REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

Criminal Appeal 23 of 2003
(From Original conviction (s) and Sentence (s) in Criminal Case No. 720 of 2001 of the Resident Magistrate's Court at Kangundo B. MALOBA S.R.M on 11/10/02)

MUTUA MULUNDI …….. APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

J U D G E M E N T

This is an appeal against the conviction and sentence in Kangundo Criminal Case 720/01 where the appellant was charged with the offence of defilement of a girl under 14 years Contrary to Section 145 (1) of the Penal Code. In the alternative, he was charged with the offence of indecent assault on a female Contrary to Section 144 (1) of the Penal Code. After a full trial the appellant was convicted on the main charge of defilement and sentences to 14 years imprisonment and 10 strokes of the cane. He is aggrieved by the said conviction and sentence which prompted this appeal.

Briefly stated, the facts of this case are that the complainant was coming from school on 12/10/01 at about 6.00 p.m when she was accosted by somebody from behind her who held her by the throat, made her fall and dragged her to a nearby bush where he had carnal knowledge of her after he threatened her with a knife. He released her about 8.00 p.m. She went home, reported to her grandmother about the ordeal. He father was informed of the incident on 13/10/01, he came home on 14/10/01 took her to report to the police and was also examined by a Clinical Officer who found her hymen to be broken, had whitish discharge, vaginal swab examination released pus cells and yeast. PW 3 said that the complainant saw the appellant at a kiosk, pointed him out and he was arrested and later handed over to police on 15/10/01 to Corporal Esther Maweu who had him charged.

In his petition of appeal, the appellant raised 5 grounds of appeal. At the hearing of the appeal, Mr Kisebu, counsel for the appellant consolidated and argued ground 1, 2, and 4 together, ground 3 and lastly ground 5. In ground 1, 2 and 4 it is argued that the identification of the appellant was not proved beyond any doubt. In ground 3, it is argued that the offence of defilement was not proved and lastly ground 5 touched on sentence, that it is harsh and excessive.

Counsel for the appellant submitted that the evidence on identification was contradictory in that the complainant never mentioned the name of her attacker to PW2 and yet complainant claimed to have known her assailant by name of Mutua Mulundi. It is further argued that though the magistrate found that the complainant identified the appellant to her father, she denied knowing how he was arrested.

On ground 3, the counsel argued that it was not ascertained what the complainant's age was as she claimed to be 14 years, the Clinical Officer assessed the age to be 15 years and hence there was no proof

of age and an offence under Section 145 (1) of the Penal Code was not therefore committed.

On the issue of sentence, counsel was of the view that despite the present outcry against sexual offences, the appellant having been a first offender he should have been given a lenient sentence and that if found guilty he should be sentenced to the period already served.

The appeal was opposed by the state counsel who argued that the appellant was properly identified as the complainant was accosted at about 6.00 p.m and was with the appellant for long; she knew him by name and informed her grandmother that she was assaulted by a person she knew.

As regards the issue of complainant's age, he urged the court not to find it a material inconsistency and uphold the conviction.

The state counsel urged the court to uphold the 14 year sentence but allow the appeal on corporal punishment which has been abolished. He observed that the offence is prevalent.

I have considered all the submissions by both counsels and reviewed the evidence as I am required to, this being a first appellate court.

From the record, it is apparent that the appellant was not a stranger to the complainant. The complainant said she had known him for sometime, a year and in his defence the appellant did confirm that the complainant used to go to his home with another girl. Whatever for, he did not say.

The complainant then told court that she was with the appellant from 6.00 p.m to about 8.00 p.m. They were in close contact. 6.00 p.m was still daylight. I have no doubt and do agree with the magistrate that the complainant did not only identify but recognized her assailant. Were there inconsistencies in the prosecution case as regards identification of the appellant? The appellant's counsel pointed out the fact that the complainant did not tell PW2 the name of the assailant but merely said she knew the assailant amounts to inconsistency. I find this not to be material inconsistency. Even PW3 the father said PW1 only told her she could identify the person and she did point him out while he was at the canteen. Although the complainant said that she named him, she did not specify to whom she did so.

The complainant also claimed that the appellant was arrested in her absence. PW3 did not say whether once the complainant pointed out the appellant, he was arrested. From cross-examination of PW3 by the appellant, it is apparent that PW3 was with another person when he arrested the appellant and the complainant was not present. It seems she just pointed out from a distance. The complainant's evidence that she was not present at appellant arrest is therefore not contrary to the other evidence. She identified appellant and led to his arrest.

Though the complainant did not mention it, her grandmother PW2 told the court that the complainant came home screaming and calling her and the magistrate found that her condition of distress proved that she was defiled. The magistrate relied on the holding in the case of ALAN REDPATH 1962 46 Criminal Appeal 319 where it was held that in sexual offence, the distressed condition of a complainant is capable of amounting to corroboration. I do agree that the circumstances in the case of Redpath case were different from the present but even in the present case, the fact that the complainant went home late in the night, crying, her clothes muddy all go to corroborate her evidence as to ordeal she had just passed through. It may however not point to the assailant. The nature of the distress that amounts to corroboration, I believe differs with the circumstances of each case.

The appellant was charged with the offence of defilement under Section 145 (1). Under this section age of the victim is essence. The victim has to be less than 14 years of age. In this case there was contradictory evidence of what the contradictory evidence of what the complainant's age was. Though she claimed to be 14 at the time of her testimony on 20/3/02, meaning that she was 13 years old at the time of the alleged offence, no birth certificate was produced. The Doctor's opinion is that she was 15 years of age. An offence cannot there have been committed under Section 145 (1) of the Penal Code. Was any other offence committed? We have the evidence of PW1 herself as to what happened to her. She was examined

by a Clinical Officer who found her hymen torn which is evidence of penetration; she had pus cells and yeast. Though the Clinical Officer's evidence did not show who may have committed the offence but that evidence goes to show that the complainant had taken part in a sexual activity. There is no longer a requirement that there be medical evidence connecting the appellant with the offence. In the case of FRED WANJALA versus REPUBLIC Criminal Appeal 61/84, the Court of Appeal held that it is not mandatory to obtain medical evidence in a case of defilement or for that matter a sexual offence. It can be proved without the aid of medical evidence if the evidence is sufficiently cogent. The complainant pointed at the appellant. So far evidence on record there is no reason at all for the complainant to have framed that appellant. The court believed the complainant and has no reason to doubt her. The evidence is cogent. The conclusion I reach is that the appellant had unlawful carnal knowledge of the complainant. Once the age of complainant was not ascertained the charge should have been one of rape Contrary to Section 140 of the Penal Code.

Was the sentence of 14 years excessive?

When the appellant was charged in 2002, the maximum sentence under Section 145 (1) was 14 years. Considering the incidents of such offences, even if the complainant was a 1st offender, was a bit on the higher side.

Having found however that the offence was one of rape Contrary to Section 140 of the Penal Code, under Section 354 of the Criminal Procedure Code, I hereby quash the conviction for an offence of defilement and substitute it with conviction for an offence of rape Contrary to Section 140 of the Penal Code. I hereby sentence the appellant to 10 years imprisonment.

Strokes were done away with the 2003 amendment of the Penal Code and Criminal Procedure Code. Orders accordingly.

The appeal on both conviction and sentence is dismissed.

R.V. WENDOH

JUDGE

Dated at Machakos this 24th day of February 2005

R.V. WENDOH

JUDGE