



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

Misc Crim Appli 322 OF 2005

FRANCIS OTSIENO NYANGO..... APPELLANT

V E R S U S

REPUBLICPROSECUTOR

**(From Original decision in Criminal Case J15 of 2004)CM's Court Makadara) by Mrs
Gandani SRM**

J U D G E M E N T

The appellant, Francis Otsieno Nyango, has appealed against conviction and sentence wherein he was sentenced to serve ten (10) years imprisonment for the charge of defilement contrary to section 145 (1) of the Penal Code that on 25th day of December, 2003 at Mathare 4A in Nairobi within Nairobi area, had carnal knowledge of Bevaline Ongachi, a girl under fourteen years.

The complainant testified that one day she was sent to pour out rubbish when she met the appellant whom she knew as Baba Medi. He asked her to see him as he wanted to send her to buy sugar. She obliged and appellant pulled her and closed the door to the house. He raised the volume of the radio then put her on his bed and she says-

“He did bad things to me. He then put his penis in my vagina. I felt a lot of pain. He had removed my pants and put it on the floor. He slept on top of me....”

Appellant warned her that he would cut her with a panga if she told her parents. – she eventually told her mother.

Appellant's wife was away at the time. P.W.2 Milka Ateka, P.W.1's mother confirms finding P.W.1 sleeping on her back with her legs up. P.W.1 told her she could not walk and had sores on her vagina. She examined P.W.1 and says-

“I saw that she had cuts on her vagina and semen was coming out....”

P.W.2 said appellant, who had been their neighbour disappeared, then sent emissaries with apologies and offering to pay compensation by instalments. James Alfayo Wita (P.W.3) stated that on 21/2/04, the appellant went to defend himself to the minor's father, at a kiosk by the roadside and he sought forgiveness and offered to refund money used for complainant's treatment. P.W.3 is a brother to complainant's father – so he got youth wingers of the area, but appellant denied committing the offence. P.W.3 didn't know appellant before that day. P.W.6 Police Constable Geoffrey Ebusu is the one who took the appellant to see the police surgeon along with the P3 forms – this was on 23/2/04. P.W.5 explains that the appellant had disappeared after committing the offence. P.W.6 Dr. Zephania Kamau

examined the minor (P.W.1) and said she had healed scars and tears at the Amberoid vaginal opening. Her hymen was broken – he did not take samples as she was brought 3 months after defilement. A vaginal swab was taken but no spermatozoa was found. She had pus cells which was a sign of infection. He also examined the appellant and found his private parts to be normal and he showed no signs of illness. No samples were taken from him.

In his unsworn defence, the appellant said on 23/12/03 he left Nairobi for upcountry and returned on 21/2/04 when he was accused of defiling a girl on 25/12/03. They took him to the youth's office and beat him up- he was injured in his private parts and bled a lot. He claimed that when complainant was asked whether he was the one who had defiled her, he denied saying it was Baba Media. Appellant confirms that he is also known as Baba Media.

The learned trial magistrate observed that P.W.1 was hesitant to reveal who had defiled her as she had been threatened with death, but she later disclosed that it was the appellant and that –

“I find that the accused was properly identified as the defiler here. The accused was complainant's neighbour. So it follows that she knew the accused well. Complainant said she was raped by Baba Medi and is noteworthy that even the accused admits being Baba Medi.”

Appellant in his grounds of appeal stated that the learned trial magistrate erred by basing his conviction on evidence which was not sufficiently trustworthy.

- That the prosecution case was not proved beyond reasonable doubt.
- That his defence was not properly considered.

In his submissions to the court, the appellant urged the court to consider his sentence given that he had family responsibilities and that all his children have dropped out of school from the date of his arrest. He says he has totally rehabilitated and has undergone spiritual transformation and is now born again.

The State opposed the appeal both on sentence and conviction saying the evidence sufficiently proved the charge pointing out that the complainant gave evidence as to how appellant lured her to his bed and defiled her and that this evidence was confirmed by the complainant's mother who examined her and found sores on her private parts. He also points to the medical evidence by Dr. Zephaniah Kamau which corroborated the evidence that complainant had been defiled and had healed scars and tears on the vaginal opening. He insists the conviction was safe and secure. As regards the sentence, the learned State Counsel submits that by virtue of the Criminal Law Amendment Act No. 5 of 2003, the maximum sentence is life imprisonment and so the ten years meted out against appellant taking into consideration the seriousness of the offence and the tender age of complainant, then the sentence was neither harsh nor excessive and urged for the dismissal of the appeal. Basically in his address to the court, the appellant dwelt on his sentence and said nothing about the conviction. I however looked at his grounds of appeal wherein he submitted that the learned trial magistrate relied on untrustworthy evidence – it is not clear which one of the witnesses, the appellant refers to as untrustworthy as he did not elaborate even in his submission. I read through the learned trial magistrate's judgement, the appellant's defence was considered and dismissed. Really I don't think it is for the court to prosecute the appellant's appeal for him. At the end of the day, all I have are the grounds of appeal without any flesh put to them and I have been unable to glean anything that would be favourable to the appellant for the first and second limb or even the third limb. The conviction therefore remains upheld.

As for the sentence, are there any factors that would justify interfering with the sentence? Appellant says he is now rehabilitated and has undergone a spiritual transformation. Sentence is intended to punish but also correct, to somewhat avenge for the victim while also hopefully awaken in the offender a rehabilitated spirit. Appellant has been in prison custody for about three years now – the maximum sentence for the offence is life imprisonment. The nature of the offence is very serious – the victim, a young girl who has undergone suffering and trauma. Under the circumstances, my view is that the sentence was justified and would not warrant interfering with it. The sentence is confirmed.

The appeal is therefore dismissed.

Delivered, signed and dated this 25th day of April, 2008 at Nairobi.

H.A. Omondi

Judge