REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
Criminal Appeal 31 of 2009

ATHUMAN SWALEH ATIK.....APPELLANT
VS
REPUBLIC.....RESPONDENT

(From original conviction and in Criminal Case No. 1258 of 2007 sentence of the Chief Magistrate's Court at Malindi before Hon. J. Kiarie - PM)

JUDGMENT

Athuman Swaleh Atik (the appellant) was convicted on a charge of rape contrary to section 140 of the Penal code, and sentenced to serve ten (10) years imprisonment.

The prosecution case was that on 9th day of October 2005, in Magarini location, he unlawfully had carnal knowledge of D.K.K without her consent. He had faced an alternative charge of indecent assault on a female contrary to section 144(1) of the Penal code that on the same date and place, he unlawfully and indecently assaulted D.K.K by touching her private parts.

Appellant denied the charge – prosecution called a total of seven witnesses to prove its case.

D.K (PW1) is also known as K.K lived in M where she sold palm wine. One Sunday on 9-10-05, at about 2.00pm, she left her home for M centre – returning at night. She was accompanied by her sister in-law's son. On the way, appellant emerged - PW1 recognized him as he was someone she knew from home – he asked her where they were going, and PW1's companion said he was escorting her home – appellant told the boy to go home and that he would escort PW1.

After the boy had left, and having gone a short distance, appellant suddenly grabbed PW1 and drew her to himself, fell her to the ground and lowered his trouser and raped PW1 who had not worn her underpants as they cause her discomfort. It was her testimony that she had not consented to the act and she screamed and struggled – stopping only because appellant warned her to choose between death and the rape. One Sulubu who was smoking a cigarette emerged, and appellant fled. Pw1 told him what had happened and he escorted her home.

On cross-examination PW1 stated that the incident took place at night.

K K M (PW4) confirmed escorting PW1 at 2.00am from K.F.M's home where there had been traditional dances and PW1 had been selling palm wine there.

He confirmed that on the way they met appellant who offered to escort PW1, so he left. It was his evidence that there was a lot of moonlight that night saying:

"it is bright moonlight. I know accused since he was born"

PW1 assured PW4 that she knew appellant. He however did not witness the rape.

PW2 K.W.W a village elder received a report about the incident and escorted PW1 to the AP camp, where a report was made and plaintiff was referred to Malindi Police Station.

Pc Timothy Muchiri of Malindi Police Station upon receiving the report, referred PW1 to hospital. PW1 was examined by Samuel Abdulli Ibrahim (PW5) a registered clinical officer whose findings were that she had a scar on the right side of the forehead. On the genitals, nothing abnormal was detected. This finding was confirmed by Dr. Wambego (PW6) who found no injury on her genitals, no discharge, no spermatozoa in the vagina and she was HIV negative.

In his unsworn defence, appellant described events of the day he was arrested by APs for an offence he knew nothing about.

The trial magistrate in his judgment held that at the complainant knew the appellant and that there was a bright moon which enabled the parties to see and recognize each other. He then stated:

"It may be that PW6, that PW6, the doctor did not find spermatozoa, but she went to hospital on 14-10-05 about six days after the alleged rape, spermatozoa can not be seen after that long.

Without medical evidence to support rape, the next is to look at the alternative offence charged. He touched her private parts, there can be no entry of a male genitalia into a female's without the two contacting. The two private parts have to touch.
His (sic) part of what the Sexual Offences Act is calling sexual assault.
The contact of the to sexual organs would fail (sic) under section 6(a) of the Sexual Offences Act but this particular one would be the sexual assault captioned in section 5(1) of the sexual Offences Act."

The appellant was aggrieved with the findings and filed an appeal based on same grounds although the crux is that evidence was not corroborated. The State concedes the appeal, Miss Waigera submits that appellant was convicted on rape contrary to section 140 of the Penal Code yet PW1 yet the medical evidence both by the doctor and the clinical officer found no evidence of injuries to the genitalia and no significant finding whatsoever. It was her contention that the trial magistrate misdirected himself because having found that there was no evidence to prove rape, he still conceded that there had been sexual contact and quoted sections of the Sexual Offences Act which had by then not come into operation bearing in mind that appellant was charged under the Penal Code. She did not object to sentence being set aside, pointing out that appellant was sentenced in 2001 and has already served three (3) years imprisonment.

From an analysis of the evidence – it is clear the incident took place at night – I have no doubt that PW4 escorted PW1 and "handed" her over to the appellant – there was a bright moon which enabled PW4 to see and recognize appellant whom he knew since childhood.

As to whether appellant raped the complainant – Trial magistrate correctly found that the medical evidence did not prove that – so having made such a finding, what formed his basis for concluding and convicting the appellant on a charge of rape?

He invoked provisions of the Sexual Offences Act, which had not come into operation at the time when appellant was charged, and convicted under a statute that he had not been charged under – having a rather convoluted reasoning –with all due respect to the trial magistrate - rape is rape whether it is under the Sexual Offences Act or Penal Code – the bottom line being penetration – not a touching of the genitals.

The Sexual Offences Act came into operation in 2006, the present charge was in 2005 the first schedule of the Act addresses the transitional provisions and section 3 provides that:

"Any proceedings commenced under any written law or part thereof repealed

by this Act, shall continue to their logical conclusion under these written laws"

It then follows that the trial magistrate erred by invoking provisions of the Sexual Offences Act and this was prejudicial to the appellant and the conviction is set aside.

Appellant was sentenced to ten (10) years imprisonment, it seems he had been remanded in custody since 2005, which in effect means he has been incarcerated for five years – under the circumstances a retrial is not the fair or better option.

Consequently the sentence is set aside.

Appellant shall be set at liberty forthwith unless otherwise lawfully held.

Delivered and dated this **12th** day of **May 2010** at Malindi.

H. A. Omondi

LADY JUSTICE