

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

Criminal Appeal 47 of 2004

1. Criminal Law

2. Criminal appeal

Subject of main charge

Defilement contrary to **Section 145(1)** of the Penal Code.

Particulars of offence

Count I

On 8th January, 2004 in Kericho within Rift Valley Province unlawfully had carnal knowledge of I.O. a girl under the age of 16 years

Alternative count

Indecent assault of a girl contrary to Section 144 of the penal code.

On 8th January, 2004 in Kericho District within Rift Valley Province unlawfully and indecently assaulted I.O. a girl under 16 years by touching her private parts.

Count II

Defilement contrary to **Section 145(1)** of the Penal code.

On 9th January, 2004 in Kericho District within Rift Valley Province unlawfully had carnal knowledge of C. B a girl under the age of 16 years old.

Alternative charge

On 9th January, 2004 in Kericho District within Rift Valley province unlawfully and indecently assaulted C. B by touching her private parts

b) Plea not guilty in count I and alternative
not guilty in count II and alternative

c) Trial

i) Guilty on count I and II

ii) Convicted and sentenced to life imprisonment.

iii) No alternative charge findings.

3. Appeal

a. That the trial magistrate convicted him on insufficient evidence

b. He had an unquestionable demeanor

c. He was kept long at the police station

d. He had a strong defence.

e. The standard of investigations was meager

In reply – rejected

Sufficient evidence

4. Findings

a) Conviction established

b) Sentence – will not be interfered with due to the relationship of appellant to the minors.

5. Case Law - NIL

6. Advocates

a) Appellant in person

b) B.L. Kivihya senior state Counsel for the Republic and instructed by the attorney general

R.O.M.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(From the original conviction and sentence of the Principal Magistrate W. Nyarima ESQ PM in Criminal Case No. 421/04 at Kericho delivered on 4th June, 2004)

JUDGMENT

I: Procedure

1. R.O.M was charged before the Principal Magistrate Court at Kericho on 21st January, 2004 with the two counts of

“Defilement of a girl contrary to Section 145(1) of the Penal code.

That

On 8th January, 2004 in Kericho within the Rift Valley Province, unlawfully had a carnal knowledge of I.O a girl under the age of 16 years [old].

An alternative count of indecent assault was preferred against him being

On 8th January, 2004, in Kericho district within Rift Valley Province, unlawfully and indecently assaulted I.O a girl under 16 years old.

Count II

The charge on count II was that of:-

Defilement of a girl contrary to section 145(1) of the penal code.

The particulars of the offence being

On the 9th January, 2004 in Kericho District within Rift Valley Province unlawfully had carnal knowledge of [C.B] a girl under the age of 16 years.

He also faced an Alternative charge of Indecent assault.

That on the 9th January, 2004 in Kericho district within Rift Valley Province unlawfully and indecently assaulted [C.B] by touching her private parts.

2. A plea of not guilty was entered on all the counts and its alternative count, on the 21st January, 2004.
3. The trial commenced for hearing on 9th February, 2004. *“In Camera”*. This being, that all members of public were excluded from the court and the court thereafter constituted itself into a children’s court.
4. The trial magistrate satisfied himself that the child is of tender years and examined the child before evidence was recorded (*Voir Dire*). The child, if he or she does not understand the meaning of an oath a child is permitted to give evidence if *“the child is possessed of sufficient intelligence to justify the reception of the evidence”* and *“the child understand the duty of speaking the truth”* (*Evidence for Magistrates by P. Durrand*).
5. After trial the appellant was found guilty and convicted. In mitigation he maintained his stand of not guilty but prayed for leniency. The trial magistrate sentenced the appellant to:
Life imprisonment on Count I and
Life imprisonment on Count II of which sentence of imprisonment was to run concurrently. This was passed on 4th June, 2004.
6. Being dissatisfied with the conviction and sentence the appellant, lodged an appeal on the 15th June, 2004. On 21st February, 2005 the appeal was admitted for hearing before two judges at the High Court of Kenya at Nakuru (Musinga J). No action on this file was taken except on the 12th March, 2009. Four years later when a production order was issued at the High Courts at Kericho. The appellant’s proceedings had not been typed. These were ready on 16th July, 2009.
7. The appellant was permitted, with leave of this court to amend his grounds of appeal.
8. The appeal was heard before two judges of the High Court.

II: Appeal

9. In his petition of appeal, the appellant stated

- i) That the trial magistrate erred in convicting him on insufficient evidence on both counts.
- ii) That he had an unquestionable demeanor.
- iii) He was kept a long time at the police station before being brought to court.
- iv) His defence was strong.
- v) The standard of investigations was merger.

III: Brief facts

10. The facts stated in the lower courts was that the appellant was in a relationship with one F.N as man and wife. F. N (PW3) cohabited with the appellant and later he paid dowry for her under the customary law. Both came from the same community.

11. F had two daughters who were not sired by the appellant. She gave birth to them in 1992 and 1993

respectively but had not yet obtained a birth certificate. When in 2004 this incident is said to have occurred the two girls were aged approximately 12 and 14 years old. The girls themselves claim they were ten years old and 11 years old respectively.

12. PW3 went to her home in Kisii(*ancestral*) and left the two daughters alone with the appellant to look after. She appears to have gone for a period of ten days or more returning on 18th January, 2004.
13. On the 8th January, 2004, PW1 I.O, a pupil at T Primary School class five recalls that the appellant whom she calls father asked that she accompanies him to a tea factory to collect some items. It was 5.00p.m. She agreed. As they walked the appellant suddenly asked her to walk through a bush. As she did so, he ordered that she removes her inner wear. She declined. He forced himself upon her and defiled her till late at night. They returned to the house where they slept that night.
14. The following night she was asleep in the same bed as her sister. The appellant came into their bed and defiled her twice then went and defiled her sister C.B. He had given C.B an “*alcoholic*” drink telling her it was medicine. I.O said C.B then ran out.
15. C.B. had slept with her full clothes. She then noticed that she was nude and the appellant defiled her twice. She was in pain. He took her by force to his bed where he defiled her till day break.
16. That morning the two sisters reported the matter to their neighbours who alerted the police.
17. On the night of 9th January, 2004 PW4 a neighbour saw PW2 the minor girl come out of their house crying and informed her of the conduct of the appellant . The appellant took her back to the house. The said neighbour raised an alarm that caused the appellant’s arrest. She had heard the cries at about 2.00a.m.
18. The matter was investigated (PW5). The minors were examined by a clinical officer who confirmed that the labia minor and hymen were torn with bruises. The examination occurred on 14th January, 2004. The appellant was not examined.
19. In his evidence he stated on 12th January, 2004 he was picked up by the security officer in the tea company where he works and resides. He was not brought to court until 19th January, 2004.
20. The police asked him for Kshs. 10,000/= bribe in order to destroy his police file. He had no moneys to give as a bribe. He denied the offence.
21. The trial magistrate convicted him of the charges before court on count I and II.

III:

22. The appellant state there was insufficient evidence against him. It is so on the question of the scientific evidence. The two incidents that occurred twice, one with PW1 minor on 8th January, 2004 whilst the second day of 9th January, 2004 with both PW1 and PW2 minors whereby they were repeatedly defiled. It is the police who should take the minor immediately to the medical doctor for a swab in order to collect medical evidence for transmission to the government chemist for analysis. Instead we see a situation where the appellant’s blood, spit are not collected for analysis. This is a common situation in Kenya, more so, because it is a family affair and the mother of the children was absent. Indeed the children were examined 12 days after the incident and after the mother came back on the 10th day.
23. We believe this could be the reasons the appellant states the evidence was insufficient, that he has a good demeanor, namely the step father of the minors.
24. The evidence before court from the two minors themselves who state they had been defiled. The clinical officer confirms that both minors had bruises and alteration/tear to the hymen and labia. The conduct of the minor is noted that on 9th January, 2004 when the incident of defilement occurred, PW4 a neighbour heard cries from the child at 2.00a.m. She saw the child run out. PW1 confirmed this in her evidence but she was soon returned back to the house by her step father.
25. The court of appeal have, in such instance permitted the evidence to be admissible in law.
26. The wife to the appellant state that both of them are church goers at the Deliverance church. That they had previously lived well. She disclosed she had one child with the appellant but the child had passed away.
27. The minors evidence requires to have had additional accomplice that the evidence they have given is true and that “*it is reasonably safe to act on that evidence*” “*It must be independent evidence to connect the accused to the crime or tending to connect him to the crime*”.
28. That evidence laid, to the fact the appellant, was given custody of the two daughters to look after. That he was in a position of trust to safeguard the two minors but breached that trust by defiling the two minors. PW4 hearing the cries of one of the minors from the house and of how the appellant came after the minor to take her back in the house. There was only the minor alone with the appellant.
29. The trial magistrate believed the story of the minors and the witnesses and convicted the appellant.

30. As to that conviction we would hold it to be safe to be relied on.

31. On the issue of sentence, this occurred during the pendency of the penal code offence and not under the Sexual Offences Act of 2006.

32. The sentence is of life imprisonment. We would not interfere with this sentence.

33. We order that the appellant's name be registered in the Sexual Offences Register held at the High Court Law Courts at Kericho as it is required in all courts all over Kenya duly maintained by the Deputy Registrar or the in charge of the station that the appellant's name be entered into the register as a "*dangerous person*".

DATED this 3r day of December, 2009 at KERICHO

.....
M.A. ANG'AWA
JUDGE

.....
M.G. MUGO
JUDGE

T.M.O. Nyaingiri advocate instructed by M/S Nyaingiri & Co. advocates for the Appellant – present
R.K. Koech Senior State Counsel instructed by the Attorney General for the Respondent - present