REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Criminal Appeal 177 of 2008

(From Original Conviction and Sentence in Criminal Case No. 3738 of 2005 of the Chief Magistrate's Court at Mombasa: B.T. Jaden – S.P.M.)

ABDALLA ALI HASSAN .....…….. APPELLANT

VERSUS

REPUBLIC …….…….…….....……... RESPONDENT

JUDGMENT

The Appellant **ABDALLA ALI HASSAN**, has filed this appeal challenging his conviction and sentence by the learned Principal Magistrate sitting at Mombasa Law Courts. The Appellant was arraigned before the lower court on 19th October 2005 on a charge of **DEFILEMENT OF A GIRL CONTRARY TO SECTION 145(1) OF THE PENAL CODE**. In addition the Appellant faced an alternative charge of **INDECENT ASSAULT ON A FEMALE CONTRARY TO SECTION 144(1) OF THE PENAL CODE**. The Appellant pleaded ***'not guilty'*** to both charges. His trial commenced on 6th April 2006, at which trial the prosecution led by **CHIEF INSPECTOR MSHENGA**, called a total of five (5) witnesses in support of their case. The complainant **H A** a 15 year old school girl told the lower court that on an unknown date in December 1991 she was on her way to school at 7.00 A.M. The Appellant called her and sent her to buy him milk. When she returned the milk and change to his house the Appellant grabbed her threw her onto his bed and defiled her. He then gave her 100/-. The complainant further tells the court that similarly on another date she does not recall the Appellant again lured her into his house and raped her. This second time he gave her Kshs.50/-. The complainant did not report these incidences to her parents. She only later told one of her teachers. The matter was reported to police. The complainant was taken for medical treatment. The Appellant was then arrested and charged.

At the close of the prosecution case the court ruled that the Appellant had a case to answer. He gave an unsworn defence in which he denied the charges. The learned trial magistrate then delivered her judgement in which she convicted the Appellant on the alternative charge of Indecent Assault. After listening to his mitigation the court sentenced the Appellant to serve five (5) years imprisonment. It is against this conviction and sentence that the Appellant now appeals.

The Appellant who was unrepresented at the hearing of his appeal opted to rely entirely upon his written submissions which had been duly filed in court. **MR. ONSERIO**, learned State Counsel who appeared for the Respondent State made oral submissions and conceded the appeal. Having myself carefully perused the lower court record I quite appreciate the decision by the State to concede the appeal. Reasons will become apparent hereafter.

The complainant was a 15 year old girl who was in class 6 at K Primary School. She tells the court that the Appellant a man who she well knew defiled her yet she is totally unable to recall the dates when this occurred. I find this hard to believe. Rape is a traumatic experience to any woman or child. Since the complainant was in upper primary school, she must have been well aware of dates, times, seasons etc. Yet she is totally unable to recall the dates when

such unusual and traumatic events happened to her. This boggles the mind. She is able to narrate in great detail what was allegedly done to her but cannot recall the dates.

It is more suspicious that despite having been defiled on two separate occasions the complainant made no report to any adult in authority – she did not report to her parents or her teachers about the incidences. It is only by chance that her teacher **PW3 B N** found out when she confronted the complainant after she found her being ridiculed by classmates in school. It is hard to believe that the complainant underwent such an ordeal twice and had no trusted person not even a school-mate who she could report the matter to. Though complainant said she knew her assailant she did not give **PW3** his name. Why? This failure to report becomes even more suspicious in view of the admission by the complainant that her grand-mother was involved in a land case with the Appellant. This is more so because it is this grand-mother **PW2 Z I D**, who took the lead in having the police pursue the matter. It is strange that the complainant's own parents who ought to have been outraged at the defilement of their child seemingly took a back seat in the matter.

Further doubt is cast on the complainant's evidence by the testimony of **PW5 DR. LAWRENCE NGONE** who produced the P3 form on behalf of one Dr. Njoroge. As the trial magistrate observed at page 39 of her judgement this P3 form was filled but was not signed. It ought not to have been accepted as exhibit in this state, because it is only by signing that a document is validated and authenticated. Be that as it may the evidence of the doctor is that upon examination the complainant was found to have no physical injuries and her hymen was intact. The doctor further states at page 32 line 3

> ***"Laboratory tests revealed no evidence of penetration"***

Since the complainant was seen by the doctor several weeks after the alleged rapes, it is quite possible that physical injuries may have healed. However the fact that her hymen was found to be intact dispels the allegation that she was defiled. The complainant was categorical in her testimony that on both occasions the Appellant put his penis into her vagina. This implies that he penetrated her. The medical evidence however shows that no penetration occurred.

Lastly I do have my doubts about the veracity of the complainant as a witness. She told the court that the Appellant gave her money (100/- and 50/-) after defiling her. She says she used this money to buy sweets for her friends. However she is unable to name a single friend who benefited from her generosity. Why was the complainant so reluctant to name the children for whom she had purchased sweets? I cannot rule out the possibility that the complainant could not name any child because she never bought sweets for anybody i.e. no money was ever given to her by the Appellant.

Whilst the complainant in her evidence admits that her grand-mother was a witness in a land case against the Appellant, **PW2** her grand-mother totally denies having been involved in any such case. This contradiction was addressed by the learned trial magistrate in her judgement at page 39 line 18 where she observes

> ***"The grandmother (PW2) denied in cross-examination having had a case over any plot with the accused or having been a witness in any such case. The complainant on the other hand denied having colluded with the grandmother but stated she knew her grandmother is a witness in an ongoing case involving the plot where the accused is supposed to demolish his house. The plot issue is fraught with the inconsistencies and contradictions"***

It is surprising that having made such an observation the trial magistrate would proceed to convict the accused. On my part I cannot rule out the possibility that this case of defilement (especially in view of the absence of any corroborative medical evidence), was fabricated against the Appellant due to bad blood over the land case. I find that the trial

magistrate erred in failing to give due weight to these glaring inconsistencies.

Lastly I note that the judgement appears to have been read out in the absence of the Appellant. This goes against procedure. Not only did the court fail to indicate whether or not Appellant was present at the time of reading the judgement at page 40 line 9 the prosecutor says

> ***"PROSECUTOR***
>
> ***The accused is absent. I pray the matter may be mentioned on 20.6.08 when the trial court is sitting"***

This makes it clear that the judgement was delivered in the absence of both accused and his counsel. No reason is given why this was so. On

20th June 2008 when the court resumed, the trial magistrate just proceeded to take mitigation and impose sentence. This was highly irregular.

On the whole I find that this trial was fraught with anomalies and inconsistencies. The evidence was less than satisfactory and in my view did not meet the legal threshold of ***"proof beyond a reasonable doubt"***. This conviction was unsafe and I do hereby quash the same. The subsequent five year sentence is also set aside. This appeal therefore succeeds. The Appellant to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and Delivered in Mombasa this 5th day of October 2010.

M. ODERO
JUDGE

Read in the presence of:-
Appellant in person
Mr. Onserio for State

M. ODERO
JUDGE
5/10/2010