REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 256 of 2005

(From original conviction and sentence in Criminal Case No. 3189 of 2004 of the Senior Principal Magistrate's Court at Kibera Ms. Kasera, SRM)

RICHARD MULWA KIMWALU ……..……. APPELLANT

VERSUS

REPUBLIC …….....……. RESPONDENT

JUDGMENT

In this appeal by ***RICHARD MULWA KIMWALU*** (appellant) three broad issues have been raised namely, that the learned trial magistrate erred in law and fact in convicting the appellant whilst relying on the evidence of identification of a single witness, two, vital witnesses were not called to testify and three, the sentence imposed was harsh and excessive.

The background facts of this case are short and straightforward. VKM (complainant) was on 24th April, 2004 at about 8.30 p.m. sent by her elder sister, MM (PW2) to buy paraffin. On the way she saw a person who followed her all the way to the kiosk where she was to buy the paraffin. She bought the paraffin and left. That person still followed her. When the complainant neared the house she felt someone hold her two hands. Thereafter he held her by the neck. When she raised the alarm, the person ordered her to shut up or else he would kill her. He pushed her to the ground unbuttoned her trouser and pulled it down. He removed his own trousers and thereafter defiled her. In the process, the complainant raised an alarm and people came. That person rose and ran away. Apparently, the complainant had recognized that person with the assistance of lights from houses nearby. That person was the appellant. The appellant was then traced and arrested. Following further investigations, the appellant was charged with the offence of Defilement of a girl contrary to Section 145(1) of the Penal Code. The prosecution called six witnesses and at the end of it all, the learned Magistrate found the case for the prosecution proved, convicted the appellant and sentenced him to 18 years imprisonment.

The appellant was aggrieved by the conviction and sentence and hence preferred this appeal in which as I have already stated he has raised three broad grounds of appeal. In support of the appeal, the appellant tendered written submissions which I have carefully read and considered.

The appeal was of course opposed by the state. Mr. Makura, learned state counsel in opposing the appeal submitted that there was overwhelming evidence adduced in support of the charge. Counsel in particular referred the court to the evidence of PW1, PW2, PW3 and PW5 in this regard. PW1 testified as to how the appellant defiled her. That PW2 and PW3 testified as to how they were led by PW1 to the appellant's residence whereat PW1 positively identified the appellant as the one who defiled her. With regard to PW5 counsel submitted that he was a government analyst who conducted tests on PW1's swimsuit and found that it had seminal stains and degenerated spermatozoa. He came to the conclusion that sexual activity had taken place with regard to the complainant.

With regard to sentence, counsel submitted that the appellant was sentenced to 18 years imprisonment after the court considered the appellant's mitigation. The maximum sentence provided for the offence is life imprisonment. According to the learned state counsel, the prison term imposed on the appellant was therefore not excessive considering that the complainant was only aged 13 years.

As this is a first appeal the appellant is entitled to expect this court to subject the evidence on record as a whole to exhaustive re-examination and to this court's own decision on the evidence having given due allowance to the fact that this court did not observe the demeanor of the witnesses. See ***PANDYA VS REPUBLIC (1957) E.A. 336*** *and* ***OKENO VS REPUBLIC (1972) E.A. 32.***

From the onset I wish to state that the evidence of PW6, raises some doubts as to whether the appellant really committed the offence. According to this witness the pant of the appellant which had been taken to him for analysis was not stained with any spermatozoa. The appellant had been arrested soon after the alleged offence. There is no evidence that the appellant had occasion to change his pants. Now if the appellant had been involved in a sexual activity with the appellant, one would ordinarily expect that his underpants would be soiled with spermatozoa. The learned Magistrate did appreciate this fact when she rendered herself thus

"……..***The evidence of PW5 Albert Kathuri only indicate that the complainant was involved in sexual activities as there were sperms on her inner pant. Some sperms were decomposing. This was 2 days after the offence. The blood group of the accused was "B" but this is not linked to the spermatozoa found on the complainant's pants……..***"

In my view the trial court ought to have resolved the doubts created in favour of the appellant. The doubts were one, no spermatozoa, life or degenerated were found on the pants of the appellant and two, the spermatozoa found on the complainant could not be linked to the appellant by blood sample. These doubts taken in totality would suggest that there was no nexus and or linkage between the appellant and the sexual activity involving the complainant.

The only evidence that tends to connect the appellant with the offence is one of identification by recognition. The complainant stated that she was able to see and recognize the appellant. Indeed PW1 specifically stated that she had known the appellant prior to the alleged offence. However mistakes do occur even in recognition of close relatives and friends. ***SEE REPUBLIC VS TURNBULL (1976) E ALL E.R. 549.*** The offence was committed at night at about 8 p.m. and in a bush. It must have been dark. According to PW1 she saw the person who held her. In her evidence in chief PW1 did not state by what means she was able to see and recognize the person who held her, being the appellant. It was only under cross-examination by the appellant that she was able to say thus:-

"…….***The place was lit and I could see you properly …...***"

However this answer begs one question, by what means was the place lit? The learned Magistrate did not go into this issue at all in her Judgment.

Both PW2 & PW3 in their testimony stated that they found the complainant in the bush crying. They were armed with a torch. Indeed under cross-examination by the appellant PW3 stated:-

"……***I saw K. when I flushed the torch-……..***"

The fact that a torch had to be flushed in order that the complainant could be seen would seem to suggest that the place where the incident occurred was enveloped in darkness thereby putting the allegation of PW1 to the effect that the place was well lit in doubt. If the place was not well lit could PW1 have been able to positively identify the appellant? I have my own doubts. The evidence of PW1 on the question of identification by recognition ought therefore to have been approached with necessary circumspection. The learned Magistrate in my view failed in this task. Even assuming that the place was well lit, it behoved the trial Magistrate to make inquiries as to the source and intensity of the light, the type of light, the distance from the source of light in relation to where the alleged offence took place e.t.c. In the

celebrated case of ***CHARLES O. MAITANYI V REPUBLIC (1986) 2 KAR 75*** the court of appeal had this to say on the issue of identification by use of light

"……***It is at least essential to ascertain the nature of the light available, what sort of light, its size and its position relative to the suspect ---- are all important matters helping to test the evidence with greatest care. It is not a careful test if none of these matters are not known because they were not inquired into……..."***

Although this was a case of recognition as opposed to visual identification, nonetheless the above inquiries are equally necessary. After all PW1 testified that he saw the person who subsequently identified as the appellant at a distance following her to and from the place she had been sent to buy paraffin. The distance that the person trailing PW1 kept from PW1 until she was suddenly held from behind was not also inquired into. In the case of ***ANJONI VS REPUBLIC (1980) KLR 59***, the court of appeal held that recognition of an assailant is more satisfactory more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or another.

However, in view of what I have already stated regarding failure by the learned Magistrate to make the aforesaid inquiries, the principles in the ***ANJONI CASE (SUPRA)*** may be inapplicable in the circumstances of this case. In any event, PW1 was not categorical that he knew the appellant. All that she stated in her evidence with regard to this aspect of the matter is:-

"……***I have been seeing the accused within the estate before……."***

If this is the only basis for recognition of the appellant by PW1, then the possibility of mistaken recognition cannot be ruled out as well.

Further it does appear that the learned Magistrate was not aware that the evidence of identification was by a single witness. Accordingly, the learned trial Magistrate ought to have warned herself, but did not, of the dangers inherent in basing a conviction on the testimony of a single witness in respect to identification. That was an error in law. See ***ABDALLA BIN WENDO VS REPUBLIC (1967) EA 583.*** Accordingly the possibility of error or mistake herein was not excluded at all.

I also note according to the evidence of PW2 that the person who defiled PW1 was from one Mama Mwende's house who had sent her to buy charcoal. She stated:-

*"……. **She took the charcoal and a man in that house followed her and defiled her in the bush……."***

In my view and as correctly submitted by the appellant, the said Mama Mwende was an essential witness. She ought to have been called to testify for a just decision by the court to be reached. This witness ought to have testified to confirm whether the appellant was really in her house by then, and if he followed the complainant after she sent her for charcoal. It is instructive that PW3 stated in this regard:-

*"……**- We went to Mama Mwende and she said she did not live with Mulwa……."***

The said lady it is apparent disowned the appellant. She did not tell PW2 or PW3 that the appellant had been in the house. It is also noteworthy that PW1 in her testimony never mentioned that she had gone to Mama Mwende's house who in turn had also sent her for charcoal. Failure by the prosecution to call this witness can only be attributed to one fact, that her evidence would have been inconsistent with the prosecution case. In the case of ***BUKENYA VS UGANDA (1972) E.A. 549,*** the court held that the evidence from essential witnesses should be called by the prosecution in compliance with the duty placed upon it to make available all witnesses necessary not only to establish their case but also to establish the truth of the whole matter even if their evidence would be inconsistent with their case. The appellant invited me to draw adverse inference that the prosecution's failure to call this witness was because they knew she would exonerate the appellant. Based on the circumstances of the case and the evidence on record such an invitation is not without merit.

Finally, I think that some of the prosecution witnesses were not credible. Beginning with PW1, she had told PW2 and PW3 that a person from Mama Mwende is the one who defiled her. However in her own testimony she did not as much as mention such a thing. She also never mentioned that she had also been sent by Mama Mwende to buy charcoal for her. PW2 and PW3 who made a report of the incident to the police station gave different version to PW4, as concerns the circumstances under which the appellant was arrested. In their evidence in chief, they all stated that the appellant was arrested from a house. But when they filed their report with PW4 they said:-

*"…… **he was found with the girl. They said they found him in the bush having her carnal knowledge….."***

What would be the reason or motivation for this discrepancy and or contradiction in their evidence! The appellant claims that the case is a frame up. Going by the record this possibility is not remote; if not the possibility that the appellant is a victim of mistaken recognition can also not be ruled out.

In winding up, I have come to the inevitable conclusion that the case against the appellant was not proved beyond reasonable doubt contrary to the finding by the learned Magistrate. Accordingly, I allow the appeal, quash the conviction and set aside the sentence. The appellant may be set at liberty forthwith unless otherwise lawfully held.

Dated at Nairobi this 11th day of October, 2006.

…….**……**

MAKHANDIA

JUDGE