



REPUBLIC OF KENYA

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

Criminal Appeal 596 of 2006

LENKITIA OLE MEIMBAKU.....APPELLANT

-AND-

REPUBLICRESPONDENT

(An appeal from the judgment of Principal Magistrate Mrs. H. Wasilwa dated 27th June, 2006 in Criminal Case No. 7610 of 2005 at Kibera Law Courts)

JUDGMENT

The charge brought against the appellant was defilement of a girl under the age of 16 years contrary to s. 145 (1) of the Penal Code (Cap. 63, Laws of Kenya); and the particulars were that the appellant, on 30th October, 2005 at [particulars with held pursuant to section 76(5) of the Children Act 2001] within Rift Valley Province, had carnal knowledge of **A.K**, a girl under the age of 16 years. He faced the alternative charge of indecent assault on a female contrary to s. 144(1) of the Penal Code; and the particulars were that on the said occasion and at the said place, he unlawfully and indecently assaulted **A.K** aforesaid, by touching her private parts.

Joseph Lokunge (PW1), the local Chief, testified that the complainant's father (PW4) reported to him an incident of defilement committed upon his (PW4's) daughter. Thereafter, PW4 arrested the suspect, and brought him before PW1. The chief (PW1) then took the complainant, her father (PW4) and the appellant herein to Magadi Police Station, and handed over the matter to the Police.

The Court after taking the complainant (PW2) through the *voir dire* examination, ruled that she was intelligent enough to follow the proceedings, and did understand the nature of the witness-oath.

PW2, a 15-years old primary-school girl testified that she was coming from her aunt's home on 30th October, 2005 at 4.30pm, in the company of her uncle. When PW2 and her uncle got to a water tank which is installed at Lolot, she felt like having a drink of water; and as she made for the tank, she met the appellant herein; and at that point, her uncle left her to go somewhere else. This gave the opportunity for the appellant to come to PW2 proposing something; and these are PW2's words:

"The accused came and asked me if I would accept what he was to say. I said no; he was saying he wanted to have sex with me. He struggled with me and dropped me down, and raped me. I couldn't scream, as he was strangling me."

After PW2 was left alone, she went home and told her mother what had happened; and here mother informed her father (PW4) who went and reported the matter to the local Chief (PW1). The appellant is

PW2's uncle, and is well known to her. The Chief arrested the appellant and handed him over to the Police. Pw2 went to Magadi Hospital for treatment, following the incident.

On cross-examination, PW2 said the incident took place on a Sunday; the defilement incident took place at 4.30p.m.; the arrest of the appellant took place at 5.00p.m. the same day.

Police Constable John Nzau, Police Force No. 51698 (PW3) of Magadi Police Post re-arrested the appellant after the appellant was brought along by the Chief (PW1); and he took the complainant to Magadi Hospital for examination. PW3 provided the complainant with a P3 medical-reporting form which was duly filled in; and he charged the appellant with the offence of defilement.

The complainant's father, **M.K** (PW4) testified that the complainant came and informed him, on the material date, that she had been sexually assaulted by his cousin, the appellant herein. After a report was made at Magadi Police Post, the appellant who had been arrested by the Chief (PW1), was re-arrested and charged.

PW5, **Dr. Jack Omondi**, a surgeon with Magadi Soda Company produced the P3 medical-reporting form in respect of the complainant. PW5 found that the complainant was a fifteen-year-old girl, with no injuries except around the genitalia. She had bruises around the intro-uterus, and external injuries on the *labia majora*. She had a foul-smelling vaginal discharge, but no sperm was recovered, owing to the time that had elapsed between the time of the alleged sexual assault, and the time of medical examination. PW5 drew the conclusion that the complainant had been sexually assaulted.

The appellant gave an unsworn defence and called no witness. He said he was a pastoralist, and on the material day he had been at his place of work until 4.30p.m. At 4.30p.m., the appellant said, he went to take a meal, after which he went to have a drink at a bar, and he remained there until 9.00p.m. and, at that time, PW4 demanded he goes with PW4 to see the local Chief (PW1). On the following morning the Chief took the appellant to the Police post; but the appellant said he knew nothing about a sexual assault on the complainant.

The learned Magistrate took all this evidence into account, and held as follows:

“There is no problem of identification in this case, as the complainant knew the accused well. The complainant reported to her parents the same day and then the Chief was informed the following day. The complainant was a girl who appeared truthful and I had no doubt that she was. I believe her testimony. The doctor also confirmed that she had injuries in her vaginal area – extensive bruising of [the] *labia majora*.

“The accused and the complainant were related and there is no grudge whatsoever which we are told existed between them which would have [led] the complainant to plant this case on the [accused]. The accused's defence was a mere denial.

“I find [that the] prosecution have established [their] case against the accused beyond reasonable doubt. I find the accused guilty as charged, and I convict him”

The learned Magistrate treated the appellant as a first offender, took into account his statement in mitigation, and sentenced him to a fifteen-year term of imprisonment.

The appellant's grounds of appeal are, in summary, as follows: that he had been convicted on the basis of uncorroborated evidence; that the trial Court failed to take into account the fact that there had been no struggle during the alleged sexual assault, and the complainant did not raise an alarm at the material times and further, there was no medical linkage of the alleged offence to his person; that the evidence was incomplete, and some essential witnesses had not been called; that the appellant's agreeing to be taken before the Chief (PW1) was inconsistent with guilt; that the appellant's defence had not been duly considered by the trial Court and that the sentence imposed was harsh and excessive.

On the occasion of hearing the appeal, the appellant came armed with written submissions, to which he said he would add nothing orally. He had annexed to the written submissions a new document, which bore the heading: “Amended Grounds of Appeal”; and in these new grounds he stated that the prosecution had not proved their case beyond reasonable doubt; that the conviction had been entered on the basis of contradictory evidence; that the trial Magistrate had failed to take into account the appellant’s mitigation statement, and had imposed an illegal sentence.

Learned State Counsel **Mr. Mulati** contested the appeal, and urged that, not only had the complainant been duly qualified as a competent witness through the *voir dire* examination, but her testimony had in addition been corroborated especially by PW4 and PW5; and PW5 had found in the complainant’s genitalia bruises which were consistent with the outcome of a sexual assault.

Mr. Mulati urged that the conviction be upheld, the appeal dismissed, and the sentence affirmed.

The learned Magistrate properly conducted a *voir dire* examination, and came to the conclusion that the complainant was a fit and proper witness. The trial Court went further and considered the demeanour of witnesses, coming to the observation that the complainant was a truthful witness who had given an honest account in her testimony.

In judicial practice, this Court in its appellate capacity, should not depart from such a focused position as is recorded in the proceedings; and I will uphold the finding of the trial Magistrate on the veracity and truthfulness of witness accounts.

I have no doubts that the complainant was sexually assaulted by the appellant on the material day and at the material time; and that the complainant knew him, and properly identified him. All the other testimonies are, in various respects, corroborative of the testimony of the complainant.

In the light of this factual position in the evidence, I hold that the appellant’s defence was devoid of any foundation, and was offered more as a defence for its own sake; I reject that defence, just as did the learned trial Magistrate. I also find that none of the grounds of appeal holds water and, consequently, they are hereby dismissed.

The appeal is dismissed; the conviction is upheld; the sentence imposed by the trial Court is affirmed.

Orders accordingly.

DATED and DELIVERED at Nairobi this 26th day of January, 2009.

J.B. OJWANG

JUDGE

Coram: Ojwang, J

Court Clerk: Huka

For the Respondent: Mr. Mulati

Appellant in person