

REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Appeal 195 of 2010

ANTONY NJUGUNA WANJEMA APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The appellant was charged with the offence of defilement of a girl contrary to Section 8 (1) as read with Sub-section (3) of the Sexual Offences Act. In the alter native he was charged with the offence of indecent act with a female contrary to Section 11 (1) of the Sexual Offences Act. In both cases the complainant was a girl aged 15 years old. He denied the offence but after a full trial he was convicted and sentenced to 20 years, imprisonments. This is an appeal against the said conviction and sentence.

In his grounds of appeal he has complained that his fundamental rights were violated leading to detention in the police cell for more than the required duration of 24 hours, that the learned trial magistrate erred in law and fact in convicting him on inconclusive and fabricated evidence. Lastly that the case was not proved and the sentence was manifestly harsh and excessive.

According to the evidence on record, the complainant boarded a public service vehicle to go and visit her grandmother. When she alighted the appellant asked her to show him a path leading across the bridge and since she knew the path she complied. After taking some tea, presumably at her grandmother's home, they left with the appellant. She asked the appellant if he had asked for permission from her grandmother and he said he had done so. They ended up in the home of the appellant where he prepared supper and they ate. After that she took some medication and both went to the house of the appellant's sister in law where the appellant borrowed some clothes for her. She changed and went to bed in the appellant's house. She normally has seizures/epilepsy which she experienced that night and lost consciousness.

In the morning when she woke up, she noticed some discharge on her skirt and discovered the appellant had had sexual intercourse with her when she had seizures. She also noticed blood when she went to urinate and felt itching in her private parts. It was her evidence that she did not expect the appellant to assault her sexually. She returned to her grandmother's home after two days. The matter was reported to the chief and the appellant person was arrested. She was subsequently taken to Gatundu District Hospital where she was treated. She identified the appellant as the person who sexually assaulted her.

On being questioned by the court she said she had known the appellant previously for one year. The movements of the complainant were confirmed by P.W. 2, the grandmother. Doctor Rosa Chemwei P.W. 4 then attached to Gatundu District Hospital, gave evidence and confirmed that the complainant was sexually assaulted and produced a P3 form to that effect. In his defence, the appellant denied the offence. The learned trial magistrate was satisfied that the appellant committed this offence and proceeded to convict him.

I have examined the entire evidence on record. There is no suggestion in the evidence that the appellant was framed. In any case in the entire record he did not raise this in cross-examining the prosecution witnesses in that line. In fact, his cross-examination of P.W. 1, the complainant, did not focus on the offence at all. He did not cross examine P.W. 2 and P.W. 3

The evidence of the complainant was corroborated in material particulars by that of the Doctor P.W. 4 who confirmed the sexual assault on the complainant. The complainant and her grandmother positively identified the appellant.

On my part, I find that the evidence was sufficient to sustain the conviction. The appellant was arrested on 4th June, 2009. The alleged offence was said to have taken place on the diverse dates between 30th and 31st May, 2009. He did not raise the issue of late presentation to the court when he first appeared for plea. In any case, the delay in producing an accused person before the court does not entitle such an accused person to an acquittal. The raising of this point at this stage is an afterthought which cannot be entertained. The offence was proved beyond reasonable doubt. This appeal cannot succeed. It is therefore dismissed.

Orders accordingly.

Dated, signed and delivered at Nairobi this 13th day of November, 2012.

A. MBOGHOLI MSAGHA

JUDGE