



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 215 OF 2007

LABN MWACHONA MWAMBELAAPPELLANT

VERSUS

REPUBLIC PROSECUTOR

[Being an appeal from the judgment and conviction of the Senior Resident Magistrate T. Mwangi dated 22/11/2007 in Criminal Case No. 2574/06 at Mombasa Law courts]

J U D G M E N T

The appellant **LABAN MWACHOMA MWAMBELA** has filed this appeal challenging his conviction and sentence by the learned Senior Resident Magistrate sitting at the Mombasa Law Courts. The appellant was initially arraigned in court on 24/7/2006 on a charge of **DEFILEMENT OF A GIRL CONTRARY TO SECTION 145 (1) OF THE PENAL CODE**. The particulars of the offence were as follows-

‘on the 15th day of July 2006 in C[...] Location Mombasa district within Coast Province unlawfully had carnal knowledge of F.A a girl under the age of sixteen years’

The appellant entered a plea of ‘not guilty’ to the charge and his trial commenced on 13/9/2006. The prosecution led by **INSPECTOR KITUKU** called a total of three (3) witnesses in support of their case. The complainant a girl aged 12 years told the court that the accused found her playing in a field near the airport. He told her that he would carry her on his bicycle and take her to her mothers stall. Instead the appellant rode into the forest where he forcibly undressed the complainant and proceeded to defile her. He then gave her 30/- and warned her not to tell anyone what had happened. On yet another occasion on 15/7/2006 the appellant again came and took the complainant away on his bicycles. He took her to a secluded area where he again defiled her this time using a condom. After the assault the complainant began to bleed from the vagina. A passer-by noticed this and apprehended the appellant who was taken to the village elders. Police were called in and came to arrest the appellant. The complainant was taken to hospital for treatment.

At the close of the prosecution case the appellant was found to have a case to answer and was placed on his defence. He gave an unsworn defence on which he denied having ever defiled the complainant. On 22/11/2007 the learned trial magistrate delivered her judgment in which she convicted the appellant and sentenced him to serve ten (10) years imprisonment. Being aggrieved the appellant filed this appeal. **MR. ONSERIO** learned state counsel opposed the appeal.

The complainant was a child aged 12 years. The trial magistrate did conduct a 'voire dire' examination as required after which she concluded that the minor understood the nature of an oath and could give sworn testimony. The complainant gave a very graphic and vivid account of the approaches which the appellant made to her. Though only a child, her evidence was clear and cogent and she remained unshaken under cross-examination by the appellant. The trial magistrate who had the benefit of seeing and hearing the complainant testify stated that she had '*no reason to doubt her evidence*'.

The fact of defilement was corroborated by the P3 form filled and signed by **PW3 DR LAWRENCE NGONE** of Coast General Hospital. He noted as follows

"on genital her hymen had been ruptured and had white discharge". This is clear proof that penetration had occurred. As the learned trial magistrate pointed out the fact that no spermatozoa were seen in the vaginal swab could be explained by the fact that the appellant had used a condom.

The complainant did identify the appellant as the one who defiled her. She knew the appellant who was a photographer in the area. The complainant had encountered the appellant several times before. It is clear that this was a well thought out scheme by the appellant to trap this particular child. He had carried her once before on his bicycle after which he gave her 50/-. He was clearly trying to gain the complainant's confidence and lull her into a false sense of security. The incidences of defilements took place in broad daylight where the complainant had ample time and opportunity to see and identify the accused. I find no possibility of a mistaken identify.

In his defence the appellant claim that the complainant was used by people who had a grudge against him to frame him. The appellant did not name these persons nor did he explain why they held a grudge against him. There is no allegation that the appellant or any member of her family held any grudge against the appellant – why would she agree to be used to frame him. This issue of a frame-up did not arise in the appellant's cross-examination of the complainant. In my view the same was a mere afterthought.

Finally, I find no merit in this appeal. I find that the appellant's conviction on this charge of defilement was sound both in law and in fact. I have no hesitation in confirming said conviction. The 10 year sentence was in my view both lawful and appropriate given the circumstances and I do uphold the same. The upshot is that this appeal fails in it's entirely.

DATED and delivered in Mombasa this 6th day of September 2011

**M. ODERO
JUDGE**

In the presence of
Onserio – for state
Appellant in person
Mutisya – Court clerk.

**M. ODERO
JUDGE**