



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Criminal Appeal 630 of 2006**

**JULIUS ANDAMA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant was charged with the offence of Defilement of a girl contrary to Section 145 (1) in that he had carnal knowledge of S. Y a girl under the age of sixteen years on 28<sup>th</sup> March 2005. Alternative charge of indecent assault on a female contrary to Section 144 (1) of the Penal Code was preferred against the Appellant as a second count. Count III is being unlawfully in Kenya contrary to Section 13 (2) of Immigration Act Cap. 172 Laws of Kenya.

The Nationality of Accused is recorded. Plea was taken and the Appellant pleaded not guilty on all counts. After full trial the Appellant was convicted of alternative count under Section 144 (1) of the Penal Code.

He was acquitted of other 2 charges. The sentence is 10 years. He filed a Petition of appeal of 5 grounds which was amended to 14. He filed written submissions.

In his grounds of Appeal filed on 25<sup>th</sup> October 2006 he complained that the evidence adduced by the prosecution did not link him with the offence in question, that evidence of PW1 and PW2 without considering the Doctors medical evidence exonerated the Appellant. The trial Magistrate failed to find that there was grudge in the family. Appellant's defence was not given due consideration. It appears that the Appellant reserved his right to add more or amend his grounds after receiving the record of appeal. There is no record of leave to amend having been granted however did amend his grounds of appeal which were forwarded to court on 21<sup>st</sup> January 2009. The court cannot ignore his amended grounds as they are on record.

In addition to earlier grounds he added defence of Alibi and that the charge sheet was defective, that he was kept for 12 days before being brought to court failure to bond important witness Ms Fauda Amdmisa contravention of Section 77 of Constitution and Section 198 of Criminal Procedure Code. Court record does not indicate language used at any sitting. Trial Magistrate contravened Section 77 (2) Cap 80 Laws of Kenya. Failure to administer caution before reading the charge (Rule 3). Trial Magistrate contravened Section 169 (1) Civil Procedure Code in his judgment.

The prosecution called 5 witnesses and the Appellant gave an unsworn statement. The prosecution evidence was that Appellant penetrated the complainant's vagina but the Police Surgeon gave no such evidence. The trial Magistrate therefore found that the Appellant unlawfully touched PW1's genitalia. He did this with the intention of gratifying himself sexually. The alternative charge reads "**by touching her private parts.**"

The Appellant in his unsworn statement narrated a long story of this chapter of his life. However he mentioned his uncle Atiki Ayubu and son Yusuf and Yusuf's friend and S the complainant who he learned had been taken to hospital. He himself was charged and taken to hospital. The Appellant places the event on 11<sup>th</sup> April 2005 when the charge sheet places it on 28<sup>th</sup> March 2005 (date of arrest). Therefore he was in custody from 28<sup>th</sup> March 2005 and taken to court on 8<sup>th</sup> April 2005 when his plea was taken.

It is clear therefore the unsworn statement was false and had no truth as far as this offence is concerned. It is not true that he was at his home on 11<sup>th</sup> April 2005. He was in custody. PW1 said that she was alone with Appellant. The Appellant parted PW1's legs and sat there on her then her aunt came and the Appellant went away. PW2 narrated how he saw Appellant enter the house and thereafter walking speedily away at the time he saw PW1 standing at the gate trembling and she appeared to be in shock.

PW3 a businessman. He was informed of what had happened to the child S.Y. He went to Nairobi Women Hospital where he found his daughter with her mother. She told him that someone had held her and raped her. The trial Magistrate treated this evidence correctly. The next witness is PW5, a doctor, he testified that on 2<sup>nd</sup> April 2005 he examined one S.Y on a case of defilement. She had no physical injuries, to her vulva. The hymen was intact she had no pre vaginal discharge. She had been treated at Nairobi Women's Hospital. The high vaginal swab was taken to government chemist. As in previous hospital report (there was redness of the perineal or aspect of vagina. Some spermatozoa was seen

The witnesses examined the Appellant also and found that his sex organs were normal. He took Appellant's blood pants and saliva which were taken to the Analyst. He exhibited Exhibit 2. The prosecution closed its case and the court called upon the Appellant to give his defence. As stated above the Appellant gave unsworn statement most of which was not relevant to the charges against him. The Appellant has to address the court only on Alternative count on which he has been convicted. Therefore looking at his submissions I find the Appellant was misguided. He was not charged with offence of rape. The offence in alternative is separately stated in the Penal Code. The particulars are clearly stated in the Charge Sheet and according to the evidence of the complainant and the Doctor the Appellant did touch the private parts of the complainant. The evidence of the Doctor was clear and it is on the ground of that evidence that count I was an acquittal.

The trial Magistrate treated the evidence of the complainant correctly. Obviously the young girl has never had such an experience before. Her description of what the Appellant did to her that "**he parted her legs and sat there**" is sufficient evidence that he touched her private parts.

The Appellant was seen leaving the compound fast and there was no other male seen in the compound at that time. The trial Magistrate considered evidence as given and concluded that the offence was committed.

On the issue of the defence of Alibi the trial Magistrate found and the record shows that the Appellant was in custody from 8<sup>th</sup> April 2005 and he was therefore not at his home on 11<sup>th</sup> April 2005. The Alibi therefore collapses. On the issue of caution the court is not required to caution a person before taking plea. The Appellant is misguided on this issue. The Appellant submits that his rights under Section 72 of the Constitution were violated in that he was not produced before court until after 12 days of arrest. However the record does not show that the Appellant raised the matter in the lower court. The Constitution requires the prosecution to show that his rights were not violated. It can only be explained if the matter is raised, at the trial and the prosecution is given opportunity to explain why they did not comply with Constitution. The case of Mark Wanjala vs Republic 2008 KLR the Court of Appeal said “**unexplained violation of Constitutional rights will normally result in an acquittal, irrespective of the nature and strength of the evidence which may be adduced in support of the charge.**”

The Constitution requires a person arrested to be brought as soon as reasonably practicable. The prosecution must have opportunity to explain in the trial court. However the Constitution provides remedy under Section 72 (6). Furthermore the Court of Appeal (High Court) is not empowered to deal with the matter. It is in the jurisdiction of trial court. There is complaint that not all witnesses listed in the prosecution list were called to give evidence. The Investigating Officer PW4 testified that the witness Farida was arrested initially but released after investigation. The prosecution is at liberty to support its case with witnesses it finds relevant. However in this case the prosecutor wished to call Firinda as last witness. She could not be traced despite efforts to get her at her rural home. This was not hiding the witness but she could not be found and blame cannot be placed on prosecution. On the issue of the language used in court the stated language is English. In the case that there is clear indication that the language is not understood by the accused person the court would call for interpretation. In this case the Appellant was speaking in court language and he did not call for interpretation. Regarding contravention of Section 77 (2) Cap. 80 (Evidence Act). It is clear that the court did not shift the burden of proof on the Appellant.

The evidence available was sufficient to support the charge for which the Appellant was convicted.

I have perused the judgment of Trial Magistrate and he did state the ingredients constituting the alternative charge which were the touching of the private part of the complainant.

Upon considering all the submissions of the Appellant and perusing the authorities relied upon by the Appellant it is clear the Trial Magistrate clearly found that the Alternative charge was proved beyond reasonable doubt. His judgment was properly written in accordance with Section 169(1) of Criminal Procedure Code.

I find no merit in this appeal and the same is dismissed.

Dated and delivered at Nairobi this 15<sup>th</sup> day of March 2010.

**J. N. KHAMINWA**

**JUDGE**