

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Criminal Appeal 349 of 2009

(From original conviction and sentence in Criminal Case No.850 of 2005 of the Senior Principal Magistrate's court at Narok – S. M. GITHINJI, PM)

WILLIAM NGATE KORINYO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, WILLIAM NGATE KORINYO, was charged with the offence of defilement of a girl contrary to Section 145(1) of the Penal Code. He was in the alternative charged with indecent assault on a female contrary to Section 144(1) of the Penal Code. He pleaded not guilty to both the charges but after trial before the Principal Magistrate at Narok he was convicted on the main count and sentenced to 12 years imprisonment. He has appealed to this court against both that conviction and sentence.

At the hearing of the appeal, Mr. Mugambi for the state, conceded it on the ground that the pressure lamp in a house about 40 metres away from the scene of defilement could not have provided sufficient light for a positive identification. I entirely agree with him. Besides that the intensity of that light is not stated- David Masinde Simiyu Vs Republic Crim. Appeal Nos. 33 & 34 of 2004 (Consolidated) and the learned trial magistrate did not warn himself of the danger of relying on the identification evidence of a single witness. I have no reason to doubt the evidence of the complainant in this case. It is, however, trite law that a witness can be honest but mistaken as even close relatives have been mistaken for other people- Ogeto-Vs-Republic, [2004] 2 KLR 14.

PW3 stated that the shirt left with the complainant was that of the appellant. He did not say what made him believe it was the appellant's. He did not point to any particular mark on it that enabled him to identify it as that of the appellant. In the circumstances his evidence cannot be relied upon.

For these reasons I agree with the learned state counsel that the appellant's conviction cannot be allowed to stand. Consequently I allow this appeal, quash the conviction and set aside the sentence. The appellant shall be set free forthwith unless otherwise lawfully held.

DATED and delivered this 24th day of February, 2010.

D. K. MARAGA

JUDGE.