



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 222 OF 2009

(From Original Conviction and Sentence in Criminal Case No. 2429 of 2008 of the Chief Magistrate's Court at Kibera)

L.O.N.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

L.O.N was charged with the offence of defilement contrary to Section 8 (1) of Sexual Offences Act No. 3 of 2006 with alternative charge of Indecent Act with a child contrary to Section 11 (1) of the same Act No. 3 of 2003.

The prosecution first called the Police Surgeon. He examined one D.A on allegation of rape. Her external genetaria was normal. Her vulva was hyperemic. The hymen was torn. There were no virginal injuries. There was no discharge. He filled P3 form. This examination was done on 25.8.08. On 1.9.08 he examined the appellant for defilement offence. He had no injuries. His geneteria was normal. He was aged 32 years.

PW2 was the complainant vire dine was conducted. She gave evidence on oath. She said she was 10 years. On 21.8.07 at 8 a.m she was in the house of her uncle the Appellant. One bedroomed house. On 21.8.07 at 8.00 a.m Appellant opened the bag by pulling the zip. He removed her underpants and laid on her. The complainant woke up and she saw him. He put his sex organ inside her. The aunt came. The Appellant panicked. He came out of her. He sells sweets the things were in a box near the cupboard complainant told her aunt that the Appellant was having sex with her. Her aunt brought officers from the chief's camp. They arrested the Appellant. The complainant was taken to

Nairobi

Women Hospital. Complainant was treated at Hospital.

Dr. Ketra Muhombe from Nairobi Women Hospital examined D. A who was brought that very day said she was sexually assaulted at 8 a.m by her uncle L. O. Her hymen was perforated (old). She had clothes smelling discharge. She did lab test. No spermatozoa. She was not bleeding. It was not first day she had had sex. Her clothing were dirty.

PW4 took the child to hospital – Nairobi women's Hospital. PW5 M. F the Appellant is her husband. He left the house and after a short time she found her husband squatting near the cupboard.

The matter was reported at the chief's camp who brought askaris to arrest the Appellant. She took the child to Nairobi Women's Hospital for examination. PW6 police officer recorded statements and escorted the complainant to Dr. Kamau the Police Surgeon. The Appellant was called to defend himself. He gave unsworn statement.

He said 3 days earlier he had difference with his wife and had arranged to visit her father to discuss the issue. Complainant made tea and drunk then at about 11.00 a.m five police officers came and arrested him and it was being alleged he had defiled D. That was the defence case. He was convicted and sentenced to life imprisonment.

The grounds of appeal are

- (1) The evidence was based on hearsay.
- (2) The trial Magistrate did not evaluate medical evidence
- (3) The trial Magistrate erred in convicting and sentencing a case which was not investigated beyond reasonable doubt. He would add more grounds on receipt of proceedings which he filed on 14/4/210 saying evidence of PW3, 4, 5 was not reliable and was speculative and heavily relying on evidence of complainant PW2 which was speculative and tainted with untruth as a result coaching by her parents.

The Appellant was never medically examined. No evidence of any quarrel with his wife and of meeting with his father in law. The Trial Magistrate erred in finding the case was proved beyond reasonable doubt.

It is argued that the offence is not committal because it is not the first time the act is done but every time it is done if complaint is raised and supported by evidence. The police did not see blood in the pant. Dr. Ketra did not see blood. Therefore the complainant is not truthful. Complainant is the one who went outside and informed her aunt that Appellant defiled her. Her aunt did not see the act herself. Therefore she could not be trusted how can the court convict on her evidence of how she was approached. The evidence of complainant was not supported by her aunt but it is to be notice that the aunt found the Appellant was crouching near the cupboard. She noticed the complainant had panicked and they have lived in the same situation all the time. She had not had any reason to uncover her before all the time they had lived in one roomed house. This part of evidence is very unreliable to support a life sentence. The medical evidence show hymen was broken it was not a fresh tear. Therefore she should not panic when she was interrupted by the aunt entering.

There was no evidence of fresh penetration into her sex organ on that day. There was no spermatozoa seen. It is my view that there was no penetration and there is doubt if it was not a fabrication. The Appellant said they had disagreed and both were living as husband and wife. In the circumstances there was doubt which ought to have benefited the Appellant. From what I have stated above I find the evidence is not sufficient to support the conviction. I therefore allow the appeal and quash the conviction and set aside the sentence. The Appellant shall be set free forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi this 19th October 2010.

J. N. KHAMINWA

JUDGE