



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Criminal Appeal 221 of 2009

*(From Original Conviction and Sentence in Criminal Case No. 981 of 2008 of the Principal Magistrate's Court at Kwale: **D.O. Ogembo – P.M.**)*

RAI TSUMA MWAMBAJI APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGEMENT

The Appellant herein **RAI TSUMA MWAMBAJI**, has filed this appeal challenging his conviction and sentence by the learned Principal Magistrate sitting at Kwale Law Courts. The Appellant was arraigned in the lower court on 17th July 2008 and charged with the offence of **DEFILEMENT OF A GIRL CONTRARY TO S. 8(1)(3) OF THE SEXUAL OFFENCES ACT 2006**. The particulars of the offence read as follows

“On the 13th day of June 2008 at about 6.30 p.m. in B Village, M Location within Kinango District of the Coast Province, had carnal knowledge of M C T a girl aged 13 years”

The Appellant denied the charge. His trial commenced on 23rd April 2009. The prosecution called a total of four (4) witnesses in support of their case. The complainant a girl of 14 years told the court that on 13th June 2008 at about 6.00 p.m. she was on her way home from school. She met the Appellant who was her cousin near the river sharpening a knife. The Appellant chased and caught the complainant. He carried her into the bushes, removed her under-pants and raped her. After he released her the complainant went home and reported the incident to her parents. The matter was reported to police but the Appellant had left his home and was not arrested until one month later. He was then charged.

At the close of the prosecution case the Appellant was ruled to have a case to answer and was placed on his defence. He opted to make a sworn defence in which he denied ever having defiled the complainant. On 6th November 2009 the learned trial magistrate delivered his judgement in which he convicted the Appellant and after listening to his mitigation sentenced the Appellant to serve 15 years imprisonment. Being aggrieved with both his conviction and sentence the Appellant filed this present appeal.

The Appellant who was unrepresented at the hearing of his appeal opted to rely entirely upon his written submissions which had been duly filed with the leave of the court. **MR. ONSERIO**, learned State Counsel who

appeared for the Respondent State made oral submissions urging the court to uphold both the conviction and sentence.

Being a court of first appeal it is incumbent upon me to re-examine and re-evaluate the evidence adduced before the lower court and to draw my own conclusions based on the same [see **OKENO –VS- REPUBLIC [1975] E.A.L.R. 32**].

I have carefully perused the written submissions filed by the Appellant and I do note that he has raised the following main grounds of appeal

- § Defective charge sheet
- § Failure to conduct a *voire dire* examination
- § Insufficient evidence
- § Failure by the trial court to consider his defence

With respect to the first ground the Appellant argues that the charge is fatally defective as the particulars did not include the word **‘unlawful’** before the words **‘carnal knowledge’**. He has cited the case of **NG’ENO –VS- REPUBLIC (2002) KLR 457**. This case is distinguishable from the present case in that the *Ng’eno* case dealt with charges brought under S. 145 of the Penal Code. This provision was repealed by the enactment of the Sexual Offences Act in July 2006. This later Act makes **any** act of Sexual Intercourse with a person under the age of 18 years an offence. As such it is not necessary under this Act to include the word **‘unlawful’**. In other words failure to include the word **‘unlawful’** does not render the charge defective at all. This ground of appeal has no merit and is hereby dismissed.

The Appellant argues that the proceedings before the lower court were rendered a nullity by the failure of the trial magistrate to conduct a **‘voire dire’** examination on the complainant. The complainant was aged 14 years old. **‘voire dire’** is a French term which literally translated means **‘speak the truth’**. It is an examination conducted on a child witness who is of tender years to ascertain whether he/she understands the nature of an oath and their duty to speak the truth. This is done in compliance with S. 19 of the Oaths and Statutory Declarations Act Cap 15 Laws of Kenya. S. 19 does not give the format of the examination to be so conducted. Such an examination need only be conducted on a child of **‘tender years’**. This term has generally been taken to mean a child under the age of 12 years. The complainant who was 14 years is taken to be possessed of sufficient intelligence to understand the nature of an oath. As such failure to conduct a **‘voire dire’** examination on the complainant is not in my view a procedural defect and certainly does not invalidate the proceedings before the lower court.

I will now proceed to consider the evidence. The complainant told the court that the Appellant who had a knife chased her and dragged her into the bushes where he proceeded to rape her. At page 8 line 25 she states

“On 13/06/2008, I was coming from school at 6.00 p.m. when I met accused at the river. He was sharpening a knife. He was alone. He started chasing me. He caught me. He carried me into the bush where he raped me by force. He removed my underpants. He only unzipped his trousers. After he raped me, he told me to go away”

The complainant has here given a very precise account of what happened to her. It will be appreciated that rape is an offence that occurs in secret and there would be unlikely to be any eye-witnesses. However there is proper corroboration of the complainant’s evidence that she had been raped by the medical evidence given by **PW3 JUSTUS MAKUKU**, a clinical officer based at Kinango District Hospital. His evidence is that he examined the complainant. She complained of having pain and tenderness in her private parts. He noted bruises on her genitals and her hymen was broken. This is all clear and conclusive evidence of penetration which confirms the complainant’s testimony that she had been raped.

Further corroboration is provided by the evidence of **PW2 C T** who is the complainant's father. He told the court that the complainant came home crying and reported that she had been raped. The fact that she immediately made her report rules out the possibility that this was an after thought or a fabricated story. From the evidence on record, I am satisfied that the complainant was indeed defiled on the material day as she stated.

The next crucial question is the identity of her attacker. The complainant says she was defiled by the Appellant whom she knew very well as her cousin. She also named her attacker to her father and mother when she got home. The incident occurred at 6.00 p.m. It was still day light and conditions were favourable for a positive identification. The learned trial magistrate did comment on this in her judgement at page J3 line 1 thus

“It is noted that the complainant herein (PW1) knows the accused well as they are infact relatives. This offence was in broad daylight at about 6.00 p.m. It is also noted that the complainant took the earliest opportunity to report the same to her parents immediately she went home after the incident.”

I am in total agreement with the above findings. This was not a case of mere visual identification alone. The complainant knew the Appellant well as her cousin. There is clear evidence of recognition which has been held to be more reliable. In **ANJONONI –VS- REPUBLIC [1980] KLR 59** the Court of Appeal held that

“recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other”

Lastly the conduct of the Appellant after the incident is indicative of a guilty mind. He vanished from his home and went to Mombasa. He did not return until one month later when he was arrested – no doubt hoping that things would have cooled down by then. On the whole I am satisfied that there was a clear, positive and reliable identification of the Appellant. I find no possibility of error or mistaken identity.

The trial magistrate did give due consideration to the Appellant's defence at page J3 line 20 and stated

“Accused in his sworn defence made a mere denial to the charges herein, only saying that the father of the complainant PW2 had threatened to show him. Accused never gave the background of reason of the threats and did not really have any defence to the specific allegations made against him by the witnesses herein. To me, the defence was a mere denial and I dismiss the same”

Finally in cases brought under the Sexual Offences Act it is essential to establish the age of the victim. The complainant told court that she was 15 years old. **PW2** her father gave her age as 14 years old. No documents were produced to prove her age. This is not uncommon. I do take judicial notice of the fact that very rarely do rural families in Kenya take the trouble to obtain birth certificates. **PW3** produced the complainant's P3 form in which her age was assessed to be 13 years. The complainant is in class 5 at B P School. I find that the complainant falls within the age group provided for by S. 8(3) of the Sexual Offences Act 2006.

From the totality of the evidence on record I am satisfied that the prosecution proved this case beyond a reasonable

doubt. The conviction was sound based in law and on the facts. I have no hesitation in confirming the same.

The trial magistrate sentenced the Appellant to serve 15 years in prison. S. 8(3) provides for a minimum sentence of twenty (20) years. The 15 year sentence was therefore unlawful. I do hereby set it aside and substitute the lawful minimum sentence of twenty (20) years imprisonment. This appeal therefore fails. The conviction rendered by the lower court is confirmed and the sentence is substituted with a term of 20 years imprisonment.

Dated and Delivered in Mombasa this 13th day of

September 2010.

M. ODERO

JUDGE

Read in open court in the presence of:-

Appellant in person

Mr. Muteti for State

M. ODERO

JUDGE

13/09/2010