



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL CASE NO. 82 OF 2007

DAVID MURIUKI THOITHI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal arising from the original conviction and sentence by R. A. A. Otieno, Senior Resident Magistrate in the Nyeri Chief Magistrate's Criminal Case No.2938 of 2005 delivered on 13th October 2006 at Nyeri)

JUDGMENT

DAVID MURIUKI THOITHI, the appellant herein, was tried on a charge of two counts of defilement of a girl contrary to *Section 145(1)* of the Penal Code. The particulars in count I were that on 18th June 2005 in Nyeri District within Central Province, had carnal knowledge of C.W.N a girl under the age of sixteen years. In count II the particulars of the offence are similar to those of count I save that the victim's name is S.W.N. The Appellant also faced an alternative count of indecent assault on females contrary to *Section 144 (1)* of the Penal Code. At the end of the trial, the Appellant was convicted on the main counts and was sentenced to life imprisonment. The Appellant being aggrieved, filed this appeal.

On appeal, the Appellant put forward the following grounds in his petition of appeal:

- 1. The learned trial magistrate gravely erred in both points of law and facts, and or misdirected himself in both in failing to approach the circumstantial evidence with due circumspection.***
- 2. The learned trial magistrate gravely erred in both in not putting in account or consideration the fact that, circumstantial evidence can be fabricated to cast suspicion on to another where the circumstances are not as such as to produce moral certainty to the exclusion of every reasonable doubt.***
- 3. The learned trial magistrate gravely erred in both points of law and facts and or misdirected himself in both in not putting into consideration the fact that evidence of which requires corroboration cannot afford corroboration to any other evidence also requiring corroboration.***
- 4. The learned trial magistrate erred in both points of law and facts and or misdirected himself in both in failing to give my defence any due weight, shifting the burden to the same and failing to find that, I over-stayed in the Police cells.***

When the appeal came up for hearing, the Appellant was granted leave to rely on written submissions while Mr. Makura, learned Senior State Counsel, opposed the appeal by making oral

submissions.

Before considering the appeal, it is necessary to set out in brief the case that was before the trial court. The prosecution's case was supported by the evidence of six witnesses. It is the evidence of **S.W** (P.W.1) that she together with **C.W** (P.W.3) in company of another took tea in the Appellant's house on 18th June 2005. P.W.2 told the trial court that the Appellant removed her underpants before inserting his penis in her genitalia. She said she went home and informed her parents what had happened to her. She was taken to hospital for examination and treatment. P.W.3 told the trial court a similar story to that of P.W.2. She alleged that while P.W.2 was outside the house the Appellant removed her underpants after which he proceeded to insert his penis into her genitalia. P.W.3 informed her father who took her to hospital for examination and treatment. **Stanley Nyamu** (P.W.4) told the trial court that when he received the report of defilement he booked a report with the Police before taking the minors to hospital for examination and treatment. The Appellant is said to be P.W.4's brother hence an uncle to the victims, was promptly arrested by the Police. **E.N** (P.W.5) informed the trial court that on 18th June 2005, she left for church and came back at about 6.00 p.m. When she arrived home she was informed by P.W.2 and P.W.3 that the duo had been defiled by the Appellant. P.W.5 said that when she examined the genitalia of the two girls she noticed some whitish substance which looked like sperm. P.W.5 said her when husband (P.W.4) arrived, she informed him of what she had been told by the girls. P.W.5 is said to have washed the minors, slept and took them to hospital the next day. On cross-examination P.W.5 admitted that she had quarreled with the Appellant over maize. She however, stated that the dispute had been amicably resolved at the time of the offence. **Dr. Macharia Matu** (P.W.1) told the trial court that P.W.2 and P.W.3 were examined by Dr. Njuguna on 21st June 2005 who filled and signed their P3 form on 22nd June 2005. The P3 form in respect of P.W.3 indicated that there were two longitudinal bruises on P.W.2's labia minora though there were no sperms noted. The doctor formed the opinion that P.W.2 was defiled. The P3 form in respect of P.W.3 indicated that her genitalia had fresh bruises on the labia minora and that there was pus cells indicative that P.W.3 was defiled and infected with an S.t.d.

When placed in his defence, the Appellant claimed that on 18th June 2005, he left for the farm at 7.00 a.m. and that he arrived home after 10 p.m. on the same day when everyone was dead asleep. In essence the Appellant was raising the defence of alibi. He claimed that he spent the night in his house until the morning of 19th June 2005 when he left to work for his employer. He stated that he spent the night of 19th June 2005 in his employer's home. He said he was arrested on 24th June 2005 without being informed of the charges.

On appeal, the Appellant raised and argued three main grounds. First, that the circumstantial evidence relied by the trial magistrate were fabricated. It would appear Mr. Makura, learned Senior State Counsel, did not address his mind on the issue. I have carefully re-evaluated the evidence which were presented before the trial court. The question is whether or not there was any evidence of a fabrication? To begin with, there is evidence that P.W.5 had a dispute over maize with the Appellant. Although it is alleged that the dispute was resolved, that alone can induce a party to fabricate a story to implicate his or her opponent. P.W.5 also admitted in cross-examination that the Appellant had not visited her home for a while. It is alleged that the defilement took place on 18th June 2005 and the Complainants were examined on 21st June 2005. The doctor noted in the P3 form that the bruises were fresh. According to the evidence of P.W.4 he took the children for treatment almost immediately. P.W.5 stated that she and P.W.4 took the children to hospital on Monday though the alleged defilement took place on 18th June 2005. P.W.5 alleged that they could not take the children to hospital on Sunday because the hospital was not open. It is a matter of common notoriety that a referral facility like the Provincial General Hospital is always open hence I am unable to believe the evidence of P.W.5. Even if her story was to be believed, the question is why wait until Tuesday i.e. 21st June 2005 to see a doctor. It is not also conceivable for injuries allegedly inflicted three days earlier to be treated as fresh wounds. The overall picture I get is that it is possible the evidence was a fabrication by P.W.5 who had a grudge with the Appellant.

The second ground argued on appeal is to the effect that There was no corroboration of the evidence of P.W.2 and P.W.3. there is no doubt that the trial Magistrate found the evidence of P.W.1 to

have corroborated the evidence of P.W.2 and P.W.3. There are two issues which have arisen: First is that the medical evidence produced by P.W.1 was improperly tendered. P.W.1 was not the maker of the P3 form. The prosecution did not lay a basis for the medical report to be produced under *Section 77* of the Evidence Act. The failure to summon Dr. Njuguna, the doctor who examined P.W.2 and P.W.3 to testify and produce the P3 form denied the Appellant a chance to cross-examine the witness. The medical report which was not interrogated by cross-examination cannot therefore be used to corroborate the evidence of the minors. Secondly, there is no evidence that the Appellant was medically examined to create the nexus with the offence. In the end I am convinced that there was no corroboration of the evidence of P.W.2 and P.W.3.

The last ground argued on appeal is that the Appellant's defence of alibi was rejected without due regard. There is evidence that the Appellant had gone in the morning of 18th June 2005 to work outside the homestead. It is the Appellant's evidence that he came back at 10.00 p.m. whereupon he found everyone asleep. He stated that he went to sleep in his house until the morning of 19th June 2003 when he left for his place of work. The trial Magistrate stated in her judgment that though the Appellant had raised the defence of alibi, he did not call any witness to corroborate his story. With respect, the learned Senior Resident Magistrate erred when she stated that the Appellant did not tender evidence to corroborate his defence of alibi because she shifted the burden of proof to the Appellant. It was not necessary for the Appellant to corroborate his defence of alibi. It was sufficient for him to simply set up the defence. It was upon the prosecution to displace such a defence. A miscarriage of justice was committed against the Appellant. The benefit of doubt should be given to the Appellant. Mr. Makura, had pointed out that the Appellant's alibi defence was displaced. With respect, that is not the position. The only evidence which put the Appellant at the scene of crime are those of P.W.2 and P.W.3. The evidence of P.W.2 and P.W.3 were not corroborated yet there was need to do so under *Section 124* of the Evidence Act. The learned trial Magistrate stated that the Appellant did not rebut the evidence of P.W.2 and P.W.3. With respect, the trial magistrate failed to appreciate the fact that the Appellant had specifically shown in the cross-examination of P.W.4 that there was a grudge between him and the complainant's parents and the fact that he specifically stated that he was not at the scene of crime.

The end result is that the appeal is allowed. The conviction is quashed and the sentence set aside. The Appellant be set free forthwith unless lawfully held.

Dated and delivered at Nyeri this 1st day of April 2011.

**J. K. SERGON
JUDGE**

In open court in the presence of Makura Learned State Counsel and the appellant.

J.K. SERGON
JUDGE