



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 176 of 2007

JACKSON ACHI LOITALIM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, JACKSON ACHI LOITALIM, was in Nakuru CMCr. Case No. [...] charged with the offence of defilement of a girl contrary to Section 145(1) of the Penal Code. He denied the charge but after trial before the Senior Resident Magistrate, he was convicted and sentenced to 15 years imprisonment. This appeal is against both that conviction and sentence.

The Appellant's five grounds of appeal raise two main points that the learned trial magistrate erred in basing his conviction on the uncorroborated and self-contradicted testimony of the complainant and failing to give his watertight defence due consideration.

On the first point, the Appellant submitted that the complainant contradicted herself on how she got to his house. He referred me to page 14 where she said that the Appellant led her to his house and page 15 where she said he called her to his house. He also referred to another statement on page 15 where she said he never called her to his house. In his view these are material contradictions which rendered the evidence of the complainant worthless.

The Appellant further submitted that were it not for his wife, who allegedly caught him red handed and informed the complainant's mother, this case could not have been instituted. He said failure to call his wife to testify in this case is fatal to the prosecution case. He said the medical evidence that the examination of the complainant revealed neither discharge nor the presence of spermatozoa exonerated him.

On his defence, the Appellant submitted that the trial court failed to consider that this was a charge his estranged wife tramped up against him to send him to prison so that she can take his property. Taking all these points into consideration

he urged me to allow this appeal.

On his part Mr. Njogu for the state urged me to dismiss this appeal as the Appellant's conviction was based on overwhelming evidence. He said that the complainant narrated how the Appellant had defiled her several times before. On the material date the Appellant's wife caught him on the act. Although she was not called, that does not in any way affect the prosecution case as Dr. Agutu's evidence corroborated the complainant's testimony that she had been defiled several times.

I have considered these submissions and carefully read the lower court record. Like the learned trial magistrate, I believe the testimony of the complainant.

The Appellant is a neighbour of the complainant. She narrated clearly that on the material date the Appellant called her to his house and asked her to sit on his lap. She complied. He then removed her pants and did "tabiya mbaya" to her. He had done that to her 5 times before. The reason why she had not reported was because the Appellant had threatened to kill her if she did so. On the material date the Appellant's wife who had been away went into the house and hit the Appellant on the back when she caught him on the act of defiling the complainant. I find no contradiction in her testimony as the Appellant claimed. The Appellant was not at another spot to have told her to go to his house. He was at his house when he called her there.

Though it did not require any corroboration, the complainant's testimony was amply corroborated. As I have pointed out, the complainant said the Appellant had defiled her five times previously. That testimony was also corroborated by the medical evidence. That the Appellant's wife who caught him red handed was not called does not change the position.

True the Appellant may have had problems with his wife. If so, she would in the circumstances, have wanted to put him in trouble but that is not the case here. If she trumped up this charge as the Appellant claimed she would have been the first prosecution witness. Again, like the learned trial magistrate, I find it inconceivable that she could have conspired with the 11 year old complainant and even the doctor who examined her to achieve that purpose.

In the final analysis, I agree with the learned state counsel that there was overwhelming evidence to support Appellant's conviction. Consequently I dismiss his appeal on conviction.

On sentence, the Appellant, a married man defiled his neighbour's 11 year old child. That is not the type of man who deserves any mercy. His appeal against sentence is also dismissed and with that his appeal is hereby dismissed in its entirety.

DATED and delivered this 27th day of January, 2010.

D. K. MARAGA
JUDGE.

