



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

Criminal Appeal 136 of 2009

SENDEU OLE TUMBES.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence in Kajiado Senior Resident Magistrate's Court

Criminal Case No. 488 of 2007 by Hon. R.A. Oganyo -S.R.M on 30.04.2008)

JUDGMENT

1. The Appellant, Sendeu Ole Tumbes, was presented before the Senior Resident Magistrate's Court at Kajiado on 16/04/07 charged with one count of defilement of a girl under the age of eleven years contrary to section 8(2) of the Sexual Offences Act, 2006. The particulars of the offence were that on the 23rd day of March, 2007, at Imbirikani Maasai Reserve in Kajiado District within the Rift Valley Province, the Appellant had carnal knowledge of SM, a girl of the age seven (7) years.
2. The Appellant faced an alternative charge of indecently assaulting a female contrary to section 144(1) of the Penal Code. The particulars of the alternative charge parallel those of the main charge save for carnal knowledge which is substituted with touching the Complainant's private parts.
3. After a fully-fledged trial in which the Prosecution called five witnesses, and with the Appellant put on his defence and having given a sworn testimony, the Learned R.A. Oganyo, convicted the Appellant and sentenced him to imprisonment for life. The Appellant was aggrieved and preferred the current appeal. In what he has mistakenly called "Grounds of Mitigation," the Appellant listed five grounds of appeal. However, there are really only two grounds. What he lists as his first ground of appeal is the assertion that he pleaded not guilty to the charges in the court below. Similarly, what he lists as his fifth ground of appeal is a request for typed proceedings.
4. As I understand them the two substantive grounds of appeal he has raised are as follows. First, he complains that the Learned Magistrate should not have convicted him since the evidence adduced revealed a discordance in the medical status of the Appellant and the Complainant. Second, the Appellant complains that the Learned Magistrate ought to have put more weight on his testimony that there was a conspiracy to implicate him in the offence.
5. I can easily dismiss the second complaint: The Appellant raised no theory of defence based on conspiracy during the trial. The first time he raised the issue was during mitigation when he claimed that

the father of the Complainant engineered the whole incident to put him in trouble. As such, there is no valid ground to complain that the Learned Magistrate should have taken his theory of conspiracy into account. At trial, his defence theory was one simply of denial: He made a strong argument that he did not defile the Complainant.

6. The law obligates this Court, as the first appellate court, to re-evaluate all the evidence given at trial and come to its own independent conclusions. This Court is not to merely confirm or disconfirm particular hypothesis made by the Trial Court. Even then, this Court must be acutely aware that it never saw nor heard the witnesses as they testified and, therefore, it must make an allowance for that. See ***Okeno v R* [1972] EA 32** and ***Kariuki Karanja v R* [1986] KLR 190**.

7. An exhaustive re-evaluation of the trial record reveals the following. It is uncontroverted that the Complainant was a child of tender years of less than eleven. The Clinical Officer who treated her and filled her P3 form estimated her age at around 7 years old. It is similarly uncontroverted that the Complainant was defiled sometime around March-April, 2007. The evidence of PW1, John Oloo Ogotu, a Clinical Officer based at Loitokitok District Hospital showed that upon examination on 02/04/2007, the Complainant was found with a torn hymen consistent with sexual penetration; vulva lacerations and pungent vaginal discharge. Upon appropriate tests, the Complainant was found to be suffering from gonorrhoea. There is no question that someone had had sexual intercourse with the Complainant. Hence, assuming the age of the Complainant was sufficiently established by evidence to be below eleven (11) as this is a definitional requirement for a successful charge under Section 8(2) of the Sexual Offences Act, the only question is whether it was proved in evidence that it was the Appellant who was responsible for the defilement. This fact needed to be established beyond reasonable doubt as required by our law.

8. So, what evidence is on record to connect the Appellant with the offence charged? This is how the Learned Magistrate disposed of this issue:

Finally, the [Complainant] positively identified the [Appellant] person as her assailant. The [Appellant] was taken to hospital. The [Appellant] was taken to hospital after his arrest one week later. He was not found to have any venereal disease. The investigating officer attributed this doctor's finding to the fact that there was a possibility of the [Appellant] having treated himself of the disease. PW4, Felix Nthenya, testified that while at Mbirikani Police post with his colleague, PC Abugi, the Complainant was escorted to the Police Post by her grandma when as the girl was being probed on how the incident had occurred, the [Appellant] who was also known to the officer, went to the station. The officer said that he knew the accused person as a herdsman of a person whose homestead was in the police lines neighborhood. That the girl pointed at him, when he approached the station, as having been the one who defiled her. She further said the names of the herdsman's employer to be one of Kitende. All these link closely to lead me to the finding that the accused person was positively identified as the culprit.

9. The upshot of this analysis of the evidence by the Learned Trial Magistrate is that there was recognition evidence to tie the Appellant to the crime. The Learned Magistrate cites the testimony of the Investigating Officer to explain the discordant medical status of gonorrhoea between the Appellant and the Complainant: That the Appellant *could* have treated himself between the time of the defilement and the time of his arrest and testing a week later.

10. This is where my difficulties with the Trial Court's decision begins. It is troubling that this explanation for the discordance in the medical status of the Appellant and Complainant was proffered – not by a qualified medical personnel – but by the Investigating officer. The Investigating Officer has no competence to give expert opinion on medical issues. For example, it appears imprudent to rely on the evidence of the Investigating Officer on how long it would take for traces of gonorrhoea to disappear from a person's blood stream. In short, the medical status discordance between the Appellant and the Complainant should have, in my view, been treated far more seriously than it was here. A proper inquiry, tender of evidence and explanation by a qualified medical expert was necessary to sustain the high degree of beyond reasonable doubt required by our law. In my view, the failure to do this should have caused substantial uneasiness before convicting.

11.The uneasiness caused by this discordance evidence is accentuated by what seems like glaring inconsistencies in the Prosecution case. A few of them would suffice to illustrate the point. First, it is not clear how and by whom the Appellant was arrested. PW3, the Complainant’s grandmother testified that she arranged for the arresting of the Appellant with the help of the area Chief. On cross-examination, PW3 insisted that the Appellant was arrested in the house of Lemomo and that she was present during the arrest accompanied by the Chief and a doctor from the mobile clinic. However, the Investigating Officer has a wholly different story: He testified that he is the one who arrested the Appellant at the Police Post when the Appellant was identified by the Complainant as the person who had defiled her. This identification was, so to speak, spontaneous and co-incidental: it just happened that the Appellant was in the area at that particular time. This contradiction is important because the Learned Trial Magistrate used the fact that the Complainant identified the Appellant at the Police Post as a key dispositive factor in establishing that there was identification by recognition.

12.Then, there is the contradictory evidence of when the defilement incidence was first reported. According to PW3, the Complainant came back home at about 5:00 PM and immediately headed for bed and refused to eat. PW3 further testified that the Complainant woke up the following morning, again ate very little and went back to bed complaining of a headache. It was only at night on the second day that PW3 insisted on getting a straight answer that the Complainant disclosed that she had been defiled by the Appellant. According to PW3, they took the Complainant to hospital for examination four days after the defilement. However, according to the evidence of both PW4 and PW5, it would appear that the Complainant was only presented to the Police more than a week after the incident.

13.This discrepancy, standing alone, would not necessarily be material. However, when it is seen in the light of the other glimpses of uncertainty outlined above, it jells into reasonable doubts as to a crucial ingredient of the offence: identity. In criminal cases, suspicion – however strong – can never be a substitute for evidence and the need to establish every necessary element of a crime beyond reasonable doubt. It is important to remind ourselves the import and function of this bold rule in the words of the famous American case of **In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)**. In this case, the US Supreme Court explained the rationale of the rule thus:

The accused during a criminal prosecution has at stake interest of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt Moreover, use of the reasonable doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof which leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper fact-finder of his guilt with utmost certainty.

14.As I am not possessed of the utmost certainty required by our law for a conviction of a felony of this nature, I make the only action permitted by law: that the conviction was unsafe in the circumstances. Consequently, I quash the conviction and set aside the sentence. The Appellant shall be set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED and DELIVERED at MACHAKOS this 28TH day of SEPTEMBER, 2012.

J.M. NGUGI
JUDGE