REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

Criminal Appeal 64 of 2006

COLLINS MARUTI KUTOSI…….……...……APPELLANT

VS

REPUBLIC……..……..RESPONDENT

(Arising from SRS RM CR. C. NO.36 of 2005)

JUDGMENT

The appellant Collins Maruti Kutosi was charged with defilement of a girl under 16 years of age contrary to section 145 (1) of the Penal Code. The particulars are as in the charge sheet. It is noted that although the charge correctly refers to 16 years old, the particulars thereunder refers to a girl under the age of 14 years.

This was a minor discrepancy which was not prejudicial to the appellant but which nonetheless ought to have been amended by the prosecution before they closed their case in order for the charge to tally with the particulars. He pleaded not guilty to the charge and the matter went to full trial with the prosecution calling a total of 4 witnesses. On his part, the appellant tendered his evidence on oath but called no witnesses. He was found guilty and convicted and sentenced to 5 years imprisonment. He was unrepresented in the subordinate court but he filed this appeal through Makali & Co. Advocates. He has appealed both against the conviction and the sentence.

The appeal is premised on the 8 grounds on the petition of appeal. Counsel nonetheless abandoned grounds 3, 4 & 7 and argued out the rest. Learned counsel for the state conceded the appeal for reasons that it was doubtful that a girl of 14 years could have had 3 to 4 rounds of sex with an adult like she stated and not even feel pain or show any signs of having been defiled. Mr. Makali also faulted the medical examination which showed all the complainant's private parts were intact and that she had some white discharge which was foul smelling yet she was said not to have been infected with a sexually transmitted disease. It will be noted that in his testimony in court, the Clinical Officer actually admitted that the discharge was a sign that the complainant was infected, yet he went on to say that she had no sexually transmitted disease.

Both learned counsel agreed on the fact that the complainant was not a credible or truthful witness at all.

I have considered these grounds along with the said submissions. I am alive to the fact that this being a first appeal, I have the duty to re-evaluate and re-analyse all the evidence adduced before the trial court and arrive at my own decision as to whether the conviction against the appellant was safe or not. In this case however, I do not find this exercise necessary. This is so because after going through the record, I find myself in total agreement with both counsel in this matter. All that is needed to dispose of this appeal is to consider the evidence of the complainant and that of the Clinical Officer. From the evidence of the complainant and her mother, it is evident that she was well known to the appellant before the date in question. She appears to have accompanied him to his house voluntarily on his bicycle. This could not happen if she did not know him before. At one point she said she was found in the appellant's house by her sister and she jumped out of the house through the window. She then joined the appellant again yet she claimed the appellant was unknown to her. Her entire evidence is so concocted and full of blatant untruths that it is not conceivable that the learned trial magistrate could have failed to notice this. She even went and slept elsewhere for 2 or 3 days before she was finally traced by her mother. What is even

more confusing is that at one point, the appellant was even a part of the search team. If indeed the complainant was defiled, which in itself is doubtful, this could have happened within those 2 days after she left the appellant's house. Her evidence was so preposterous. It was necessary for the learned trial magistrate to clearly state why he believed it and went ahead to convict on the same in absence of any other credible evidence. I agree with the counsel for the appellant that the proviso to section 124 of the Evidence Act was not complied with and that omission was fatal and very prejudicial to the appellant herein.

On the P3 form, the same shows that all the parts comprising of the complainant's private parts were intact. It is not clear therefore where even the idea of convicting the appellant for the offence of defilement came from. I agree with the learned state counsel that the evidence adduced by the prosecution created some doubt which should have been resolved in favour of the appellant. My finding is that this conviction was very unsafe and the same is not sustainable. Accordingly, I allow this appeal and quash the conviction and set aside the sentence imposed by the trial magistrate. The appellant to be set at liberty unless he is otherwise lawfully held.

W. KARANJA

JUDGE

DELIVERED, Signed and Dated at Bungoma this 20th day of June, 2007 in the presence of:- Mr. Makali for the appellant and Mr. Ndege for State.