



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
CRIMINAL CASE NO. 67 OF 2006

REPUBLIC.....PROS

-VERSUS-

CHANGOMA FUNGO.....ACCUSED
PERSON

JUDGEMENT

CHANGOMA FUNGO (the appellant) was convicted on a charge of attempted defilement of a girl contrary to section 145(ii) of the Penal Code. The appellant denied the charge, and after trial wherein four witnesses testified for the prosecution, he was convicted and sentenced to serve ten years imprisonment with hard labour.

The evidence of **K.K** (Pw 1) was that on 4/03/06 while at the posho mill, appellant approached her and sought directions to one **K`**s house. As she was leading him there, the appellant knocked off her flour and dragged her to a bush where he strangled her and removed her underwear. A pastor who was passing by heard the commotion and went to her rescue. The matter was reported to police and appellant was arrested. **CHENGO KITSAO** (Pw 2) was herding livestock in the evening when he heard a girl scream. He ran to the place and found the appellant with a girl on the ground. On seeing Pw 2, the appellant fled. She explained to Pw 2 what happened and they took a pair of shoes appellant had left. **K.S** (Pw 3) told this court that on 04/03/06, while at home in B[...], his sister **K** was brought in by **CHENGO** who said he found her under attack by the appellant. On 01/03/06, PW 1 spotted the appellant in town drinking, so she pulled him out and he was apprehended and taken to the police station. The shoes he had left behind when he fled were handed over to police and were produced as exhibit.

In his unsworn testimony, the appellant told the trial court that he had gone to B[...] when he met three people who asked him to produce money. They then asked him for alcohol. When he reported the matter to police, he was detained by the police officers.

In his judgment the Trial Magistrate noted that the complainant was 14 years old and that her testimony was corroborated by Pw 2 who found the appellant pinning the girl on the ground. He held that appellant`s act of fleeing from the scene further incriminated him saying if he was not doing anything wrong then there was no reason for him to flee. Appellant`s defence was rejected as not addressing the evidence tendered by the prosecution witnesses and that he dwelt more on his arrest, thus leaving the prosecution evidence unchallenged.

The appellant challenges these findings both on conviction and sentence saying:-

1. The evidence of Pw 1 was marked with a lot of conspiracy and the evidence was just made up and lacked corroboration.
2. His defence was unlawfully dismissed as it was not shaken by the prosecution.
3. His rights under section 72 (3) (b) of the Constitution were violated.
4. The conviction and sentence was harsh and inordinately excessive considering the circumstances of the case.

Appellant filed written submissions in which he stated that his rights were violated and the court should be guided by the decision in **ALBANUS MWASIA MUTUA V R Cr Appeal No.120 of 2004**. From the charge sheet the appellant was arrested on 1st March 2006 and taken to Court on 06/03/06 – he ought to have been presented to court within 24 hours of his arrest. From the calendar, 1st March 2006, fell on a Wednesday – which means he ought to have been presented to court latest on 2nd March 2006 – unless there was a good reason for such delay. This was not responded to by prosecution under section 72 3 (b) of the former Constitution, anyone charged for a non capital offence was required to be presented to court within 24 hours – this did not happen and no explanation was given. I therefore declare that accused rights were indeed violated.

The solution however does not lie in an acquittal, it lies in the appellant pursuing for compensation as provided by section 72 (6) of the former constitution. The State however conceded this appeal on an entirely different ground – that is the complainant`s age was not established at all and it was not clear how the Trial Magistrate decided that complainant was aged 14 years.

Indeed the record shows that Pw 1 told the Trial Magistrate she was 16 years of age the charge sheet indicated that she was under 16 years, yet for unknown reasons, which at least there not discernible from the court`s record the Trial Magistrate concluded she was 14 years of age. As correctly pointed out by **MR NAULIKHA** (Counsel for the State) in sexual offences age is a major issue and so serious is it such that the penalty will attach according to the age. So where the complainant`s age is in dispute as in this instance, the Trial Magistrate ought to have required a definite indication of her age either by prosecution producing her birth certificate, birth notification, age assessment or evidence for a parent. In the present case, none was done. This then caused the appellant great prejudice and on this account alone I find that the appeal is properly conceded.

The appeal is thus allowed and the conviction is quashed and sentence set aside. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

Delivered and dated this 26th day of July 2011

H A OMONDI

JUDGE

Mr Naulikha-----

- for State

Appellant in person present