



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL CASE NO. 142 OF 2008

JAMES APIOPIO EWOI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence by L. W. Gitari, Senior Principal Magistrate, in the Nyeri Chief Magistrate's

Criminal Case No.3006 of 2007 delivered on 16th June 2007 at Nyeri)

JUDGMENT

JAMES APIOPIO EWOI, the Appellant herein, was tried on a charge of defilement of a girl contrary to *Section 8(1) (3)* of the Sexual Offences Act No. 3 of 2006. He also faced an alternative charge of indecent act with a child contrary to *Section 11(1)* of the Sexual Offences Act No. 3 of 2006. At the end of the trial, the Appellant was convicted on the main count and was sentenced to serve 20 years imprisonment. He is dissatisfied with the decision hence this appeal.

The Appellant put forward the following amended grounds of appeal.

- 1. That the learned trial magistrate erred in law and fact in overlooking the fact that my constitutional rights as enshrined under Section 49(1) f (i) and (ii) Constitution were violated.***
- 2. That she erred in law and facts in disregarding the fact that I was bereaved at the time of the alleged incident and as such entertainment could have been far from my mind.***
- 3. That she erred in law and facts in convicting in reliance of inconsistent and contradictory evidence.***
- 4. That she erred in law and fact in disregarding my defence without sufficient reasons in contravention of Section 169 (1) Criminal Procedure Code.***

Before considering the aforesaid grounds, let me set out in brief the case that was before the trial court. The prosecution's case was supported by the evidence of seven witnesses. It is stated that on 27th October 2007 at about 6.30 p.m., S.N (P.W.1) the Complainant, was told by the Appellant that she had been summoned by her grandmother. P.W. 1 claimed she was carried by the Appellant on his shoulders to the house of one Loisaba whereupon he forcefully removed P.W.1's pant and had carnal knowledge of her without her consent. The matter was reported to the Police who swung in to and arrested the Appellant. When placed on his defence the Appellant gave unsworn statement in which he denied ever committing the offence.

This being the first appellate court, the Appellant is entitled to a re-evaluation of the case. The complainant, a 13 year old girl told the trial court that the Appellant went for her in her grandfather's house. He carried her on his shoulders to the house of one Loisaba where he is alleged to have removed the Complainant's pant, wore a condom before inserting his penis into the Complainant's vagina. **Joseph Leipit Emathe** (P.W.2), stated that on the material date he met the Appellant with the Complainant. P.W.2 said he used to live in the Appellant's kitchen but on that date the Appellant told him to leave. P.W. 2 said he left the Complainant and the Appellant in that house. **Gideon Arap Tangi** (P.W. 3), told the trial court that on 27th October 2007 he visited the Appellant's house who was a guard in Sangare Farm when he received a report that he had detained a young girl in his house. P.W. 3 said he directed one **Maria Lenangoli** (P.W.4) to enter the Appellant's house whereupon they found the Complainant therein. P.W. 3 called the Police who came and arrested the Appellant. P.W. 4 took the complainant to hospital for examination and treatment. Patrick Mbutia (P.W.7) told the trial court that he examined the Complainant and found that she had bruises on her external vaginal wall with a foul smelling discharge. P.W.7 stated that his findings were suggestive of penetration.

On appeal, the Appellant relied on his written submissions. The Appellant was of the view that the Complainant lied before the trial court. He pointed out that the Complainant had claimed that the Appellant had carried her on his shoulders to the house of Loisaba yet in his evidence Loisaba stated that on 27th October 2007 he met the Appellant and the Complainant walking. He also pointed out that the Complainant had alleged that the Appellant had put on condoms before having sexual intercourse with her. The Appellant was of the opinion that this piece of evidence was contradicted by that of Dr. Patrick Mbutia (P.W.7) who said she found the complainant had sperms. I think this submission cannot lie because it is clear from the evidence of P.W. 7 which stated that no sperms were found in the Complainant's vagina. The Appellant further argued that P.W.7 had alleged that the Complainant was defiled on 28th October 2007 yet the Appellant was arrested on 27th October 2007. With respect, I think this submission flies on the face of record because it is obvious from the charge sheet that the Appellant was arrested on 29th October 2007 for the offence committed on 27th October 2007. The medical report indicates that the offence was committed on 27th October 2007 and the Complainant examined on 28th October 2007. The other ground which was argued on appeal is to the effect that the Appellant's defence was not considered. I have perused the decision of the trial court and it is clear that the trial magistrate considered the Appellant's defence and found it to be a mere denial.

The Appellant has alleged that he was held in Police custody for more than 24 hours hence his rights under *Section 72(3)* of the Old Constitution and under *Article 49(1) f(i) and (ii)* of the New Constitution were breached. I have already stated that the Appellant was arrested on 29th October 2007 and was taken to court on 30th October 2007. It is therefore clear that he was taken to court within a reasonable time. The Appellant's constitutional rights were not breached.

In the end I find that the case against the Appellant was proved to the required standards. The inconsistencies pointed out with regard to the evidence are minor points as to time which will have little

impact on the outcome of the case. I find no merit in the Appeal. The same is ordered dismissed in its entirety.

Dated and delivered at Nyeri this 8th day of July 2011.

J. K. SERGON

JUDGE

In open court in the presence of Miss Ngalyuka learned State Counsel and the Appellant in person.