REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI

Criminal Appeal 40 of 2005

KATANA MWANGANDI……..…….APPELLANT

VERSUS

REPUBLIC ……..……RESPONDENT

J U D G M E N T

(From Original conviction and in criminal case no. 155 of 2005 of the SRM's Court at Kilifi)

The appellant herein, **Katana Mwangadi,** was charged in the main count with the offence of **defilement of a girl contrary to Section 145(1) of the Penal Code.**

The particulars in that main count is that on the 6th day of February, 2005 at about 8.00pm in Kilifi District of the Coast Province had carnal knowledge of MMD, a girl under the age of 16 years.

In the alternative charge he was charged with **Indecent assault of a female contrary to Section 144 (1) of the Penal Code.**

The particulars in the alternative charge in that on the 6th day of

M M, PW1, a minor aged 15 years gave unsworn evidence after **Voi dire.** She recalled that on the fateful day the appellant drunk **mnazi** at their home. He was served by her sister. The appellant had a large denomination note and asked the appellant to assist in changing the same. On the way back home the appellant and his companion followed and attacked them. The appellant forcibly removed her pants, the cotton wool covering her vagina, as she was on menstruation, and filed her in turn. The matter was reported to the chief and the appellant was arrested. The complainant was given a P3 form which was later filled by a medical practitioner and admitted in evidence as exhibit ……

Bahali Mwachozi, PW2, recalled that on 6th February 2005, she was at home when appellant and another person came to drink. They had a problem with change. The appellant sent her and PW1 to get the change. They failed to get change. On the way home they met the appellant and her companion who attacked them. She managed to escape but PW1 was cornered. She ran home and a little while later PW1 came crying and reported to their father that the appellant had raped her. A report was made to the village elder. She identified the appellant as Moi. She had known him since childhood.

P.C. Sheilla Kiplu, PW3, was on the duty desk on 7th February 2005. He received and booked a report of defilement. He facilitated the medical examination of the complainant and issued also issuance of a P3. Later on the appellant was identified by the complainant herein and PW2 and accordingly arrested.

A panga used in the course of attack was produced as exhibit ……in these proceedings.

Dr. Otuori, PW4, produced the medical report as exhibit 1 in respect of the complainant on behalf of Dr. Mwakagalu who had been transferred ot Taita Taveta under …..in accordance with Section 33 as read together with Section 77 of the Evidence Act (Cap 80) Laws of Kenya.

At the close of the prosecution's case the learned trial magistrate put the appellant on his defence. In his unsworn defence the appellant denied defiling the complainant whom she described as her neighbour. He distanced himself from the offence. Instead he blamed his companion of having committed the offence.

At the end of the trial, the learned trial magistrate convicted the appellant as charged and sentenced him to serve 20 years imprisonment and thus provoked this appeal.

I have carefully analyzed the evidence in support of the charge. It is conceded by the appellant that he went to the house of the complainant, father, on the fateful day and drunk **mnazi.** It is equally conceded by the appellant that the complainant is her neighbour hence there could be no mistaken identity. I am thus satisfied that the appellant was at the same end that he was properly identified.

The complainant reported the incident to her father who reported to the chief on the same day. The appellant was equally arrested on the same day. Medical examination embodied in the P3 form produced by **Dr. Ondieki Otuori** as exhibit is disclosed vaginal laceration accompanied by blood. The offence was committed on 6th February 2005 and the P3 filed on 11th February 2005, the panga which was used in threatening the complainant was also recovered in the bush where the offence was committed and produced in evidence.

The learned state counsel supported the conviction and sentence. He submitted that the offence was committed on 6th May 2005 at about 9.00pm. PW2, who was in the company of the complainant, reported the incident to the complainant's father who reported the matter to the police who swung into action immediately. The appellant and complainant are neighbours and there cannot be any issue of mistaken identity. The fact of defilement was corroborated by medical evidence produced by PW4 as exhibit 1. The case against the appellant was thus proved beyond any reasonable doubt. On sentence, the state counsel submitted that it was deserved taking into account the age of the complainant (15 years) and the fact that she risked getting an infection and the fact that the incident occurred when she was in menstruation period thereby traumatizing her.

In my judgment the evidence against the appellant was overwhelming. He was properly identified and the fact of defilement was established beyond reasonable doubt by medical evidence.

Accordingly, I dismiss the appeal both on conviction and sentence.

DATED and DELIVERED at Malindi this 7th day of May 2008.

N. R. O. Ombija

JUDGE