



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
Criminal Appeal 204 & 203 of 2008

PETER NDUNDA1ST APPELLANT

KATILO MUTUNGA.....2ND APPELLANT

VERSUS

REPUBLICRESPONDENT

(Appeal from a Judgment of the Principal Magistrates Court at Makueni

(Hon. F.M. Nyakundi Ag. PM) dated 18th September 2008)

in

(PM'S CR.C. No. 610 of 2005)

JUDGMENT

1. Peter Ndunda and Katilo Mutunga were the accused persons in **Makueni SRM'S Court Criminal Case No. 610/2005**. Whereas Ndunda faced the charge of defilement of a girl under the age of 16 years Contrary to Section 145 (1) of the Penal code and the alternative charge of indecent assault on a female Contrary to Section 144 (1) of the Penal Code, Mutunga was charged with aiding defilement of a girl under the age of 16 years Contrary to Section 145 (1) of the Penal Code. The offences were allegedly committed on 8/9/2005 at K[PARTICULARS WITHHELD] Market, M[PARTICULARS WITHHELD] Sub-Location and the victim was one, N.M., a resident of the said market.
2. The evidence tendered was that on 8/9/2005, N.M. then aged 13 years old was on her way home after seeing her brother at Makueni and she boarded a public service vehicle and her neighbour, K aforesaid sat next to her. On the way, K told N.M. not to alight at Kwa Musole stage but to go with her to K[PARTICULARS WITHHELD] and help her with luggage. When they arrived, the 2nd accused allegedly held her by the hand, took her into a nearby house and locked it. Inside the house, although dark, N.M realized that there was a man inside and he asked to have sex with her but when she refused, he nonetheless proceeded to remove her petty coat and underwear and had carnal knowledge of her. She felt pain and they slept till morning when K came and because her clothing was bloody, she gave her cotton wool to put in her vagina and that is when she noticed that the 1st accused was the tout in the vehicle she had travelled in, the previous night. Together with him they again allegedly boarded the same vehicle and proceeded to Machakos where he bought her a panty and took her to a house where she stayed for 3 days. A woman in that house took care of her for those days and later escorted her home where her parents were absent as they had gone to look for her. K came and asked her what had happened and when her mother returned, N.M. explained her ordeal and the accused persons were arrested.
3. The above evidence was given at length by PW1 and PW2, her brother, J MM stated that PW1 went to his place of work at Wote on the material date and left at 4.30 p.m. but never reached home. The next day, he received information

from his brother, JM that PW1 had not returned and when he enquired from the first accused, he responded that he had left her at K[PARTICULARS WIYHHEL]and that the 2nd accused should know where PW1 was. When he went to the 2nd accused's home, she replied that she had seen her at Wote on the previous day and then PW1 made a missing person report and on 11/9/2009, PW1 returned home and explained that she had been defiled by the first accused with the aid of the 2nd accused.

4. PW3, Dr Musyoki produced a medical report of one Dr. Kimani who noted that PW1's hymen was torn and that her vagina had no tear. She had a whitish discharge with no spermatozoa and that she had been diagnosed with gonorrhoea. She was in good physical condition but appeared depressed. A P3 issued to her was produced by the doctor.

5. PW4, P.C Patrick Matheka received the initial report and investigated the case before causing the arrest of the accused persons and charged them with the offences detailed out above.

6. In their defence, the 1st accused denied the offence and stated that he had been framed up while the 2nd accused stated that on 8/9/2005, she was at Wote where she had gone to visit her husband and returned to K[PARTICULARS WITHHELD] at 7.30 p.m. She denied seeing either the 1st accused or the complainant, whom she knew previously. She denied all the evidence of PW1 and stated that although they were neighbours with her, they had problems over land she had bought from PW1's family.

7. I have taken into account the elaborate submissions by Mr O.N. Makau for the Appellants and Mr O'Mirera for the Republic. The whole case has given me anxious moments. I say so because the conduct of PW1 throughout the incident in question is questionable. I will return to that issue shortly but I will quickly dispose of one point of law that was raised. It was argued that the Appellants were kept in custody beyond 24 hours Contrary to Section 72 (3) (b) of the Constitution. It is my view that, valid as the point may be, it should have been raised at the earliest instance to enable the prosecution attempt an explanation of the delay. Without those facts being properly raised and responded to, the court cannot determine the issue on the merits and the Appellants may well pursue compensation under Section 72 (6) of the Constitution – See also Mureithi vs R, Cr. Appeal 286/2006.

8. Returning to the evidence on record, it is quite possible that the victim of the alleged defilement may have fallen into a trap organized by the 2nd Appellant in conspiracy with the 1st Appellant but my doubts abound. If PW1 and the 2nd Appellant were sitting next to each other and the 2nd Appellant were sitting next to each other and the 1st Appellant was busy in the matatu as its tout, when did the Appellants without PW1 knowing so, determine that she should be defiled? And if the 2nd Appellant and PW1 left the matatu together, at what point did the 1st Appellant leave the matatu, go ahead into a house and await his victim? Further, if the 1st Appellant was already in the house and presumably open it for himself, where and how did the 2nd Appellant (who never entered the house) obtain a padlock and keys to lock it and then return to open it in the morning?

9. PW1 also said that the 1st Appellant threatened her but the bizarre happenings the following day are beyond explanation. If the 2nd Appellant then took her away to Machakos Township, why did she not try to attract attention to her ordeal? Then there is the issue of the woman in whose house she was kept for three days. Why did the police not investigate her involvement and confirm what really happened in Machakos, if at all? And why did PW1, living with a strange woman for three days, not make an attempt at seeking help?

10. I raise all these questions because PW2, brother of PW1 stated that PW1 had “**disappeared**” from home before she popped up at his place of work and he promptly asked her to return home. It is possible that PW1 was merely playing truant and later implicated the Appellants to explain away her own ill conduct? The point is that in a case with so many grey areas, corroborative evidence may well have been necessary to allay any doubts that the Appellants were indeed culpable. This is indeed the law as set out in Chilla & Another vs R (1967) E.A 722 where it was held that in sexual offences, where a victim, in the court's mind is telling the truth, corroboration may not be necessary and in such a case corroboration is not mandatory. I am convinced that in spite of the amendments to Section 124 of the Penal Code by Act No. 5/2003, in this case, more evidence than the complainant's word was necessary.

11. I should at this point refer to the medical evidence tendered which would otherwise have been powerful evidence of sexual assault. Although PW1 was examined some days after the alleged defilement, and her hymen was broken and therefore denoting prior sexual activity, no other part of her sexual organ had evidence of forced penetration. Both her labias had no tear and the vulva was wholly intact. Compare that evidence with PW1's testimony that she bled on the date of assault and the 2nd Appellant gave her cotton wool to clean up. Surely, and I am not an authority on the subject, if she bled, some residual scar or evidence of injury would have been detected days later.

12. Regarding the gonorrhoeal infection, the P3 form was inconclusive on the subject. The doctor merely stated that the whitish discharge was “**most likely gonorrhoea**” and therefore also probably not it.

13. In the end, I am not convinced that the case against each Appellant was proved beyond reasonable doubt. All the doubts raised above must favour them and their conviction was in error.

14. I find merit in the Appeal and the same is allowed and their convictions quashed and sentences set aside. They may be released unless they are otherwise lawfully held.

15. Orders accordingly.

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

ISAAC LENAOLA

JUDGE

In presence of: **O.N. Makau for Appellants**

Mr O'Mirera for Respondents

ISAAC LENAOLA

JUDGE