



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI**

Criminal Appeal 17 of 2007

***(FROM ORIGINAL CONVICTION AND IN CRIMINAL CASE NO. 1112 OF 2006 OF THE SENIOR RESIDENT
MAGISTRATE COURT AT KILIFI BEFORE C O OBULUTSA SRM)***

SAFARI KENGA WAKO AND ANOTHER.....ACCUSED

-versus-

REPUBLIC.....RESPONDENT

JUDGMENT

Safari Kenga Wako (1st appellant) and Madaraka Said Nyanga (2nd appellant) were convicted on a charge of indecent assault contrary to section 5 (1) (1) of the Sexual Offences Act, No. 3 of 2006 that on 22nd day of October 2006 in Kilifi District of the Coast Province, unlawfully and indecently assaulted V.K.K by touching her private parts, namely, her Vagina.

They were also convicted on the 2nd count of creating a disturbance in a manner likely to cause a breach of the peace contrary to section 95 (i) Penal Code that on 27th day of October 2006 at about 9.00Pm in Kilifi District of the Coast Province, created a disturbance in a manner likely to cause a breach of the peace, by threatening to beat V.K.K. The appellants denied the charges, and after trial, they were convicted on the aforementioned charges and sentenced to serve ten (10) years imprisonment. Although the sentence was one, conviction seems to have been on the alternative charge and count 2.

V.K (Pw 1) told the trial court that she was at home with her children on an undisclosed date, at 9.00Pm, when she escorted a lady to Safari, (1st appellant). Upon getting to the said Safari, he escorted her back. Along the way, he attacked her, knocking her down and then raped her. When he finished, Madaraka (2nd appellant) appeared and also raped her, slapped her then told her to go away. In the morning, she went to 1st appellant's mother. It was her evidence that 1st appellant was previously her in-law, whilst the second appellant was her uncle.

On cross-examination she stated that 1st appellant threatened her not to scream and denied suggestions by 2nd appellant, that she was drunk at the time. The complainant's daughter F.K (Pw 2) confirmed that her mother left their home accompanying a certain lady who had requested to be escorted to the 1st appellant. When her mother returned later in the night, she told her she had been raped by the two appellants. Infact when her mother returned that night, 2nd appellant slammed (?) her (Pw 1) into the house.

Pw 3 Lawrence Chai Shida a village elder testified that on 25/10/06 2nd appellant went to him requesting him to settle his case with Vidzo. Pw 3 had already received the report from the complainant.

Doctor Kimaga of Kilifi District Hospital examined the complainant found that she had injuries on the private parts but there was no discharge and no spermatozoa detected. She had no disease but was pregnant. Then on cross-examination he said:-

“She had no injuries on her private parts”

Pw 5 Pc Sarah testified that complainant went to the Police Station accompanied by the two appellants who were under escort, on allegation of being defiled.

In their unsworn defences 1st appellant confirmed that he knew complainant as a neighbour who sells alcohol. On 19th, he found the complainant drinking, he left her and went home. Then he went to the shops and found the complainant with another lady who said she wanted to see the 1st appellant. He decided to escort them back. He met the accused (presumably 2nd appellant) who asked what was wrong with the complainant and 1st appellant left seeing her. 2nd appellant's testimony was that the complainant is his aunt. He was on his way to a wedding when he met her on the road – she was drunk. He escorted her home and then went to the wedding.

The learned Trial Magistrate in his judgment found that the complainant and the appellants were known to each other and infact 2nd appellant was related to the complainant and that the two were together on that day and that the appellants had an opportunity to assault her, noting that 2nd appellant even sought a reconciliation. So they were found guilty on the second count and sentenced. The Trial Magistrate record reads as follows;-

“In respect to the alternative charge, the court has considered the testimony of V and finds her credible and consistent. The two accused had the opportunity to assault her...In respect to the 3rd count, no evidence was given and accused 2 will be acquitted of the same. The two will be found guilty on count 2...”

At the hearing of the appeal, both appellant were represented by Mr Gunga. There grounds of appeal were that;-

1. The learned Trial Magistrate erred in failing to find that there was absolutely no evidence to support the charge of indecent assault and based his findings on conjecture.
2. The learned Trial Magistrate erred in finding that the applicants had an opportunity to commit the offence yet there was no evidence to support that finding.
3. The learned Trial Magistrate erred by introducing extraneous factors to the case and in particular introducing the aspect of reconciliation.
4. The learned Trial Magistrate erred by convicting the appellants on uncorroborated evidence.
5. The learned Trial Magistrate failed to consider the circumstances of the offence, and the conduct of the complainant.
6. The learned Trial Magistrate passed a harsh and excessive sentence.

At the hearing of the appeal, Mr Gunga submitted on behalf of the appellants that the charge sheet referred to section 5 (1) (i) of the Sexual Offences Act, yet what exists is section 5 (1) (a) (1) of the Act. He pointed out that the learned Trial Magistrate failed to identify the error, and proceeded to try and convict the appellants. Further that, even if the court were to find that to be a minor discrepancy, then, the ingredients for indecent assault were not proved beyond reasonable doubt especially taking into account the definition given by the Act what is indecent assault and which must pay regard to penetration. It is his contention that the evidence does not suggest penetration or contact between the complainant and the appellants and it is not shown in her evidence which part of her body was touched, drawing to this court's attention that it is why infact the medical evidence which was produced was found to be insufficient and led to an acquittal on the charge of rape. It is his submission that the Trial Magistrate went ahead to convict simply on conjecture.

As to the finding that appellants had the opportunity to assault the complainant, Mr Gunga poses the question whether being together on that night was sufficient to create an opportunity to assault the complainant and whether that alone was sufficient to form a basis for conviction. His response to his question is that merely being with the complainant on that particular night did not necessarily mean that the appellants committed an offence, because the law requires proof.

As regards Pw 3's evidence that 2nd appellant went to him requesting for a settlement of a case between him and the complainant, Mr Gunga argues that it was not established what was being settled and that the issue of reconciliation was not even there nor was it established what they were reconciling over. He poked holes at the judgment terming it a simple one page which did not disclose any

reasons for the decisions arrived at.

Mr Ogoti (the ADDP), on behalf of the State, conceded to the appeal saying the charge sheet on which the appellants were convicted was defective. He drew this court's attention to the fact that the offence known as indecent assault was repealed and replaced by an offence known as indecent act on a female contrary to section 5 of the Sexual Offences Act NO. 3 of 2006 and the meaning of indecent act is given a definition at section 2 of the Act – so the offence known as indecent assault, no longer exists.

However as regards sentence, Mr Ogoti submitted that the same was not in error as the Act provides that if an offence is established under section 5, the important term must not be less than ten years.

With regard to the offence of an indecent act, Mr Ogoti points out that the ingredient is that the offender has contact or makes any contact with his genital organs on the breasts, buttocks with that of another person. In this regard then, Mr Ogoti explains that the offence is restricted to the organs and parts of the body indicated in section 2 of the Act and in this matter, there was no such evidence.

There is the wording of the learned Trial Magistrate judgment where he seems to have convicted the appellants on the alternative charge as well as the 2nd count. However I think that was an inadvertent slip on his part because a reading of the findings and sentence clearly points to the fact that conviction was on the alternative charge of indecent assault on a female contrary to section 5 (1) (1) of the Sexual Offences Act No.3 of 2006. Does such an offence exist under the said Act? There is no offence known as indecent assault on a female under section 5 (1) of the said Act, that section provides for Sexual Assault states;-

“(1) Any person who unlawfully

(a) Penetrates the genital organs of another person with

(1) any part of the body of that person

is guilty of an offence termed Sexual Assault. The offence as preferred fell under the Penal Code which was repealed where the new Act came into operation. That makes the charge sheet defective. But perhaps it may be argued that the error is one which could be remedied by provisions of section 382 Criminal Procedure Code.

Even if that were the case and it is to be argued that what prosecution intended was to charge, the appellant with the offence as provided under section 5 (1) a of the Sexual Offences Act, then the second issue to consider is whether the ingredients of such an offence was established. That provision clearly refers to **PENETRATION** – the Doctor's findings did not establish any penetration or contact between the complainant and the Appellants, and all that he found was that she was pregnant. There was even no suggestion that either of the appellants was responsible for that pregnancy.

Section 2 of the Sexual Offences Act, which is the Interpretation section defines penetration as the partial or complete insertion of the genital organs of another person. Apart from the fact that the medical evidence and not find any evidence of penetration, the evidence availed to the trial court made no specific reference as to any act of penetration – Pw 1 simply said she had been raped without detailing what acts the appellants committed so as to enable the court to determine whether they fitted with the definition anticipation under section 2, and in any event the medical evidence on rape was found wanting by the trial court.

The upshot therefore is that the evidence was not sufficient to sustain the conviction in the alternative charge and the conviction here is quashed. The sentence is thus set aside and I order that appellants shall be set at liberty forthwith unless otherwise lawfully held.

Delivered and dated this 9th day of December 2009 at Malindi

H A OMONDI
JUDGE