



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 85 OF 2010

(From Original Conviction and Sentence in Criminal Case No.1555 of 2008 of the Principal Magistrate's Court at Kwale: Ogembo D.O. – P.M.)

JOSEPH MUTUA alias PABLO APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGEMENT

The Appellant **JOSEPH MUTUA alias PABLO**, has filed this appeal to challenge his conviction and sentence by the learned Principal Magistrate sitting at Kwale Law Courts. The Appellant was first arraigned in court on 27th October 2008 on a charge of **RAPE CONTRARY TO SECTION 3(1) OF THE SEXUAL OFFENCES ACT 2006**. The particulars of the offence were:

“On the 24th day of October 2008 Msambweni District within Coast Province, unlawfully and intentionally committed an act which caused his penis penetrate into T.M's vagina without her consent”

The Appellant entered a plea of not guilty to the charge and his trial commenced before the lower court on 31st March 2009. The prosecutor led by **INSPECTOR SIBUDA**, called a total of four (4) witnesses in support of their case. The complainant **T.M** told the court that on the material day at 9.00 p.m. the Appellant whom she knew well as a neighbour came and found her outside her house. He accused the complainant of assisting his wife to run away and then began to pull the complainant away from the house ostensibly to take her to the police station. On the way the Appellant diverted into the nearby bushes where he raped the complainant, all the while threatening to kill her if she made noise. After the rape the complainant went and reported the matter to police. Appellant was then arrested and charged.

At the close of the prosecution case the Appellant was ruled by the court to have a case to answer and was placed on his defence. He gave a sworn defence in which he totally denied raping the complainant. On 26th February 2010 the learned trial magistrate delivered his judgement in which he convicted the Appellant of the offence of rape and thereafter sentenced him to serve 15 years imprisonment. Being dissatisfied with both conviction and sentence the Appellant filed this present appeal.

MR. ONSERIO learned State Counsel conceded the appeal on the basis that the charge sheet as

framed was fatally defective. I have looked at the charge sheet. The Appellant is charged with committing an act of Rape contrary to S. 8(1) of the Sexual Offences Act. S. 8(1) merely provides the definition of the term rape. The penalty for the offence is provided for by S. 8(3) of the Act which provides:

“A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life”

Failure to include S. 8(3) in the charge sheet renders the charge incomplete and therefore fatally defective. The charge ought to have read Rape contrary to S. 8(1) **as read with** S. 8(3) of the Sexual Offences Act. This defect in the charge renders the subsequent proceedings null and void as one cannot be convicted on the basis of a fatally defective charge sheet. Therefore on this ground alone the appeal must succeed.

Mr. Onserio on behalf of the State has requested for a re-trial in the matter. However even if the charge sheet were not fatally defective, my view is that the evidence adduced in support of the charge still does not merit a conviction. **PW1** told the court that immediately after she had been released by the Appellant she went home and told her neighbour **‘MBEYU’** what had befallen her. The said **‘Mbeyu’** was not called to testify. Her evidence would have been crucial to confirm the complainant’s allegation of rape.

PW3 CHRISPIN MUNYAPARA is a clinical officer and produces the P3 form in respect of the medical examination conducted on the complainant. The report indicates that a **‘foul-smelling discharge’** as well as **‘spermatozoa, pus and blood’** were noted on the Appellant’s genitalia. From this the conclusion was that rape had occurred. I cannot agree with this finding which is to my view far too vague. The complainant by her own admission was a married woman. **PW2 M.M** was her husband. As a married woman **PW1** obviously must have been sexually active. The finding of discharge and spermatozoa are not exclusive pointers to rape. There were no bruises or lacerations which would indicate forcible penetration. These can just as easily be found on a married woman. These findings on their own are not proof of rape. No blood typing or secretor tests were done to determine whether the sperms detected emanated from the Appellant. **PW4 PC. DAN MUSUKU** confirmed to the court that the Appellant was not taken for medical examination. Infact **PW4** says at page 20 line 8:

“We did not take you to hospital because you had bathed”

In my view this statement has no merit. Whether or not the Appellant had bathed after the incident has no bearing on whether tests could be done. The police only required from him a blood and/or saliva sample both of which would be unaffected by bathing. I find that the police failed to conduct conclusive investigations into this matter and the results of the medical examination conducted on the complainant were therefore ambiguous.

Therefore aside from the defective charge sheet I find that the evidence adduced did not prove the charge sufficiently. The allegation of rape was not properly corroborated by the medical evidence available. Therefore this appeal succeeds. I quash the Appellant’s conviction for the offence of rape. The subsequent sentence of 15 years imprisonment is also set aside. The Appellant is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and Delivered in Mombasa this 6th day of April 2011.

M. ODERO
JUDGE

In the presence of:
Mr. Onserio for State
Appellant in person