



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL 28 OF 2008

JACOB MWAMBURI APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the Original Conviction and Sentence in Criminal Case No. 744 of 2007 of

The Senior Resident Magistrate's Court at Kwale – Ogembo D. O. – SRM)

JUDGMENT

The appellant Jacob Mwamburi, was charged, tried and convicted by the Senior Resident Magistrate, Kwale of defilement of Idiots and Imbeciles contrary to Section 146 of the Penal Code in Kwale SRM CR. Case No. [.....]. The appellant also faced an alternative charge of indecent assault on a female contrary to Section 144(1) of the penal Code. The particulars of the main charge were that the appellant on the 27th March, 2007 at about 3.00p.m., in Kwale District of the Coast Province, unlawfully had carnal knowledge of J.M without her consent. The particulars of the alternative charge were that the appellant on the 27th March, 2007 in Kwale District within the Coast Province unlawfully and indecently assaulted J. M aged 13 years by touching her private parts. The appellant pleaded not guilty and after trial, the Learned Senior Resident Magistrate (Ogembo D.O.), found him guilty of the main charge, convicted him and sentenced him to 15 years imprisonment.

The appellant was not satisfied with the conviction and sentence and has moved to this court on appeal citing five (5) grounds filed on his behalf by M/s Okanga & Company Advocates. In a nutshell, the appellant challenged the trial Magistrate's finding that the case had been proved beyond reasonable doubt. The appellant further complains that the medical evidence advanced before the trial Magistrate did not support the charge and that his defence was not considered.

When the appeal came up for hearing, the Learned State Counsel, Mr. Onserio, conceded the appeal on the primary ground that the learned Senior Resident Magistrate misdirected himself on the medical evidence tendered before him and further that the sentence imposed upon the appellant was illegal. Counsel for the appellant submitted, in the main, that the findings of the trial Magistrate with regard to the medical evidence were not borne from the record. Counsel further contended that the age of the complainant was not established and therefore that the appellants conviction was unsafe.

At the trial the complainant testified that on a date she could not remember, at about 4.00p.m., she went out to get wood to construct a playing out-fit. She met the appellant who was herding cattle who held her by force and wrestled her to the ground. He removed her dress and underwear. He also removed his trousers and raped her. He threatened to kill her if she screamed. After the ordeal the complainant reported to the appellant's father who did nothing. She then informed her mother of the ordeal. She was later taken to the police who referred her to a hospital at Msambweni where she was examined and a P3 form completed.

The complainant's mother R.M, was called as a witness. She testified as PW2 as follows: On 27.3.2007 at about 3.00p.m., her daughter (PW 1) went to cut wood and when she failed to return at 4.00p.m., she started looking for her. She found her at about 6.00p.m., on her way from the appellant's house. She struck her and the complainant disclosed that she had been raped by the appellant who had warned her against screaming. She later reported to Msambweni police who issued a P3 form which was later completed by a Doctor at Msambweni District Hospital.

The said P3 form was issued by PW 3, PC NN and was produced before the trial Magistrate by PW4 ATC on behalf of ST. The testimony of PW 4 is significant and material parts thereof may be reproduced.

“The complainant was examined on 29th March, 2007 ... She was 13 years. In her private parts, no blood was noted. She was also not

found with any disease. She was also not pregnant. The P3 form was signed on 3.4.2007.”

That testimony was in conflict with the testimony of the complainant and her mother who stated that the sexual encounter between the complainant and the appellant resulted in her pregnancy. The learned trial Magistrate in his judgment found as follows:-

“The evidence of rape was also produced in the P3 form (EX.1) in which the Doctor noted the whitish discharge from her private parts and also that her hymen was broken. In fact, during the court trial, the complainant was still pregnant. And since there is no evidence that she had any sexual relations with any other man it may have been the accused who impregnated her.”

With respect, the conclusions drawn by the Learned Senior Resident Magistrate were not borne from the evidence which was adduced before him. The Learned Trial Magistrate made assumptions which, with all due respect, did not flow from the record. That was a serious misdirection. A criminal trial can only be sustained by credible evidence but not by assumptions.

From the foregoing it is clear to me that the evidence in support of the charge was not sufficient to support the conviction of the appellant. The conviction was therefore unsafe and it is not surprising that the Learned State Counsel conceded the appeal. The result is that the appeal is allowed, the conviction quashed and the sentence set aside. The appellant should be released forthwith unless otherwise lawfully held.

Order accordingly.

DATED AND DELIVERED AT MOMBASA THIS 27TH DAY OF AUGUST 2009.

F. AZANGALALA

JUDGE

Read in the presence of: Mr. Mwawasi holding brief for Okanga for the appellant and Mr. Onserio for the State.

F. AZANGALALA

JUDGE

27.8.2009