



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Criminal Appeal 80 of 2007

FREDRICK MWEKE MATHEKA APPELLANT
VERSUS
REPUBLIC RESPONDENT

JUDGEMENT

The Appellant FREDRICK MWEKE MATHEKA, has filed this appeal against his conviction and sentence before the lower court. The Appellant had been charged with the offence of DEFILEMENT OF A GIRL CONTRARY TO SECTION 145(1) OF THE PENAL CODE. In addition he faced an alternative charge of INDECENT ASSAULT ON A FEMALE CONTRARY TO SECTION 144(1) OF THE PENAL CODE. The complainant G.W, told the lower court that on 3rd July 2003 the Appellant sent one N to call her to his house. The complainant went and the Appellant locked her in the house and raped her. He then released her and gave her Kshs.20/- and told her not to tell anyone what had happened. The complainant reported the incident to her grand-mother who took her to the police station.

At the close of the prosecution case the Appellant was placed on his defence. He gave a sworn defence and denied the charges claiming that he had been framed due to the differences between the two families. On 5th May 2008 the learned trial magistrate delivered her judgement in which she convicted the Appellant of the alternative charge of Indecent Assault and sentenced him to ten (10) years in prison. It is against this conviction and sentence that the Appellant now appeals. He opted to rely entirely upon his written Fredrick Mweke Matheka v Republic [2010] eKLR

submissions which had been filed in court. MR. MUTETI, the learned State Counsel conceded the appeal.

I have carefully perused the record from the lower court and I do fully understand the decision of the State to concede this appeal. It is clear that some key witnesses were not called to testify. The complainant said that it was one Ngina who came to call her to go to the Appellant's house. This Ngina was not called to testify. Further the complainant told the court that the first person who she reported her defilement to immediately after the incident was her grand-mother. Her said grand-mother was not called to testify. These were all key and crucial witnesses. Failure to call them severely weakened the prosecution case.

The evidence on record was also contradictory. The complainant initially told the court that the Appellant was her relative later when recalled to the stand she stated that there was no relationship between them. The medical report was also confusing. The doctor said he noted bruises and tenderness on the complainant's labia. Yet he made no comment as to whether or not her hymen was intact, despite the complainant having indicated that she was a virgin. Indeed the learned trial magistrate in his judgement at page 15 line 15 states of the medical report

“This evidence was lacking in various respects”

Despite this the trial magistrate still proceeded to render a conviction.

The complainant said that the incident was reported to police immediately yet no efforts were made to arrest the Appellant despite the fact that the complainant named him. Lastly the Appellant raised an alibi defence which was not displaced by the prosecution. On the whole in the light of the above inconsistencies and anomalies I find the conviction rendered by the trial magistrate to be unsafe. For this reason I do allow this appeal and quash the conviction rendered by the lower court. The attendant ten (10) year sentence is also set aside. The Appellant is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and Delivered at Mombasa this 30th day of June 2010.

M. ODERO

JUDGE

Read in open court in the presence of:-

Mr. Onserio for State

Appellant in person

M. ODERO

JUDGE

30/06/2010