REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 176 OF 2009
(From Original Conviction and Sentence in Criminal Case No. 162 of 2008 of the Principal Magistrate's Court at Kwale: ***Ogembo D.O. – P.M.)***

OMAR HAMISI KATSUMI ..... APPELLANT
VERSUS
REPUBLIC ..... RESPONDENT

JUDGEMENT

The Appellant **OMAR HAMISI KATSUMI**, has filed this appeal against his conviction and sentence by the subordinate court. The Appellant was arraigned before the learned Principal Magistrate sitting at Kwale Law Courts on a charge of **DEFILEMENT CONTRARY TO SECTION 8(1) (2) OF THE SEXUAL OFFENCES ACT 2006.** The particulars of the offence were that

"On the 8th day of December 2007 in Kwale District within CoastProvince had carnal knowledge of F.T a girl aged 15 years."

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 and his trial commenced before the lower court on 30th October 2008. The prosecution led by **INSPECTOR GITONGA** called a total of six (6) witnesses in support of their case. The brief facts as narrated by the complainant **F.T**, a 15 year old, class 7 pupil at S Primary School were as follows. On the night of 8th December 2007 the complainant and her cousin **M. M**, **PW2** were asleep at home. The Appellant and another man not before court, removed the Makuti door to their house and came in at 10.00 p.m. One of them held the complainant by the neck and placed a knife at her throat. He removed her under-pant and proceeded to rape her. The other man was in the meantime raping M. The men then exchanged and continued to rape the two girls in turn in this manner. At some point the men decided they were hungry and forced the two who were naked to prepare a meal. They then demanded money. As they searched for the money the complainant managed to escape. She ran to the neighbour's house where she was given a ***'lesso'*** to cover her nakedness. A few minutes later **PW2** also escaped to the same neighbour. The incident was reported to the police who later arrested and charged the Appellant.

At the close of the prosecution case the Appellant was ruled to have a case to answer and was placed on his defence. He declined to make any statement in defence. On 28th September 2009 the learned trial magistrate delivered his judgement in which he convicted the Appellant on the main charge of defilement and sentenced him to serve fifteen (15) years imprisonment. It is against this conviction and sentence that the Appellant now appeals.

The Appellant who appeared in person at the hearing of this appeal opted to rely entirely upon his written submissions which with the leave of the court had been duly filed. **MR. ONSERIO**, learned State Counsel who appeared for the Respondent State urged the court to confirm both the conviction and sentence of the lower court.

Being a court of first appeal I am mindful of my duty to re-examine and re-evaluate the evidence adduced before the lower court [see **AJODE –VS- REPUBLIC [2004] 2 KLR 81]**

The Appellant has been charged with the offence of Defilement, which is defined as the act of sexual intercourse with any girl under the age of 18 years. The complainant gave her age as 15 years. She told court that she was a student in class 7 at S Primary School. I take judicial notice of the fact that in rural parts of this country it is not uncommon to find children not having acquired a birth certificate. I also find it quite reasonable that a 15 year old child would likely be in primary school. The complainant's P3 form gives her age as 15. This is evidence of a medical practitioner who is well placed and qualified to assess age. I therefore find that indeed the complainant was 15 years old as she alleged.

The complainant narrated to the court how two men broke into the house where she was sleeping with her cousin, placed a knife at her throat and raped her severally. At page 7 line 28 the complainant states

"Then suddenly I woke up to find someone holding my throat. He then placed a knife on my neck. The man ordered me to remove my clothes. The man then removed my underpants. His colleague had also attacked M on her bed. The man then raped [me]. He was in a long trouser. He just unzipped [sic]. He raped me once. As he continued raping me, he called his friend and let him rape me also. He changed and went to rape M. They kept changing …."

The complainant here has given a graphic, detailed account of the terrible ordeal of multiple rape she and her cousin endured. As if that were not enough the two men when spent then ordered the girls to cook a meal for them all the while naked. The complainant's evidence is well corroborated by **PW2** who was with her at the material time. She too gives a haunting narrative of how they were attacked at night and raped interchangeably. I do not believe that these two young girls would fabricate such a tale. I am convinced that they were telling court the truth. The fact that they immediately reported the incident to their father **PW3 S.M** rules out any possibility that this was a fabricated Tale. **PW5 CRISPIN MNYAPARA**, a clinical officer attached to Kwale District Hospital testified that he examined the complainant on 29th January 2008. He noticed a whitish discharge from her vagina which was also swollen. His conclusion was that she had been defiled. In my view the swollen vagina is proof of multiple forced entry. The evidence of **PW5** is medical evidence tendered by an expert. It is not controverted in any manner whatsoever. I therefore find as a fact that the complainant was infact defiled on the material date.

The complainant has identified the Appellant as one of the men who defiled her. The incident occurred at night but complainant told the court that she knew the complainant very well as he was her neighbour and she was able to recognize his voice. Under cross-examination by the Appellant the complainant firmly states at page 8 line 21

"I had known you since July 2007 when I came to the village. I know your voice well and I identified you well. Voices are different and I could not mistake your voice."

The complainant's evidence in this respect is duly corroborated by **PW2** who goes further to specify that the Appellant was speaking in Duruma vernacular. At page 11 line 9 **PW2** states

"I identified you because of your voice. The other man was speaking Kiswahili. You were speaking in Duruma language …."

Both witnesses also tell the court that at some point during the ordeal the Appellant and his colleague ordered the two girls to prepare a meal. To achieve this the men had to light a fire. It was with the aid of the light from this fire that they were able to confirm their identification of the Appellant. **PW1** states at page 8 line 29

"I also saw you as the fire was on. I even saw your clothes as you were in the house for a long time. It had been dark in the house for a long time. I saw you well after the fire was lit after you said you were hungry. You lit the fire with kerosene and I saw you well."

PW2 corroborates this evidence at page 10 line 18 where she states

"After they raped us, they told us to cook for them. It is me who cooked after the 2 [men] lit the

fire. We then ate ugali and omena, the 4 of us"

Thus it is clear that the fire was lit to enable the two girls to cook. I have no doubt that having already identified the Appellant by his voice they were able to confirm this identification by the light of the fire. It is a known fact that apart from visual identification, it is quite possible to identify a person whom one knows by means of his/her voice. The two girls spent several hours in the company of the Appellant and the other man. They even cooked for them and ate together. I find there was ample time and opportunity to see and positively identify the Appellant.

In addition this was not mere visual identification. Both girls were able to recognize the Appellant whom they knew well as he was a neighbour. In the case of **ANJONONI & OTHERS –VS- REPUBLIC [1980] KLR 59**, the Court of Appeal held

"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 another"

The two girls gave clear, consistent and cogent evidence. Though young they each remained unshaken under cross-examination by the Appellant. Both children named the Appellant immediately thereafter to their father **PW3** as well as to the local village chairman **PW4** who says at page 12 line 28

"The children said they could identify one of the attackers as Omar Hamisi Katsumi, in his presence. His home is just close by"

I have no doubt in my mind that these two young girls were very sure of who they had seen. Their identification of the Appellant is in my view free from any possibility of error whatsoever.

The Appellant was put to his defence and in compliance with S. 211 Criminal Procedure Code was called upon to present his statement in defence. The Appellant as was his right opted not to make any statement in defence. His actual words were

"I choose not to give any evidence. I shall wait for the judgement of the court"

As the trial magistrate pointed out this left the prosecution evidence uncontroverted in any manner whatsoever. I am satisfied that the prosecution did through its witnesses prove the charge against the Appellant beyond a reasonable doubt. His conviction was well founded and I have no hesitation in confirming the same.

After his conviction the Appellant was granted an opportunity to mitigate. Thereafter the trial court sentenced him to serve 15 years imprisonment. S. 8(1) (3) of the Sexual Offences Act provides as follows

"(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of <u>not less than</u> twenty years [my emphasis]"

The 15 year sentence imposed is therefore unlawful. The Sexual Offences Act provides clearly for a minimum sentence of twenty (20) years. As such and in order to correct this I hereby set aside the 15 year sentence imposed by the lower court and instead substitute the lawful sentence of twenty (20) years imprisonment. This appeal fails in its entirety. The conviction of the lower court is confirmed. The Appellant will now serve a tern of twenty (20) years imprisonment from the date of his first conviction in the lower court.

Dated and Delivered in Mombasa this 4th day of November 2010.

M. ODERO
<u>JUDGE</u>

Read in open court in the presence of:-
Appellant in person

Mr. Onserio for State

M. ODERO
JUDGE
4/11/2010