



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 65 OF 2006

*(From Original Conviction and Sentence in Criminal Case No. 203 of 2005 of the Senior Resident Magistrate's Court at Voi: **K. Muneeni – S.R.M.**)*

MILTON WANGO APPELLANT
VERSUS
REPUBLIC RESPONDENT

JUDGEMENT

The Appellant herein **MILTON WANGO** had been arraigned before the subordinate court on 18th March 2005 on a charge of **DEFILEMENT OF A GIRL CONTRARY TO SECTION 145(1) OF THE PENAL CODE**. Additionally the Appellant faced a charge of **INDECENT ASSAULT ON A FEMALE CONTRARY TO SECTION 144(1) OF THE PENAL CODE**. The particulars of the main charge were that

“On the 10th day of March 2005 in Taita-Taveta District within Coast Province, had unlawful carnal knowledge of H.N a girl under the age of Sixteen years”

The Appellant entered a plea of ‘not guilty’ to both charges and his trial commenced on 8th April 2005. The prosecution led by **INSPECTOR MUNGA**, called a total of four (4) witnesses in support of their case. At the close of the prosecution case the Appellant was placed on his defence. He gave a sworn defence in which he denied the charges. The Appellant also called one witness in support of his defence. On 10th May 2005 the learned trial magistrate delivered his judgement in which he convicted the Appellant on the main charge of Defilement and thereafter sentenced him to serve twenty (20) years imprisonment. Being dissatisfied with both his conviction and sentence the Appellant filed this appeal.

The Appellant who was unrepresented at the hearing of his appeal relied entirely upon his written submissions which had been duly filed in court. **MR. ONSERIO**, learned State Counsel in opposing the appeal urged this court to uphold both conviction and sentence.

I have carefully perused the record of the trial before the lower court. The complainant a child aged 6 years did appear before the trial magistrate on 25th April 2005. However the child completely refused to testify. She even declined to answer any of the questions put to her as part of the ‘**voire dire**’ examination. I have no doubt that the court environment can be very intimidating to a young child and the complainants refusal to answer any questions is quite therefore understandable.

The court in such circumstances would have to rely on extraneous evidence to support a conviction. **PW1 CHRISTINE KALEMA** a clinical officer attached to Wundanyi Health Centre gave evidence that the child was medically examined on 11th March 2005. She was found to have a perforated hymen. The conclusion of the doctor was that she had been defiled. She produces the complainant’s P3 form as an exhibit.

PW3 J.M told the court that the complainant is a pupil at Werugha Primary School. She told the court that the complainant reported to her that her father had ‘**hit her with a stick on the vagina**’. It is not exactly clear what this means. It could well refer to the act of defilement but could also as well refer to the act of being caned. The evidence of **PW3 F.M**, the complainant’s mother does not much help

matters. She in her evidence tells the court that the complainant used to complain that the accused used to **'beat her with a stick at the bottom'**. Again this does not necessarily refer specifically to the act of defilement. There is evidence of bad relations between **PW3** and the Appellant who was her husband and there is evidence that a previous case of defilement against the said child had been reported. In cross-examination **PW3** stated that the Appellant told her to leave with her children. I find that the evidence of these witnesses could be interpreted other than referring to a defilement.

The learned trial magistrate in his judgement at page 7 line 28 stated

"The doctor found the girl had been infected with a sexually transmitted disease"

This finding was factually incorrect. At no point in her evidence did **PW1** refer to a sexually transmitted disease. She merely talked of **'sign of infection in the urine'** which is a totally different matter. Infection in urine can have several different causes not necessarily sexual in nature. The trial magistrate erred in making such a finding as it was not supported by the evidence on record.

On the whole the failure of the complainant to testify severely weakened the prosecution case. Had the trial court been creative enough he would have sought to extract evidence from the child by way of proxy or by use of diagrams. The evidence of the other prosecution witnesses does not in my view meet the required standard of proof. This conviction was unsafe and I do quash the same. The subsequent sentence of 20 years is also set aside. This appeal succeeds. The Appellant is to be released forthwith unless he is otherwise lawfully held.

Dated and Delivered in Mombasa this 9th day of November 2010.

M. ODERO
JUDGE

Read in open court in the presence of:-
Appellant in person
Mr. Onserio for State

M. ODERO
JUDGE
9/11/2010