unable to give the name of such an employee nor where he came from. It is possible for one not to know the name of his employee if he was recently recruited. In fact the Complainant confirmed in cross-examination that she found a farm worker in the Appellant's farm. I am unable to comprehend why the learned trial Senior Resident Magistrate came to the conclusion there was no farm worker. She disbelieved the evidence of the Appellant and that of the Complainant. She singled out the evidence of the Appellant to be false. She also came to the conclusion that the Complainant may have been influenced not to tell the whole truth for fear of her life. In such a case, then one cannot treat her (complaint) evidence to be reliable. In short, I think the evidence taken as a whole created serious doubts. The benefit of doubt should have been given to the Appellant. There is strong suspicion that the Appellant committed the offence but unfortunately that cannot substitute proof.

The second ground ably argued by the Appellant is to the effect that the trial magistrate disregarded the Appellant's defence of alibi. The Appellant said that he left the farm after instructing the Complainant to fetch a hammer for him from the house. The Complainant confirmed in her evidence that the Appellant left the farm to purchase some cigarettes. The defence set up by the Appellant appears to be credible. I am convinced the learned trial Senior Resident Magistrate unfairly rejected the Appellant's defence. It is possible that when the appellant left the farm, another person came into the farm to defile the Complainant. This finding therefore further creates doubts as to whether the Appellant actually defiled the Complainant.

The third main ground argued on appeal is that the trial magistrate erred when she convicted the Appellant under *Section 8* of the Sexual Offences Act No. 3 of 2006 yet the offence was committed at a time when the aforesaid Act had not come into force. Mr. Makura learned Senior State Counsel, conceded the appeal on this ground. I am convinced that the learned Senior State Counsel rightly conceded the appeal on this ground.

In the final analysis and on the basis of the above reasons, the appeal must succeed. It is allowed with a consequential order that the conviction is quashed and the sentence is set aside. The Appellant is hereby set free forthwith unless lawfully held.

*Dated and delivered at Nyeri this 11<sup>th</sup> day of March 2011.*

**J. K. SERGON**  
**JUDGE**

In open court in the presence of Mr. Mindo holding brief Muchiri for the Appellant and Mr. Makura for the State.