



DOMINIC MBINDYO *alias* SAA.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the Judgment of Honourable (Mrs) D.A Mochache

(SRM) dated 17th October 2008 in Kangundo PM'S CR.C. No. 491 of 2005)

JUDGMENT

1. The Appellant herein, Dominic Mbindyo *alias* Saa was charged with the offence of defilement of a girl under the age of 16 years contrary to Section 145 (1) of the Penal Code. He also faced the alternative charge of indecent assault on a female contrary to Section 144 (1) of the Penal Code. The offences were allegedly committed on 9/8/2005 in Machakos District and the victim was one [M.N], a 12 year old girl. He was convicted of the offence in the main count and in the event he was sentenced within **Kangundo SRM'S Court Criminal Case No. 491/2005** to serve 15 years in prison. His appeal to this court is both against conviction and sentence and from the Petition of Appeal, his complaint is that generally the evidence tendered was contradictory and specifically the medical evidence was not sufficient to prove the charge.

2. The evidence that is being challenged was as follows:-

That PW1, [M.N] was on 9/8/2005 walking towards a river where she was to fetch water when the Appellant who was known to her as a village drunk with the nickname "**Saa**" grabbed her and pulled to a bush where he proceeded to undress her and then defiled her. It was her evidence that she felt a lot of pain and when the Appellant was through with his mission, he threatened to kill her if she told anyone what had happened and then he walked away. PW1 then went home but terrified of the threat, told no one about her ordeal. After a few days, her auntie (PW2) realized that PW1 was walking with difficulty and informed PW1's mother who on checking her private parts realized that she had been defiled and PW1 named "**Saa**", the accused, as the alleged offender. PW2, [V.M] stated that she knew the Appellant as an alleged local "**chang'aa**" seller and perpetual drunk and that she was the one who realized that PW1 was walking with difficulty and informed the mother who then took action.

PW3, [F.K.N], grandmother of PW1 received information from PW2 that PW1 was walking with difficulty and when PW3 examined PW1's private parts, the latter emitted a foul smell and she was wet and she was one of those who took PW1 to the police station and hospital.

PW4, [A.K.N], mother of PW1 and sister of PW2, corroborated their evidence regarding the events of 11/8/2005 when she received the report of PW1's ordeal. She later took PW1 to hospital and the Appellant was arrested.

PW5, P.C. Maurice Ayao Oganda received the report of the incident in question on 12/8/2005 and issued the P3 form and later re-arrested the Appellant. He also took possession of PW1's muddy and bloodstained dress and underwear which he produced as exhibits.

PW6, Dr. Anne Wairagu examined PW1 on 12/5/2008 and noted that her private parts had bruises and the hymen was lacerated. The vulva and labia majora indicated bruising and she produced a P3 form showing the extent of the injuries.

3. In his own defence, the Appellant denied defiling PW1 but admitted that he knew her and that his nickname was indeed "**Saa**". He added that PW1 had "**no witnesses**" and had framed him up probably "**because (they were) neighbours**".

4. In her judgment, the learned trial magistrate found that PW1 was truly defiled and the offender was the Appellant and she sentenced him to 15 years imprisonment.

5. For my part, I have carefully read the evidence on record and I should begin my evaluation (see **Okeno vs R (1972) E.A. 32**) by stating that PW6 when examining PW1 clearly confirmed that her private parts had some injuries probably caused by a weapon she named as "**a male sexual organ**". She also interviewed PW1 who said that it was the Appellant who defiled her. Prior to that PW2, PW3 and PW4 had all noticed her difficulties and examined her with the result that they smelt the foul smell she emitted from her vagina and then took action to interrogate her and she named the Appellant as the defiler.

6. Is the above evidence conclusive of the Appellant's culpability? In his Petition of Appeal, the Appellant stated that the evidence tendered was contradictory but all he stated in that regard was that the complainant went with her clothes but the Investigating Officer said that he collected them from the scene. And that she said that she had been threatened but gave no such report to anyone. In my view neither issue is material enough to dissuade me from holding that the incident indeed took place. Both PW1 and PW5 identified the clothes as the ones she was wearing on the material day and they were muddy and bloody for obvious reasons.

7. That matter aside, there is no evidence that PW1 made up her vaginal injuries and the truth is that she had sexual activity that led to bruises in her labia and laceration of her hymen. She testified that she had no sexual intercourse before that date and the question is, did the Appellant forcefully, illegally and without her consent deflower the 12 year old?

8. I have no doubt in my mind that PW1's evidence is credible. She had known the Appellant before, a fact the Appellant did not deny and the offence was committed in daylight. That PW1 failed to report the incident immediately cannot oust the otherwise credible evidence. She had been threatened and she was fearful. In any event, as soon the injuries were noticed by PW2, PW3 and PW4 she readily named the Appellant and repeated the assertion to PW5 and PW6.

9. Regarding the medical evidence tendered, I see no issue raised in that respect and I have said above that it was consistent with PW1's evidence and in fact was wholly corroborative of it. I am aware that in sexual offences, corroboration is not mandatory but it is desirable and in this case I have held as such (see also **(Kebiba vs R Cr. Appeal No. 104/200)**).

10. In the end, the Appellant's conviction was sound and on sentence, it was lawful and consistent with the gravity of the Appellant's conduct.

11. The Appeal must and is hereby dismissed.

12. Orders accordingly.

Dated and delivered at Machakos this **18th** day of **September** 2009.

ISAAC LENAOLA

JUDGE

In presence of: **Appellant present**

Mr O'Mirera for Republic

ISAAC LENAOLA

JUDGE