REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Criminal Appeal 52 of 2005

KYALO MUTISYA ……...…….....……. APPELLANT

AND

REPUBLIC ……..... RESPONDENT

(Being an appeal from original conviction and sentence in Kangundo SRM Criminal Case Number 739 of 2004 dated 3/01/2005)

JUDGMENT OF THE COURT

1. The appellant, KYALO MUTISYA was arraigned before the Kangundo Principal Magistrate's Court charged with defilement of a girl under the age of 16 years contrary to section 145 (1) of the Penal Code. The particulars of offence were that:-

"On the 4th day of Octomber (sic) 2001 at Mbiuni location, Kabaa sub-location in Machakos District within the Eastern Province, he had carnal knowledge of "[*Particulars withheld pursuant to section 76(5) of the Children Act,2001]".* **a girl under the age of sixteen years."**

The appellant denied the charge.

2. The facts of this case will emerge from the evidence of the 4 prosecution witnesses. PW1 was "[*Particulars withheld pursuant to section 76(5) of the Children Act,2001]".* the complainant. She told the court that on the material day at about 8.00 p.m (or was it 8.00 a.m.) she was at home when she was sent to Mumbuni Market in the company of her cousin CATHERINE MUASYA (not called as a witness) by her father. She said that she left home at about 9.00 a.m. via her sister Mueni's home. She said she then left her sister's home and boarded a matatu that took her to Mbiuni through Kabaa market. PW1 stated that while at Mbiuni, she was accompanied by one MULWA. That while she was on her way to a hotel within Mbiuni market, she was ambushed by the appellant who grabbed her and pushed her into the nearby bushes and later into a dry river bed, near the hotel where after removing her knickers, the appellant had forced sexual intercourse with her.

3. PW1 said that she could not scream during the ordeal because the appellant warned her that if she did so, he would kill her and also because he was much stronger. PW1 stated that because this was her first sexual encounter, she felt pain and bled. That after the intercourse on the dry river bed, the appellant took PW1 to his house at around midnight and forced her into sexual intercourse again twice. Later that night, according to PW1, members of the public among them one Mutuku (PW2), Mueni and her cousin

Catherine went looking for her and that when the appellant heard the people coming he fled but that he was chased and arrested 10 minutes later and brought back to the house where PW1 was. PW1 said she was later taken to Kathema Police Post where she made a report and was also issued with a P3 Form before proceeding to Kangundo Sub-District Hospital for treatment. PW1 identified the P3 Form – MFI – 1 and also identified the appellant who she said spoke to her all the while in the Kikamba language. The appellant had no questions for this particular witness at the close of her evidence in chief.

4. PW2 was MUTUKU MUTISO (Mutuku) a businessman in Nairobi. He stated that PW1 was his niece and who though married as at 30/11/2004, was still unmarried in the year 2001, and a pupil at Masana Primary School. Mutuku stated that at about midnight on 4/10/2001, he was informed by one Catherine Wausi that PW1 had been grabbed by the appellant. That on receipt of the information, he left for Mbiuni Market in the company of other people and on arrival thereat, he was informed that KYALO MUTISYA had indeed grabbed PW1. Mutuku stated that he went to the appellant's home in search of her niece and that when the appellant saw Mutuku and others, he (appellant) took to his heels but that after giving chase, the appellant was arrested and taken back to the house. Mutuku testified further that after he established from PW1 that the appellant had had unlawful carnal knowledge of her, he (Mutuku) apprehended the appellant and took him to Kathema Police Post. He also said that when PW1 was taken to hospital on the following day, she was not bleeding. The appellant did not put any questions to PW1 either.

5. PW3 was Number 59090 Police Constable PATRICK MBOLOI of Njukusi Police Post near Embu but previously of Kathema Police Post. He stated that on 5/10/2001 at about 5.00 a.m, he was on duty at the police post when the appellant, who was tied up with ropes, and PW1 were taken to the post with a complaint that the appellant had defiled PW1. He said that he booked the report and then placed the appellant in cells. He said he later issued PW1 with a P3 Form before taking both the appellant and PW1 to Kangundo Sub-District Hospital. PW3 said that after it was established that PW1 had been defiled, he charged the appellant accordingly. PW3 also said that he made enquires into the allegations against the appellant and also took witness statements. In what now appeared like his characteristic style, the appellant did not put any questions to PW3.

6. PW4 was FELISTA MAKAU, a Clinical Officer at Matuu Hospital, but previously working at Kangundo Hospital. She recalled that on the 5/10/2001, she examined PW1 who had a complaint that she had been defiled by a person known to her on 4/10/2001. PW4 testified that PW1's clothes had tears and spots of dry blood and that at the time of the examination, PW1 was aged 13 years. PW4 stated that on examination of PW1, she found that her (PW1's) labia majora had bloody bruises with evidence of venereal disease. That PW1's vagina had discharge of blood and the cervix too had slight bleeding. PW4 also stated that PW1 had not been treated since the defilement. PW4 said she classified the injury as harm.

7. It was also PW4's evidence that there was evidence of penetration which was fresh with visible spermatozoa. The appellant did not put any questions to this witness. When the appellant was called upon to defend himself at the close of the prosecution's case, he opted to say nothing, only saying that he would leave it to the court. The appellant had no witnesses to call either. Judgment was reserved for 29/12/2004, but on that date, the appellant was not produced in court. Judgment was thus read on 3/01/2002. The appellant was found guilty and convicted as charged and sentenced to imprisonment for life.

8. Being dissatisfied with both conviction and sentence, the appellant has appealed to this court. In his amended Petition of Appeal, the appellant sets out six home-made grounds of appeal which in summary are that:-

a. the learned trial magistrate grossly misdirected himself in both law and fact in convicting the appellant on a defective charge;

b. the learned trial magistrate erred in both law and fact in convicting the appellant on evidence that had not been tested on cross-examination;

c. the learned trial magistrate grossly misdirected himself in both law and fact in basing the appellant's conviction on evidence of identification when it was not clear that the appellant had been properly identified;

d. the learned trial magistrate erred in both law and fact in basing the appellant's conviction on uncorroborated and hearsay evidence;

e. the learned trial magistrate erred in both law and fact in failing to find that the conditions for identification of the appellant were not free from error;

f. the learned trial magistrate erred in both law and fact by convicting the appellant on evidence that was not proved beyond reasonable doubt.

9. In the Petition of Appeal filed earlier the appellant contended that his trial caused him prejudice because the trial court failed to disqualify itself after he (appellant) had asked the court to do so; that the trial court was not impartial and that because of the trial court's partiality, in the matter, the appellant refused to cross-examined witnesses, and finally that the conviction was against the weight of evidence.

10. At the hearing of the appeal, Mr O'Mirera, Principal State Cousnel submitted that both conviction and sentence were based on sound law and fact and that all the evidence adduced by the prosecution clearly pointed to the fact that the appellant abducted PW1, and had sexual intercourse with her three times once at the river and twice in his house. Mr O'Mirera also submitted that PW1's evidence was fully corroborated by the testimony of PW2 who told the court that on arrival at the appellant's house, the appellant took to his heels and was only brought back to the house after a chase by PW2 (Mutiso) and other members of the public.

11. Regarding the appellant's complaint that the trial court refused to disqualify itself, Mr O'Mirera submitted that the record does not show that such a request was put to the court by the appellant. Mr O'Mirera submitted that the appellant's failure to cross-examine the witnesses was self-imposed and that coupled with his silence in the face of evidence pointing at him as the perpetrator of the horrible crime against PW1, this court should be in no doubt that it is him who committed the offence against PW1. On sentence, Mr O'Mirera said that the sentence was deserved.

12. In reply to Mr O'Mirera's submissions, the appellant said that he now wanted his case remitted to the lower court for retrial, on the ground that he had now remembered that the proceedings were not conducted in a language that he understood. Mr O'Mirera disagreed with the appellant on this point.

13. It is my duty as the appellate court of first instance to reconsider and evaluate the evidence afresh with a view to reaching my own conclusions in the matter (See OKENO VS REPUBLIC (1973) EA 32). In his judgment, the learned trial magistrate made a finding that the prosecution had proved its case beyond any reasonable doubt against the appellant. The learned trial magistrate found that all the prosecution witnesses were truthful and credible witnesses and that their evidence against the appellant remained unshaken.

14. I carefully reconsidered the evidence on record and evaluated it afresh. I have made the following findings from the said evidence:-

a. That though the plea was taken in Kikamba, the rest of the record does not show in what language the proceedings were conducted.

b. That from late evening on 4/10/2001 up to about midnight, the appellant and PW1 were in each others company and that during that time, the appellant forcefully had carnal knowledge of PW1 three times.

c. That at about midnight, the appellant walked PW1 to his (appellant's) two roomed house and that it was from that house that the appellant tried to escape when PW1's people (among them PW2) came

looking for her.

d. That though the appellant made an attempt to escape from the house where he had taken PW1 and forced her into two rounds of sexual intercourse, he (appellant) was apprehended by Mutiso (PW2) and other members of the public.

e. That there was medical evidence that PW1 had been defiled and infact infected with a venereal disease.

f. That there was no light in the house where both PW1 and the appellant were when Mutuku and other members of the public found them out.

15. On the basis of the findings (a) and (f) above, I would allow this appeal, quash the conviction and set aside the sentence of life imprisonment. Should I order a retrial? Although Mr O'Mirera does not think that this should be so, I am satisfied that this is a proper case for retrial. I am of the view that the evidence on record is such that if properly considered, it could very well result in a conviction. The appellant himself does not object to a retrial. He has infact asked for it.

16. In the result, I order that the appellant shall be tried de novo on the self same charges before a different court. In the meantime, the appellant shall be held in prison custody until he is produced before the Principal Magistrate's Court at Kangundo for appropriate orders as to a fresh trial.

17. Orders accordingly.

Dated and delivered at Machakos this 17th day of April 2008.

R.N. SITATI

JUDGE