



IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 94 OF 2007

(From Original Conviction and Sentence in Criminal Case No. 951 of 2003 of the Chief Magistrate's Court at Kibera)

JOHN NTHE WA KASSIM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

John Nthewa Kassim was charged with defilement contrary to Section 145 (1). He was imprisoned for 10 years. He has filed this appeal with 4 grounds:

- (1) Trial Magistrate misdirected himself in believing the evidence deduced by PW1 which was not cogent and water tight to warrant conviction.
- (2) Trial Magistrate failed to carry his task and failed to consider the prosecution case which was full of loopholes evidence lacked corroboration.
- (3) The Trial Magistrate failed to consider defence.

There was count 2 of Indecent assault contrary to Section 144 (1) Penal Code. This

was an alternative charge.

The prosecution case was that PW1 female minor was 10 years. She was residing with mother and father in Kibera. She knew the appellant. He resides near her home.

On 9/1/2005 appellant gave her 10/= and took her to his house. The appellant inserted his penis in her vagina. He lay on her and she felt bad. Appellant opened the door for her to go home. She told her mother. She was taken to hospital where she was treated then she was taken to the Police Station where the matter was reported.

PW2 testified she knew J.M. She is 10 years. On 5/1/05 at 6 pm she was with PW1 she was bathing her and she noticed complainant was feeling pain. Eventually she said her brother 15 years old put a stick inside her vagina. She told her that the Appellant had defiled her. The complainant went with PW1 who showed her the appellant's house. PW2 and the father went to the house again and found 2 men there. PW2 and others arrested them and took them to police station.

PW1 indentified one of her rapists. They went to Kilimani Police and Hospital. PW3 testified that he had screams on the road on 15/1//05 at 6 pm. He went outside and saw a crowd of people saying a man had defiled a 10 year old girl. A crowd was going towards a house. When they knocked a man opened the door. The complainant identified her rapist. Both appellant and complainant were taken to Kilimani Police Station.

About 100 young people were there. PW1 was called inside the police station and she again identified the appellant as the person who defiled her.

The 2 were arrested. The other man was released. The complainant was taken to Nairobi Women Hospital. She was treated. The case was investigated by PW4 a female Police Officer. She informed the court that the complainant had died.

Medical evidence was given by Police Surgeon Doctor Z. Kamau. He said she tested positive to HIV according to report from Nairobi Women's Hospital.

Dr. Kamau also examined Appellant. He had no injuries. The defence of Appellant was that he was arrested on 15/1/2005.

The Appellant was acquitted on main count of defilement but was sentenced under alternative count. There was sufficient evidence that Appellant did commit indecent assault that is touching her vagina. The sentence of 10 years is prescribed punishment.

I have examined the evidence by prosecution and I find no reason to interfere with the decision of the Trial Magistrate. The appeal is dismissed.

Dated and delivered at Nairobi this 28th October 2010.

J. N. KHAMINWA

JUDGE