REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 259 OF 2009

*(From Original Conviction and Sentence in Criminal Case No. 449 of 2008 of the Senior Resident Magistrate's Court at Voi: **P.N. Ndwiga – S.R.M.)***

EMMANUEL KASHANGA .... APPELLANT
VERSUS
REPUBLIC .... RESPONDENT

JUDGEMENT

The Appellant **EMMANUEL KASHANGA**, has filed this appeal challenging his conviction and sentence on a charge of **INCEST BY MALE PERSON CONTRARY TO SECTION 20(1) OF THE SEXUAL OFFENCES ACT 2006**. The particulars of the offence were that

"On the 8th day of June 2008 at around 4.00 A.M. in Taita Taveta District within the CoastProvince had penetration of D.W aged 21 years who is to his knowledge his sister."

The Appellant who was arraigned before the lower court on 10th June 2008 entered a plea of 'not guilty' to the charge. His trial commenced before the learned Senior Resident Magistrate sitting at Voi Law Courts on 25th November 2008. The prosecution led by **CHIEF INSPECTOR GITHOGE**, called a total of five (5) witnesses in support of their case. The case as narrated by the complainant **D.W** is that on 8th June 2008 she and other family members were attending the funeral of a cousin in M. Location. The Appellant who was the complainant's biological brother had also traveled from his place of work in Mombasa to attend the same funeral. On the material day the complainant went to sleep with some children. At 4.00 A.M. the Appellant woke her up claiming that he wished to collect an item from his bag which was in the same room. The complainant opened the door to let him in. A quarrel arose between them as the Appellant told the complainant to return to her husband. He then grabbed her neck, threw her on the ground, tore off her panty and proceeded to rape her. The complainant reported the incident to her aunt P and then to her mother. The Appellant was taken to the police station where he was 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 gave a sworn defence in which he denied the charges. On 30th September 2009 the learned trial magistrate delivered her judgement in which she convicted the Appellant of the charge of Incest and thereafter sentenced him to serve ten (10) years imprisonment. It is against this conviction and sentence that the Appellant now appeals.

The Appellant who was not represented by counsel at the hearing of his appeal chose to rely entirely upon his written submissions which had been duly filed in court. **MR. ONSERIO**, learned State Counsel appeared for the Respondent State and made oral submissions in which he urged the court to uphold both the conviction and sentence of the lower court.

I have carefully perused the record of proceedings from the lower court. I have also given careful considerations to the submissions of both the Appellant ant Mr. Onserio. There is no doubt that the Appellant and the complainant were a brother and sister. The complainant in her evidence states that she

and the Appellant have the same mother and father. **PW2 D.K**, who is their mother confirms this relationship. In his own defence the Appellant confirms that indeed the complainant is his biological sister. I therefore find as a fact that the Appellant and the complainant were siblings.

The complainant told the court that on the night in question the Appellant came to the room where she was sleeping and raped her. She states that the Appellant held her by the neck and strangled her to prevent her shouting for help – he threw her to the ground and raped her. At the very least I would have expected the doctor who examined **PW1** to have noted bruises on her neck. Yet **PW5 DR. WILSON CHARO** of Voi Moi District Hospital states in his evidence at page 14 line 10

"Head and Neck – no injury"

This seems strange given that the complainant told the court that she was being strangled all through the rape. The complainant was an adult aged 21 years who had a 2 year old child, therefore she had obviously been sexually active before this incident. The doctor noted ***"healed bruises on vaginal bone."*** This in and of itself is not conclusive proof that rape had occurred. Indeed under cross-examination by the Appellant the doctor **PW5** states at page 14 line 25

"The bruises in the vagina were healed. A woman who has given birth can have healed bruises in the vagina."

The complainant confirmed that she had given birth as she had a 2 year old child. The possibility that the healed bruises in her vagina were a consequence of this birth and not a rape cannot be ruled out. Thus the medical evidence available does not conclusively point to a rape.

In her evidence the complainant told the court that immediately after the incident she went to the home of her Aunty P.M and told her what had happened. This ***'P.M'*** was not called as a prosecution witness to confirm this. Her evidence was in my view crucial as it would corroborate the complainant's allegation of rape. Her failure to testify greatly weakens the prosecution case.

At page 5 line 3 the complainant states that

"He [the Appellant] had removed my panty on one leg only."

That pant was not shown to complainant and she did not identify it. Surprisingly **PW4 PC EMILY MUNIALO**, the investigating officer produces a torn light brown panty as an exhibit in court **Pexb2** and proceeds to identify it as belonging to the complainant. Quite apart from the fact that the complainant herself at no time identified this torn panty as hers, the complainant in her own evidence made no mention of her panty having been torn. She only says the Appellant **removed** one leg of the panty. It is curious that this torn panty which is a crucial piece of evidence only turns up at the tail end of the trial when the investigating officer is testifying. Where had this exhibit been all this time? Why was it not shown to the complainant for purposes of identification? The investigating officer cannot purport to positively identify so intimate an item of clothing on behalf of the complainant. The possibility that evidence was been manufactured as the case progressed in the lower court cannot be ruled out entirely.

On the basis of the above anomalies and inconsistencies it is my view that the prosecution did not prove their case beyond a reasonable doubt. Several doubts remain. The conviction of the Appellant was not sound. I therefore quash that conviction. The subsequent sentence is also set aside. This appeal succeeds. The Appellant to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and Delivered in Mombasa this 27th day of October 2010.

M. ODERO
JUDGE

Read in open court in the presence of:-
Appellant in person
Mr. Muteti for State

M. ODERO
JUDGE