

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Criminal Appeal 28 of 2006

(From original conviction and sentence in Criminal Case No.437 of 2005 of the

Resident Magistrate at Wundanyi)

JACOB MWAVULAAPPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

The appellant herein, Jacob Mwavula, was tried on a charge of defilement of a girl contrary to section 145 of the penal code. He also faced an alternative count of indecent assault on a female contrary to Section 144(1) of the Penal code. After undergoing a full trial, the appellant was convicted on the main charge and sentenced to serve 7 years imprisonment with hard labour. Being aggrieved he preferred this appeal.

On appeal, the appellant put forward a total of 5 grounds of appeal in his petition. He also filed written submissions when the appeal came up for hearing with leave of court. The learned Senior State Counsel opposed the appeal. Before delving into the arguments tendered on appeal let set out the background of the facts leading this appeal.

EB (P.W.1), the mother of RT, the complainant, left home at 5.00 a.m. She left behind the complainant a child aged 3 years under the care of RKT (P.W.2). The complainant is a grandchild to P.W.2. when P.W.1 came back at 5.00 p.m. she did not find the child at home. She was told by P.W.2 that the child had been defiled by the appellant and that the child had been taken to Wundanyi. RKT (P.W.2) told the learned trial Resident Magistrate that she was with the complainant who had been under her care. The appellant arrived when P.W. 1 was making tea. He brought with him radio spare parts ordered by BBM(P.W.3). P.W. 2 left the child outside as she went to keep those spare parts. She called the child but there was no response. She came out of the house checked around and found the appellant behind the house. P.W.2 said she saw the appellant trying to draw back the complainant's under pant. The appellant cross-examined P.W.2. Upon which she stated that she saw the appellant place the complainant on top of his as he sat. P.W.2 said she saw the appellant unzip his trousers after which he inserted his p into the v of the complainant. BB (P.W.3) confirmed having ordered for radio spare parts from the appellant. He said he came back home at 4.00 p.m. on 4/10/2005 and was told by P.W.,2 what had happened. He managed to have the appellant arrested while he was taking some traditional liquor from the neighbourhood. P.W.3 took the appellant and the child (Complainant) to Punda A.P.'s Camp where he claimed the appellant persuaded him to drop the complaint and in return he would pay him Kshs.800/- as compensation. P.W.3 said the appellant proposed to visit Kalele a traditional healer for cleaning. Christine Kalema (P.W.5), a clinical officer examined the complainant on 7/10/2005 and found that the complainant's labia majora had been bruised and her hymen was broken. She found no trace of blood nor spermatozoa in the complainant's vagina. P.W.5's findings contradicted the evidence of P.W.1, P.W.2, P.W. 3 and Ngunjatu Simba (P.W.4). The quartet had claimed that they had seen blood and spermatozoa in the private parts of the complainant. The appellant did not tender any evidence nor called for the evidence of independent witnesses when placed in his defence.

On appeal, the appellant raised 5 grounds which may be reduced to one ground, that is to say that the prosecution had not proved its case to the standard of beyond reasonable doubt. The appellant was of the view that the Clinical Officer had not found that the complainant was defiled in the absence of any trace of blood or spermatozoa.

Mr. Monda, learned Senior State Counsel urged this court to dismiss the appeal because there was an eye witness who saw the appellant doing the act which was corroborated by the evidence of the Clinical Officer.

I have considered the grounds set out on the petition of appeal and the written submissions filed by the appellant. I have also considered the submissions of Mr. Monda. I have re-evaluated the evidence tendered by the prosecution before the trial court. In this case the appellant opted to keep quiet. He has now alleged on appeal that there was a grudge between him and the complainant's father (P.W.3) over a debt which was outstanding. Unfortunately, those allegations should have been made before the trial magistrate. They cannot be raised on appeal because the allegations must be proved by evidence. Such allegations must be made before the trial court in order to cast doubt on the prosecution evidence. In the alternative the allegations could be tendered before the appellate court by way of additional evidence which can only be done with leave of court. Leave was not sought by the appellant to tender additional evidence before this court.

The main ground argued on appeal is that the prosecution's case was not proved to the required standards in criminal cases. It is said that there was contradictory evidence between the testimonies of P.W.1, P.W.2, P.W.3 P.W.4 and that of the Clinical Officer (P.W.5). I have considered the evidence of P.W.1, 2, 3 and 4. They all alleged that on 6/10/05, they saw blood and spermatozoa on the private parts of the

complainant. P.W.5 said that when she examined the complainant on 7/10/05 she did not see any trace of blood nor spermatozoa. I agree with the appellant that the contradictions exist. A careful perusal of the evidence of P.W.1 will reveal that P.W. 1 had stated in her evidence in chief that she did not wash the child as instructed by the doctor. But could these contradictions affect the outcome of the conviction? After a careful re-assessment of the evidence, I am of the view that the apparent contradictions cannot assist the appellant. First, the evidence of P.W.2 puts the appellant at the scene of crime. In fact in his written submissions the appellant admits he had gone to complainant's home. The evidence of P.W. 2 were not shaken even on the intense cross-examination by the appellant. P.W.2 met the appellant who had gone to P.W.3's house to present some radio spare parts. P.W.2 saw the appellant hold the complainant. She saw him remove the underpants of the child. She saw him unzip his trousers. She saw him insert his penis into the vagina of the complainant. P.W.5 examined the complainant and came to the conclusion that the complainant's labia majora was bruised and that her hymen was broken. These are injuries consistent with defilement. I am convinced the trial magistrate came to the correct decision hence I do not see any reason why I should interfere with his decision. I dismiss the appeal in its entirety.

Dated and delivered at Mombasa this 19th day of September 2008.

J. K. SERGON

J U D G E

In open court in the presence of Mr. Monda L.S.S.C. and the appellant.