



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

HC.CR. APPEAL NO.149 OF 2008

JULIUS MUSILI MUIMI..... APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal against both conviction and sentence in the Senior Resident Magistrate's Court at Mwingi in original Cr. Case No.491 of 2007 by Hon. Richard Odenyo)

JUDGMENT

The appellant, **Julius Musili Muimi** was charged with two counts namely, attempted defilement contrary to section 9(2) of the Sexual Offences Act and in the alternative, Indecent Act with a child contrary to section 11(1) of the Sexual Offences Act before the Senior Resident Magistrate's Court at Mwingi. In respect of the main count, it was alleged that on the 23rd April, 2007 in Mwingi District within Eastern Province, the appellant committed an act which would have caused insertion of his genital organ into the genital organ of **J.M**, a child aged 11 years. As regards the alternative count, it was claimed that on the same date and place, the appellant intentionally caused contact between his genital organs and that of the complainant who was a child aged 11 years. The appellant pleaded not guilty to both counts and he was tried.

The prosecution's case in brief was that on 23rd April, 2007, the complainant, **J.M** was driving

goats from a farm when the appellant accosted her. He took her down to Kamunyu stream removed her pant and raped her. Her brother, **C.K.K** (PW.4) whilst on his way from bathing in the stream found the appellant atop the complainant. The complainant was in her clothes while the appellant had removed his shirt. They were about 3 metres away from him. The appellant stood up and pleaded with him not to report him. In the meantime, **E.M.M.M** (PW.1) the mother of the complainant had on 23rd April, 2007 closed her business at W[.....] market. When she came home, she did not find the appellant who was her employee as a house help. When she asked PW.4 where the appellant was, he informed her that he had left. They all slept. The following day, she went back to her business whereas the complainant and PW.4 proceeded to school as usual. She returned home at about 9 p.m. and again asked for the appellant. It was then that PW.4 told her that he had found the appellant atop the complainant. The following day, accompanied by the complainant, they went to the chiefs office and filed a report. The report was received by **APC Ali Rabat** (PW5). Acting on the information received that the appellant had been seen in a local hotel at W[.....]; he proceeded there with a colleague and arrested the appellant, whom they escorted to Mwingi Police Station. At the station, the appellant was received by **P.C. Naomi Maina** (PW.6) who booked the report and took both the complainant and appellant to Mwingi District Hospital for medical examination. The complainant was examined by **Paul Kigumo** (PW.3), a Clinical Officer who classified the nature of injuries suffered as harm. Following further investigations, PW.6 preferred the charges against the appellant.

When put on his defence, the appellant chose to give unsworn statement and called no witnesses. In his defence, he stated that he used to work for the complainant's mother. He later left work when she refused to pay his salary. He duly returned to his home. He was later arrested and charged with the offences. He denied committing the alleged offences. He recalled that he was escorted to hospital for examination and nothing significant was detected. The complainant therefore planted the charges on him.

The trial court having considered and evaluated the evidence both by the prosecution and defence found the case against the appellant proved in respect of the main count. Accordingly, it convicted the appellant on that count and sentenced him to ten (10) years imprisonment.

The appellant was aggrieved by the conviction and sentence aforesaid. He therefore preferred this appeal on the grounds that the trial court did not consider the first report made by PW.1 to PW. 5 at W[...] Chief's camp which was contrary to what the complainant testified to, the prosecution evidence was full of contradictions, inconsistencies and uncorroborated, the prosecution case was not proved beyond reasonable doubt and that the trial court had failed to consider the appellant's defence which was plausible and indeed displaced the prosecution case.

When the appeal came up for plenary hearing before me on 3rd November, 2011, the appellant opted to canvass the same through written submissions that he had filed and served earlier. I have carefully read and considered them.

On behalf of the state, **Mrs. Gakobo**, learned Senior State Counsel opposed the appeal. She submitted that the evidence on record proved beyond reasonable doubt that the appellant committed the offence. The offence was committed in broad day light. The appellant was found in the act by PW.4. The appellant was an employee of the complainant's mother. The complainant therefore knew him. This cannot therefore be a case of mistaken identity. Indeed the trial court upon evaluating the prosecution evidence was satisfied that the appellant was properly identified. There was no evidence of a grudge that

would have necessitated the framing of the charges against the appellant. She prayed therefore for dismissal of the appeal.

As a first appellate court, it is my duty to rehear the whole case with a view to reaching my own decision on the case that was before the trial court. This duty is cast upon me by such decisions as **Pandya Vs. Republic [1957] E.A.336, Okeno Vs. Republic [1972] E.A.32** and **Kariuki Karanja Vs. Republic [1986] KLR 190**. In all these cases, it was held that an appellant on a first appeal expects the appeal court to exhaustively examine the evidence afresh, remembering always though, that such court did not have the privilege of hearing and seeing the witnesses who testified before the trial court. As I consider and evaluate the evidence afresh, I am also reminded that I should not ignore the judgment of the trial court, but should carefully weigh and consider it.

I have now carefully reconsidered and evaluated the evidence afresh. I have also carefully weighed and considered the judgment of the trial court. I note right at the outset that the conviction of the appellant turned on the evidence of PW.2 and PW.4. However, I do not think that such evidence deserved the credit apportioned to it by the learned magistrate. The evidence of these witnesses is simply incredible. This is why! PW.1 testified that on the material day she was at her business from morning up to about 9 p.m. when she returned home. She met her children, the complainant and PW.4 included. She inquired from them the whereabouts of the appellant, her house help. She was told that he had left. She did not pursue the issue further and try and find out why he could have left. She simply retired to bed. The following day, she went back to her business. In the meantime, both the complainant and PW.4 proceeded to school as usual. Pausing here for a moment, can it be said that the two witnesses could not have told their mother what the appellant allegedly did to the complainant that night, if indeed it happened. To my mind, such an event is so traumatic that it would have been the first thing on the tongues of these witnesses to convey to whoever cared to listen, their mother included. That they did not do so initially until much later, irresistibly point to the fact perhaps, that the event never occurred.

Further, it is even more surprising that having slept without telling their mother the alleged indiscretion of the appellant, the following day both the complainant and PW.4 proceeded to school as usual and as if nothing untoward had happened to the complainant. Their mother too, went about her business as usual. In the evening, she came back home and again asked the whereabouts of the appellant and it was at this juncture that PW.4 volunteered the information. It is instructive that in her own testimony, the complainant does not at all allude to the fact that her mother sought to confirm from her whether what she had heard from PW.4 was correct. All that she did was to wait until sunrise and then took the complainant to the chief's office. What a reasonable parent would have done before taking further steps in the matter was to confirm the story from the victim.

PW.1 had earlier been told that the appellant had left home. She knew the appellant's home. Why then did it become necessary for her to ask for the whereabouts of the appellant on the 2nd day when already she had such information given to her by PW.4 earlier. Though given such information she never bothered to find out from PW.4 and the complainant why suddenly the appellant had left her employment. This is not normal behaviour.

There is evidence on record as well, that at Mwingi Police Station, the complainant's mother paid KShs.1000/- for the P3 form to be filled. I do not think that such amount was paid for that purpose. It was paid to the police officers to induce them to prefer the charges that were wholly fabricated against the

appellant, if my assessment of the entire evidence on record is anything to go by. This conclusion is buttressed by the evidence of the complainant herself. According to her;

“Accused told me to drive them (goats) away. I did. Accused then followed me. He took me down to the Kamunyu stream next to the garden. He then removed my pants. He raped me”.

Yet the appellant was charged with attempted defilement, though the complainant claims to have been raped. There is a lot of difference between rape and attempted defilement. How could the appellant have raped the complainant and yet be charged with attempted defilement? Something does not just add up here!

Again there is evidence by the complainant herself that the appellant and herself used to go out alone at night frequently for prayer meetings. If there was opportunity for the appellant to commit such crime, this was it. He never seized the opportunity. Yet the complainant expects this court to believe that having not seized on such obvious opportunities, the appellant would in broad day light and in the presence of PW.4, who was in the neighbourhood of the alleged scene of crime, turn on her and rape and/or attempt to defile her?

The evidence of PW.1 at some point contradicted that of PW.4. Her evidence was that on the material day she was at her hotel upto 9 p.m. when she retired home. That cannot possibly be correct given that PW.4 testified that on the very day, he had attended tuition in school. He left school at about 1 p.m., went home and slept. Later PW.1 came and sat with him. 3 other people also joined them. Between PW.1 and PW.4 who then is telling the truth. Should the court believe the story of PW.1 that she was at her hotel throughout or she was at home during the day as per the evidence of PW.4. If PW.1 was at home, why then didn't PW.4 disclose to her the crime allegedly committed by the appellant on her daughter there and then.

Throughout the case, the appellant raised the spectre of the case having been framed against him by PW.1 on account of some unpaid dues from her to the appellant. PW.1 did admit that she owed the appellant some dues. The case for the appellant is that she was arrested as she demanded her dues from PW.1 in her business in the presence of his father. The arresting officer confirmed that when he arrested the appellant, it was in a hotel at W[...]. He was in the company of an old man. The complainant too confirmed that the appellant and her mother had a meeting over money. PW.1 also confirmed that the appellant had come to her hotel with his father. Now, if the appellant had committed the crime alleged, could he have had the audacity to come to the working place of the complainant's mother? I have very serious doubts.

In criminal proceedings, it is a mandatory requirement that before a trial court convicts an accused person, the case against such an accused must have been proved beyond reasonable doubt. In this case it is clearly self evident that the appellant poked holes in the prosecution case when he raised the possibility of the case being a frame up on account of money owed to him by PW.1, which fact was not discounted. Those doubts ought to have been resolved in favour of the appellant by the trial magistrate. Indeed the defence was plausible and ought to have been believed and acted upon by the learned magistrate.

The upshot of the foregoing is that the appellant was convicted on unsound evidence. Such conviction cannot be allowed to stand. The appeal is allowed, conviction quashed and sentence imposed set aside. The appellant ought to be set at liberty forthwith unless otherwise lawfully held.

Dated, signed and delivered at Machakos, this 30th day of November, 2011.

ASIKE-MAKHANDIA

JUDGE