



HAMISI MWAGAMBERE KIPASHO..... APPELLANT

-AND-

REPUBLIC..... RESPONDENT

(An appeal from the judgment of Senior Resident Magistrate Mr. D. O. Ogembo dated 16th April, 2009 in Criminal Case No. 175 of 2005 at Kwale Law Courts)

JUDGMENT

The appellant faced a main charge of defilement of a girl under the age of 16 years contrary to s. 145(1) of the Penal Code (Cap. 63, Laws of Kenya). And the allegation was that the appellant, on divers dates between the month of April, 2004 and the month of October, 2004 in Kwale District within Coast Province, had carnal knowledge of *N.M*, a girl aged 13 years.

In the alternative, the appellant was charged with indecent assault on a female, contrary to s. 144(1) of the Penal Code. The particulars were that the appellant, on divers dates as aforesaid, and at the place aforementioned, indecently assaulted *N.M* by touching her private parts.

The prosecution called five witnesses. *N.M* (PW1) testified that she had had sex with the appellant herein on 1st March, 2004; the appellant had called her from her home, which is only a short distance away, on the pretext that she was to collect some money for her father. When PW1 went to the appellant's house, he said he had a different object: he wanted to have sex, and if PW1 refused, he would kill her. He had sex with PW1, and she was asked to tell nobody about it.

Subsequently, PW1's aunt, *C.M* (PW4) asked PW1 if she was pregnant; she admitted it; and the matter was reported to her father and then to the local chief, before whom the appellant admitted responsibility. The matter was later reported to the police, who laid charges against the appellant. PW1 said she "had sex with [the] accused many times", and she gave birth on 21st March, 2006. She said her father "did not know [she] had a love affair with [the] accused". PW1 also said: "We had sexual intercourse for a long time – for one and a half years. We had sex many times. I had never slept with any other man". She said she had not told anyone about her love life with the appellant, "until I became pregnant". She said the appellant was her child's father, and that the appellant had given her Kshs. 400/= to pay to the clinic, in relation to the pregnancy. She said on cross-examination that there was no occasion when she (PW1) ever complained about a man trying to have forced sexual relations with her.

Crispin Mnyapara (PW2), the clinical officer at Kwale District Hospital had examined PW1 on 17th December, 2004 when she was aged thirteen; and she was then alleging that she had been defiled by a man known to her, who had made her pregnant. PW2 found PW1's hymen broken; she had no discharges; the urine test showed her to be pregnant – for about six months and two weeks. PW2 concluded that PW1 was pregnant, and filled in a medical-reporting P3 form giving the relevant detail.

PW3, *M.M*, who was PW1's father, learned from her sister *C* (PW4), in the course of April, 2004 that

PW1 was pregnant. The matter was then reported to the local Chief, and before the Chief, the appellant herein admitted that he had had sexual intercourse with the complainant. Later, this matter was laid at Kwale Police Station, which gave directions for medical advice at Kwale District Hospital. After pregnancy was confirmed, the appellant was arrested and charged. PW3 believed PW1 when she said the appellant was responsible for the pregnancy, but he did not know if PW1 had any other boy-friend.

C.M (PW4), a sister to PW3, was the first to suspect that PW1 was pregnant; and when she made inquiry, PW1 attributed it to the appellant herein.

Police Constable Joseph Mutuku (PW5) of Changamwe Police Station and formerly of Kwale Police Station, was the investigating officer in this matter. On 17th December, 2004, PW5 was on duty when **M** (PW3) came along with his daughter (PW1) and with a letter from the Children's Officer addressed to the O.C.S.; this letter stated that PW1 had been defiled. PW5 made a report, and issued a P3 medical-reporting form, for a report to be entered at Kwale District Hospital. The P3 form when returned to PW5, showed that PW1 was pregnant; and she told PW5 the appellant herein, who was a neighbour, was responsible for the pregnancy. PW5 recorded statements, and then arrested and charged the appellant.

The appellant (DW1) when put to his defence, said he had not made the complainant pregnant, and that he had evidence that the complainant had love relations with other men. DW1 said that both PW1 and PW3 had given false testimony.

DW2, **M.J** is a village elder who had been present when the appellant had been brought before the local Chief, in relation to PW1's complaint; and his testimony was that the appellant had denied the charge being made against him.

A.S.M (DW3), a neighbour of the appellant, said that PW3 had expressed the concern to him that the man who had made the complainant pregnant was still very young, and was not able to bear the attendant family responsibility, and so PW3 intended to attribute responsibility for the pregnancy to the appellant herein.

The learned Magistrate's line of analysis of the evidence was as follows:

- (i) ***"...the evidence of the complainant in Court was very clear, on how [the] accused first had sex with her by force and also on later dates and her testimony remained intact despite cross-examination"***;
- (ii) ***"It is noted that the....complainant did not mention any other person and she confirmed that she had only had sex with the accused person"***;
- (iii) ***"Questions as to whether it was her father or any other man who impregnated her were asked, and she denied all this"***;
- (iv) ***"The evidence of the complainant was also corroborated by that of her father (PW3), aunt (PW4), and the I.O. (PW5), that she readily mentioned [the] accused as the one who had had sexual relations with her and nobody else"***;
- (v) ***"....I do not see how out of the [blue], the complainant would just wake up and lay these serious claims against the accused. This possibility is even more remote, in view of the very tender age of the complainant"***;
- (vi) ***"The Court has also noted the unchallenged evidence of both the complainant and her father, that the accused in fact admitted being responsible for the complainant's pregnancy....."***;
- (vii) ***"I must say that I find the prosecution's case very consistent and well [corroborated] in material respects, and the same....pointed to the accused as the one who had defiled the complainant, as a result of which she became pregnant"***;

(viii) “...the defence raised by the accused and his witnesses [was] contradictory, lacked any corroboration or any merits to challenge the prosecution case. I dismiss the same accordingly”;

(ix) “It is clear that the complainant was aged.....13 years at the time of [the] commission of the offence....she became pregnant which confirms she must have been defiled. And the evidence on record clearly [confirms] that it was [the] accused who defiled her and in the process impregnated her”;

(x) “....I am convinced that the prosecution has discharged its burden as required by....law.”

The learned Magistrate convicted the appellant on the main count, and sentenced him to a five-year term of imprisonment.

The main contentions in the petition of appeal were as follows: that the trial Court shifted the burden of proof from the prosecution to the accused; that the complainant’s evidence upon which the Court wholly relied, lacked corroboration in material particulars; that there were doubts in the evidence, the benefit of which was denied the appellant herein; that there was no medical evidence to link the appellant to the offence; that the trial Court failed to take into account the defence evidence.

Although learned counsel, **Mr. Gichana** had a list of authorities to support his client’s case, he ended up not using it, as respondent’s counsel, **Mr. Monda** conceded to the appeal.

Mr. Monda urged that proof beyond all reasonable doubt had not been achieved; no report of the alleged defilement was made until after the complainant had become pregnant. Counsel urged that the mere fact the complainant implicated the appellant, did not exclude the possibility that she had sex with someone other than the appellant herein. And since at the time of trial the complainant had already given birth, it was a major omission in the prosecution case, that a DNA test was not carried out; and the outcome was that there were no material particulars linking the appellant to the offence.

I have analysed the evidence in detail: and it shows that a long time elapsed, between the times of sexual intercourse in which the complainant was involved, and the time when a complaint was made; from the complainant’s evidence, she had a long-running affair with a lover, hence a defilement attack by an intruder is not clearly brought out; even though the complainant had given birth to a baby during the pendency of trial, the prosecution did not take advantage of the situation to bring crucial evidence, in the form of DNA test results; the appellant led evidence which sought to show that the paternity of the complainant’s child could not be ascertained.

From these circumstances, the conclusion must be drawn that even though the prosecution was in a position to adduce foolproof evidence, this opportunity was not conscientiously used; and in the outcome, it is not the case, in my opinion, and with much respect to the learned Magistrate in his analysis, that proof beyond all reasonable doubt was made. Once I come to that conclusion, I must allow the appeal, which I hereby do. I set aside both conviction and sentence, and order that the appellant shall forthwith be released, unless he is otherwise lawfully held.

Orders accordingly.

DATED and DELIVERED at MOMBASA this26th.....day of November, 2009.

J. B. OJWANG

JUDGE

Coram: *Ojwang, J.*

Court Clerk: *Ibrahim*

For the Appellant : *Mr. Gichana*

For the Respondent : *Mr. Monda*