(From original conviction and in Criminal Case No. 1098 of 2005 sentence of the Principal Magistrate's Court at Malindi before Mr. D. Ogembo – SRM)

JAMES KARISA ……..……..APPELLANT

VERSUS

REPUBLIC ……..…… RESPONDENT

J U D G M E N T

James Karisa (the appellant) was convicted on a charge of defilement contrary to section 145(1) Penal Code, the particulars being that on 29th April 2005 at about 6.00pm G Location, he had carnal knowledge of M.J, a girl under the age of 16 years.

He had faced an alternative charge of indecent assault contrary to section 146 Penal Code and he was acquitted on the alternative. The appellant denied the charges and prosecution called a total of six witnesses in support of its case.

M.J (PW1) aged 14 years told the trial court that on 29-4-05 at about 6.00pm she was walking home alone from the nearby shops, when she saw the appellant near her home – he was walking towards the shop. When she got close to him, appellant stood by the road holding a knife. PW1 went to greet him because she knew him and he asked her why she was "just leaving him". He then led her into the bush, held her right hand and placed the knife on her neck – threatening to kill her, so she did not scream. She struggled but he held her tightly and ordered her to remove her blouse – she refused. He removed it, then removed her lesso and underpants. They were both standing. She remained in her petticoat. He pulled her down, removed his shirt and trousers and remained in his underwear. M.J remained lying down as the appellant undressed because he had threatened to kill her. He then started raping her as he pinned her down and carried on raping her for a long time.

After he was through, he ordered her to dress up and go home – she arrived home a few minutes after 9.00pm. She felt weak and collapsed then disclosed her ordeal to her father. A report was made to police and she was also taken to hospital. It was her testimony that:

"***I was hurt on the neck and I bled from my private parts. My petticoat had blood. Accused has never been my boyfriend, he has never seduced me."***

In court she, identified the bloodied petticoat, which the trial court noted was badly stained with blood. On cross-examination PW1 stated she knew the appellant as his home was not far from hers and that no one else witnessed the incident. She also stated that:

"***Ordinarily I would scream but I could not because you threatened me. You even covered my mouth."***

She denied a suggestion by appellant that they had agreed to meet there. The complainant's mother, F.J told the trial court that she had sent PW1 to sell cashew nuts at the market on 29-4-05 at about 5.00pm. PW1 returned at 10.30pm while crying – "***She came and fell down … she told me that she had met the accused James Karisa on road while holding a knife….accused pulled her into the bush and raped***

her."

Upon checking on PW1, she noticed that her "inner skirt" had blood. She even led them to the place where the incident had taken place. She too identified the blood stained petticoat in court during the hearing.

PW3 (J.U), the complainant's father got concerned why by 7.30pm she had not returned home and he decided to go and look for her, before getting far, he heard PW1 crying near his home and she then related her ordeal to him. He knew the appellant very well as they even worked together.

He said on cross-examination:-

"***I believed her because she knows you very well and you have even eaten with us in our house. She said you met her when it was still daylight."***

Dr. John Konde who examined M.J found that her underpants had dry blood stains, the hymen was broken and there were blood stains and he formed the opinion that rape was likely to have happened – the examination was carried out two weeks after the incident and the doctor explained that:

"***After rape, the victim ought to come to hospital within the shortest time for semen is to be traced"***

In his defence, appellant opted to remain silent and he did not call any witnesses.

The learned trial magistrate in his judgment noted that PW2 had no grudge against appellant and that appellant and complainant knew each other very well. He found the complainant's evidence to be very consistent and that even in the face of stiff cross-examination by appellant, the evidence of prosecution remained largely unchallenged.

Appellant was aggrieved by the findings of the trial magistrate on grounds that:-

(1) The learned trial magistrate failed to note that his constitutional rights had been violated under section 72(3) (b) of the constitution.

(2) The charge as drafted was defective.

(3) The evidence of witnesses was full of contradiction and had material discrepancies.

(4) The entire case was not proved to the required standard.

(5) Essential witnesses were not called.

(6) He was only incriminated because the complainant's father had a grudge against him – he alleges that the boss liked him more and paid him good money which resulted in ill feelings from complainant's father.

In his written submissions, appellant asked the court to take note that police officers had testified that he was arrested on 24-5-05 and not 29-5-05 and he was presented in court on 31-5-05 which meant that he was in custody for six days before being taken to court. He seeks to rely on the decision in **Albanus Mwasia Mutua V R Cr. App. No. 120 of 2004** which held that it was the duty of the court to enforce the provisions of the constitution and that an acquittal must result, irrespective of the nature of the evidence supporting the charge.

He argues that since there is no reason given for the delay then he must be acquitted. Appellant has cited a host of other decisions, all dealing with the question of violation of rights under section 72(3) (b) of the Constitution of Kenya.

The counsel for the State, Mr. Ogoti's response to this is that the charge sheet shows appellant was arrested on 29-5-05 and taken to court on 31-5-05 and that the intervening period was negligible.

The charge sheet which was presented to the trial court showed that appellant was arrested on 29-5-05 which was a Sunday and taken to court on 31-5-05 on Tuesday – which indicates one day's delay. However appellant's contention is that he was arrested on 24-5-05 as per evidence of PW5 P.c Protus Khaemba and this is confirmed by the evidence of Pc Mwalimu Abdlalah who stated:

"***On 24-5-05, I was at the station, when accused had been brought from K on allegation of defilement.***

On cross examination the some witness stated:

"***You were arrested on 29-5-05, almost one month later….you were charged on 31-5-05. You were arrested on 24-5-05 and not 29-5-05."***

This shift and re-shift of date of arrest of appellant created an uncertainty – was he arrested on 24-5-05 as stated by the two officers in their evidence in court or was it on 29-5-09 as indicated in the charge sheet? PW3 was certain appellant was arrested on 24-5-05, and the same was confirmed in a correction made by PW6. I therefore find that appellant was arrested on 24-5-05 and not 29-5-05 as shown in the charge sheet. He was taken to court on 31-5-05 which would mean six days unexplained delay. Since prosecution offers no explanation then I find that the appellant's constitutional rights were violated.

What remedy is then available to the appellant for the six days delay – should this result in an automatic acquittal as was held in the **Albanus Mwasia Mutua V R CA 120 of 2004,** that where there is such inordinate unexplained delay, the appellant must be acquitted irrespective of the weight of evidence prosecution may adduce. What about the victim whose rights were equally recognised by the constitution, how does this court convey to victims of crime that courts are committed to protecting their constitutional right with equal regard? To my mind, the answer is provided in section 72(6) of the constitution, which does not offer an acquittal, but compensation and that is what the appellant is entitled to and he may so pursue.

Appellant also points out that there was contradiction in the evidence of PW1 because whereas she initially said that when she saw him

"**he stood by the road first holding a knife"** yet on cross-examination she said she had not seen appellant with a knife while on the road.

Also that PW2 initially said complainant returned home at about 10.30pm but on cross-examination she said she returned at 8.30pm while PW1 said she returned at 9.00pm. appellant argues that from the evidence, then there is no correct time as to when the incident took place and that because the evidence is contradictory, then it means the witnesses are unreliable as it is difficult to distinguish the truth from untruth.

Mr. Ogoti in response submits that the evidence demonstrates that the offence took place as from 6.00pm and that complainant was defiled for two hours.

It is true that the witnesses refer to different times relating to the complainant's return – yet is that the material particular in this matter? Isn't it more a question of what time the offence is alleged to have taken place and that at lest between 6.00pm – 8.00pm, complainant was not home? Isn't it more of question of what state she was in when she got home and her explanation as to why she was getting home later than the family expected (as can be inferred from her family's reaction, which prompted her father to go out looking for her). The answers to these are in the affirmative – so yes there are contradictions regarding the time, but that does not dent the material essential in supporting this charge.

Appellant also takes issue with the question as to what garment was blood stained – was it an underpants or petticoat and says that due to this anomaly with PW1 and PW2 and PW6 (police officer) referring to

petticoat and the doctor referring to underpants and he again urges court to resolve this contradiction in his favour.

Mr. Ogoti argues that what should be of concern is the fact that rape was proved – this was confirmed by the medical evidence, all the prosecution witnesses referred to a blood stained petticoat except for the doctor – was this fatal? I think what was crucial with regard to the doctor's evidence was the medical findings regarding her physical state in relation to the offence and his finding confirmed that her hymen was broken and in his opinion rape was likely to have occurred and the contradiction as to which undergarment he observed to have been blood stained was too minor to alter the physical findings.

Appellant alleged bad blood or an existing grudge between him and complainant's father and although he suggested as much in cross-examination, he never gave any indication as to what could have been the cause of the grudge, having opted to remain silent in his defence then decided to now refer to the basis of the grudge in the appeal.

There was ground one of his appeal which was not very clear, but if I understood him correctly, he seemed to be saying that the charge was defective for failing to include the word unlawful – surely there can be nothing lawful about an adult man having sexual intercourse with a 14 year old girl and that omission does not change what section 145(1) of the Penal Code envisaged.

My finding therefore is that the conviction was safe and I uphold it. The sentence was legal and I confirm the same.

The appeal is consequently dismissed.

Delivered and dated this **22nd** day of **June 2009** at Malindi.

H. A. Omondi

JUDGE

Mr. Ogoti for state

Appellant present in person