



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CRIMINAL APPEAL NO. 68 OF 2008

TIMOTHY CHEWOKO APPELLANT
VERSUS
REPUBLIC RESPONDENT

(Being Appeal against Judgment from Eldoret Chief Magistrate's Court Criminal Case No. 703 of 2008 delivered on 22nd August 2008 by Hon. G.A. M'masi Senior Resident Magistrate).

J U D G M E N T

The appellant, **Timothy Chewoko**, appeared before the Senior Resident Magistrate at Eldoret facing a charge of defilement of a girl contrary to Section 8(3) of the Sexual Offences Act, in that on the 9th March 2008 Lugari District within Western Province, defiled T.A, a child aged Twelve (12) years. There was an alternative count of indecent act contrary to Section 11(1) of the Sexual Offences Act, in which it was alleged that the appellant unlawfully and indecently assaulted T.A by touching her private parts.

After pleading not guilty to both counts, the appellant was tried and convicted on the main count and sentenced to twenty (20) years imprisonment. He was aggrieved by the conviction and sentence and preferred the present appeal on the basis of the grounds contained in his amended petition of appeal viz:-

- (1) That, the appellant pleaded not guilty to the charge of defilement of a girl contrary to section 8(3) of the Sexual Offences Act.***
- (2) That, the learned trial magistrate did not conduct 'voire' – dire" inquiry.***
- (3) That, the learned trial magistrate did not closely examine the circumstances of the alleged identification.***
- (4) That, the evidence adduced by the prosecution witnesses was contradictory.***
- (5) That, the learned trial magistrate relied on the evidence of a single witness (PW1) which was flimsy and unsubstantial.***
- (6) That, vital witnesses did not testify to clear doubt.***
- (7) That, the purported exhibit was tampered with.***

(8) That, the learned trial magistrate erred in both law and fact when she convicted the appellant on the contradictory evidence of PW5.

(9) That, the learned trial magistrate erred in both law and fact in failing to establish that the appellant was held in police custody for three (3) days contrary to section 72(3) (b) of the constitution.

The appellant represented himself at the hearing of the appeal and relied on his written submission in support of his case. The learned Senior State Counsel, **Mr. Chirchir**, represented the State and conceded the appeal on the basis of grounds four, five, six, and eight of the grounds of appeal. He submitted that there was no doubt that the complainant (PW1) was defiled. However, the identification of the offender was not established as PW1 was the only identifying witness and although the offence occurred in broad day light, her evidence was doubtful and contradictory in as much as she pointed at the appellant as having been the assailant one week after the fact, yet she had previously stated that she was defiled by an unknown person. The learned State Counsel also submitted that there was contradiction in the evidence of PW2 and PW3 regarding the circumstances under which the appellant was apprehended. The learned State Counsel noted that the learned trial magistrate did not conduct a “voire – dire” examination prior to the testimony of PW1 and for all the foregoing reasons, the learned State Counsel conceded the appeal.

Being the first appellate court, the duty of this court is to re-consider the evidence adduced at the trial court and arrive at its own conclusion bearing in mind that the trial court had the advantage of seeing and hearing the witnesses. To that end, the case for the prosecution was that on the material date at about 3.00 p.m., the complainant **T.A (PW1)** aged twelve (12) years at the time and a primary school pupil at M Primary School was with her mother (PW2) selling bananas by the roadside when she briefly left for home. On the way along a path, a person confronted her from the back and gripped her neck. He threw her down, stripped her naked and removed her underpants. He then proceeded to unzip his trousers and defiled her. Her attempt to scream was thwarted by being held by the neck. She was defiled for about half an hour before the assailant left. The complainant reported the incident to her mother. They returned to the scene but could not find the assailant. After about a week, the complainant spotted the appellant at a market and identified him to her mother as the person who had defiled her.

The complainant’s mother **E.A (PW2)**, confirmed that she had been with the complainant when she left briefly for home to relieve herself. She later returned crying and bleeding from her private parts and on being asked what had happened, she disclosed that she had been defiled. The complainant’s mother reported the matter to her husband **J. A (PW3)** who went with others in search of the assailant. A report was also made to the police by the complainant’s mother. Thereafter the complainant was taken for examination and treatment at the Kitale District Hospital.

After being informed of the incident and that the assailant was a tall person, the complainant’s father (PW3) and others went in search of the assailant. They combed nearby bushes but did not find the assailant. On 16th March 2008, a herdsman reported to the complainant’s father that the assailant had been spotted. The two went to the market and apprehended the appellant. He was handed to the police and identified by the complainant as the assailant. He was later charged with the present offence by **Sgt. Petronila Ombaya (PW4)** of Matunda Police Station.

Bob Ananda (PW5) a clinical officer at Kongoni health centre examined the complainant on the material date of the offence and confirmed that she had been defiled. He completed a P3 Form to that effect and produced it in court. The evidence by the Clinical Officer culminated the prosecution case against the appellant.

In his defence, the appellant made an unsworn statement and said that on the 16th March 2008 he left home to look for a sheep to buy. On the way, he met a herdsboy near a railway. The boy conversed in gestures. He (herdsboy) went away and returned with his father and mother. The father asked him (appellant) what he wanted. The appellant indicated that he was looking for Madam Jesca’s place but was told that the said Madam Jesca was not at home. He had disagreed with Madam Jesca over the price of a sheep. He left the scene and in the process of putting his cellphone in his pocket after receiving a call, he was hit on the head with a rungu (club) by the complainant’s father. He (appellant) screamed and many

people arrived at the scene and were told by the complainant (PW1) that he had defiled her. He was handed to the police and charged. He was shocked on being told that he had defiled the complainant. Yet, he was robbed of his money and mobile phone. His demand for medication was declined. With that, the case for the defence was concluded without the appellant calling any witness.

Nonetheless, the obligation to prove the appellant's criminal responsibility lay with the prosecution.

The learned trial magistrate considered all the evidence placed before her by both the prosecution and the defence and concluded that the prosecution had proved its case against the appellant beyond reasonable doubt. Consequently, the appellant was convicted and sentenced accordingly. After reviewing the evidence, this court is satisfied that there was sufficient evidence given by the complainant (PW1) and her mother (PW2) as well as the clinical officer (PW5) establishing without dispute that the complainant was indeed confronted and defiled by a lone person as she proceeded to her home to relieve herself. The person is said to have suddenly confronted the complainant from the rear. The occurrence of the offence was never in dispute. The dispute related to the alleged identification of the appellant as having been the lone offender. The appellant denied responsibility and attributed his predicament to the complainant's father (PW3). The appellant indicated that he was assaulted and implicated by the complainant's father even though he (appellant) had been robbed of his money and mobile phone.

With that denial by the appellant, it was incumbent upon the prosecution to prove beyond any reasonable doubt that the appellant was indeed the offender. The sole evidence on the alleged identification of the appellant was that of the complainant (PW1). She was the victim and the only one expected to have identified the offender. Her mother (PW2) and father (PW3) clearly relied on what she told them. They were both not at the scene during the commission of the offence which occurred during the day and in favourable circumstances. However, that evidence by the complainant could not be relied upon for the reason that there was no opportunity provided for the complainant to make a proper, reliable and positive identification of the offender. She told the court that she was attacked from behind. This meant that she did not see the offender as he confronted her. Thereafter, she was subjected to a distressful and shocking ordeal which may have prevented her from making a certain and positive identification of the offender who was a stranger to her. Despite the favourable circumstances for identification, it is not uncommon for witnesses to make incorrect or mistaken identification of an offender. More so, if the offender is a stranger.

Interestingly, the appellant was arrested at the instigation of the complainant's father (PW3) who alleged that he (appellant) had been described as a tall man by the complainant yet the complainant did not give a description of the offender to her mother (PW2) who was the first to come into contact with her after the ordeal or to the investigating officer (PW4) who charged the appellant with the present offence. It seems that the complainant's father (PW3) did not speak the truth and may have implicated the appellant simply because he was the only tall person within his (PW3's) sight at the time of arrest. It was apparent that the complainant was not able to properly identify the person who defiled her. Therefore, her supposed identification of the appellant was not reliable and free from the possibility of error or mistaken identification. The conviction of the appellant by the learned trial magistrate was therefore erroneous and improper. This appeal, as conceded by the learned State Counsel, is merited.

Consequently, the appellant's conviction is hereby quashed and the sentence set aside. The appellant shall be released forthwith unless otherwise lawfully held.

J.R. KARANJA
JUDGE

(Delivered and Signed this 7th day of April, 2011).