



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA**

Criminal Appeal 286 of 2003

JAMES OCHIENG BOAZAPPELLANT

V E R S U S

REPUBLICRESPONDENT

J U D G E M E N T

The appellant was charged of the offence of defilement of a girl under the age of 14 years contrary to *section 145* of the Penal Code. The particulars of the offence were that on the 6th day of October, 2002 in Kakamega District, within Western Province the accused had unlawful carnal knowledge of [E.A], a girl under the age of 14 years.

The accused also faced an alternative charge of indecent assault to female contrary to *section 144 (1)* of the Penal Code. The accused was found guilty and sentenced to 10 years imprisonment. He was acquitted of the alternative charge.

The appellant preferred this appeal with the main grounds of Appeal being that:-

1. *The Doctor's evidence was not sufficient to draw to the appellant's guilt.*
2. *There was no proof that the appellant was involved in committing the offence.*
3. *There was failure in the general investigations of the case.*
4. *Failure of the investigating officer to testify in court rendered the conviction unsafe.*

The appellant submitted that the complainant's testimony was that the appellant's sister's had locked the door from outside and that it was the appellant who opened the door from inside which testimony was contradictory. Further, that the complainant testified that there was no neighbour during the incident yet PW3 testified that she was there.

The appellant further submitted that the evidence of PW1 and PW3 was contradictory. PW2 testified that the door was opened by the appellant whereas PW3 testified that it was opened from outside by the appellant's sister. Further, the blood samples didn't show that the appellant was involved in committing the offence. The P3 form produced was from Malava District Hospital as opposed to Kakamega General Hospital.

Mr. Karuri, learned State Counsel opposed the Appeal. He submitted that the complainant was a neighbour to the appellant and was lured by the appellant's sister by the name Lilian to the appellant's house. The door was locked and the appellant threatened the complainant with a knife and defiled her. PW3 witnessed the incident. The evidence of PW1 and PW3 was corroborated by that of PW2, the mother to PW1. Medical evidence proved that the complainant had been defiled and her hymen was broken. The appellant fled after the offence and was arrested four months later after being identified by PW2. Counsel submitted that the appellant was medically examined after four months and that examination had no bearing on the case. The appellant's defence did not challenge the prosecution evidence.

The main issue for determination is whether the appellant defiled the complainant. The evidence of PW1 is that on 6th October, 2002 at about 4.00 p.m. the appellant's sister by the name Lilian went to her home and told her that the accused wanted her to escort her sister to the shop. The complainant went to the appellant's house and waited at the sitting room. Shortly the accused came over and held her mouth. He removed a knife from his pocket and took her to his bedroom and defiled her. The complainant later on the same day explained the incident to her mother, [R.A], PW2 who confronted the appellant but was told by the appellant that he could also sexually assault her. The complainant was taken to Kakamega General Hospital where she was treated. PW2 corroborated the evidence of PW1. She testified that after the incident the accused disappeared from the neighbourhood. PW3, [R.M], a neighbour to the complainant and the appellant witnessed the appellant's sister taking the complainant to the appellant's house. She testified that the complainant stayed in the appellant's house for about half an hour and came out crying saying that the appellant had defiled her. PW3 explained to PW2 what had happened. PW3's further evidence is that it was a Sunday and many people had gone to church.

PWV, Sunfield Ayienda, Clinical Officer examined the complainant on 8th October 2002 and confirmed that the complainant had been defiled. The appellant was arrested on 21st February, 2003 at about 1.00 p.m. by PWIV, P.C. David Ekisa.

In his defence, the appellant testified that his sister Lilian Atieno had fought with the complainant and the complainant got injured. He agreed to compensate the complainant. His sister was later arrested. The appellant moved out of the neighbourhood and went to live at a scheme. He was arrested while working as a mechanic.

It is clear from the evidence that the complainant and the appellant were neighbours. It is further clear that the complainant was indeed defiled as per the results of the medical examination. The complainant's testimony is that it is the appellant who defiled her. This evidence is corroborated by that of PW3 who saw the appellant's sister taking the complainant to the appellant's house. The complainant came out of the appellant's house crying that she had been defiled by the appellant. I do find that the complainant's testimony that it was the appellant who defiled her to be reliable and the same is confirmed by the evidence of PW3. The appellant has not explained why the complainant would accuse him of defilement if the issue involved a fight between the complainant and the appellant's sister.

The medical evidence established that the complainant was defiled. The appellant's ground of Appeal that the medical evidence was not sufficient is unfounded. Further the P3 form produced for the complainant was filled at the Kakamega General Hospital and not Malava District Hospital as alleged by the appellant. The failure for the investigating officer to testify did not prejudice the appellant. The appellant was arrested four months after the incident. The medical examination at that time could not have assisted the prosecution's case. The arresting officer, PWIV testified that there was a report against the appellant of defilement at the Kakamega Police Station.

In the end, I am convinced that the trial court reached the correct verdict. The prosecution proved its case beyond reasonable doubt. This appeal has no merit and the same is dismissed.

Delivered, Dated and Signed at Kakamega this 24th day of September, 2009

SAID J. CHITEMBWE

JUDGE