



JOHANA MUCHORI WANJIRUAPPELLANT

VERSUS

RESPONDENTREPUBLIC

JUDGMENT

The appellant was charged with an offence of defilement of a girl contrary to **Section 145 (1)** of the **Penal Code**. The particulars of the charge are that on the nights of 14th and 15th day of April, 2005 at Narok District of the Rift Valley had canal knowledge of a girl “[*Particulars withheld pursuant to section 76(5) of the Children Act, 2001*]”. a girl under the age of 14 years. The Appellant also faced an alternative charge of indecent assault of a female contrary to **section 144 (1)** of the **Penal Code**. The particulars of the charge stated that on the nights of 14th and 15th day of April, 2005 at Narok District with Rift Valley Province unlawfully and indecently assaulted S W a girl of the age of 13 years by touching her private parts. The Appellant pleaded not guilty to both charges. After a full trial, he was convicted and sentenced to 18 years imprisonment.

Being dissatisfied with the conviction and sentence, the appellant appealed, he submitted that the trial Magistrate erred by relying on the evidence that lacked credibility as the vital witnesses were not called to testify. He further argued that the trial court was at fault for relying on the evidence of the complainant’s mother. Moreover the complainant was not medically examined on the day of the alleged rape. The medical report is contradicts the report from the government chemist analyst. The complainant also questioned why the complainant did not scream when she was allegedly defiled which could have attracted the attention of the passer bys.

The learned state counsel Mr. Mugambi opposed the appeal, he submitted that there is overwhelming evidence to support the conviction. The evidence by the complainant and her mother was corroborated by the evidence from the government analyst and also by the clinical officer who treated the appellant. He asked the court to consider that the matter was reported to the police on the following day. The complainant was issued with a P3 form.

The Investigating officer who testified as PW4 took the appellant to the hospital where his blood sample and saliva samples were taken for analysis. He also took blood sample and pieces of clothes of both the complainant and appellant and forwarded them for forensic examination. These items were analysed and PW1 confirmed that there were traces of semen of blood O found on the appellants clothes. The report by the clinical officer also confirmed that the appellant was found with an infection of gonorrhoea which was also found in the complainant. Considering the seriousness of the offence which provides a maximum of life sentence, counsel for the state urged the court not to interfere with the sentence.

This being a first appeal, this court is supposed re-evaluate the evidence before the trial court and arrive at its own independent determination on whether to up hold a conviction. In so doing, the court should bear in mind that it never saw or heard the witnesses and give due allowance for that. (See the case of **Njoroge –vs. - Republic 1987 KLR 19**) I will now set out albeit briefly the evidence that was before the trial court.

The facts of this case are that, G M N PW3, also the mother of the complainant testified that on 13/4/2005, she left the complainant and two other children at a place where they were living called **[particulars withheld]**. She went to till the land at a place called Konjoga. She was with the appellant with whom they were living as a man and wife. They had other children but the complainant was a step child to the appellant. The appellant left Konjogu on 14/4/2005 ostensibly to sell firewood at the market but did not return to Konjoga he instead went to **[particulars withheld]**, where he found the complainant sleeping. He woke her up and ordered her to warm some food for him. The complainant obliged and after the appellant finished eating the food, he ordered the complainant to get on to his bed. The complainant refused. The appellant threatened the complainant that if she refused to comply with his request, he would break her legs. He then ordered the complainant to leave the house with the brother and the baby who was about 3 years old. The appellant followed them with a donkey and when they reached the centre, the appellant ordered the complainant's brother to return to the house.

The appellant said that he was taking the complainant to the Kojoga to stay with her mother. He complained that she was not able to feed the child. When they were about to cross the river, the appellant removed the baby from the complainant's back, he removed her clothes and defiled her. He ordered the complainant to go to her mother. But while walking, the appellant started confessing that the power of Satan had seized him that is why he defiled the complainant. He pleaded with her not to inform her mother and promised to give her Kshs.300 so that she does not report the incident to her mother.

The complainant returned home and slept, the following day, she went to Kojoga where she found the appellant with her mother. She started crying and told her mother what had happened. The mother took her to police station where they were issued with a P3 form, by **PC William Muturi PW4**.

David Gitahi Muthiga (PW5) treated the complainant and filled the P3 form which he produced in court. He found the complainant was about 14 years old, her hymen was broken. He took urine test which showed that the complainant had a gonorrhoea infection. He did not find spermatozoa in her vaginal. The same witness also completed the P3 form, in respect of the appellant. He took some laboratory tests and the pus cells from the appellant showed that he too had gonorrhoea infection for which he was also treated.

PW4 forwarded the blood samples from the complainant and the appellant as well as the items of clothing to the government chemist for analysis. He wanted the items subjected to forensic examination by the government chemist. The samples taken were analysed by Albert Gathuri Mwaniki (PW1), a government analyst attached to the government chemist. Upon examination of the blood sample of the appellant, saliva sample, a long trouser all belonging to the appellant, PW1, compared them with traces of semen found in the under pants and green pet coat of the complainant. PW1 testified that he found the blood sample of the appellant was of blood group O secretor. The blood group of the complainant was also found to be group O. The petticoat and underpants of the complainant were stained with semen of group O secretor and few degenerated spermatozoa.

Put on defence, the appellant denied having committed the offence. He alleged that on 16/4/2005 he and the complainant who was his wife had gone to Nairiegi Enkare police station to sort out a dispute. While at the police station, he was asked to remove his shoes and socks and he was locked in the police cells and was taken to the hospital for examination. He was found to have gonorrhoea for which he was treated. He alleged that he was framed up by his wife following a disagreement on the circumcision of their son.

The trial court after evaluating the evidence found that the prosecution had proved the case against the appellant to the required standard. The trial court found the evidence against the appellant, overwhelming and defence of the appellant was found not have shaken the prosecution's case.

The appeal before this court raises the issue of credibility of the evidence by the prosecution witnesses, especially the complainant and her mother. The record of proceedings shows that the trial court examined the complainant and established that she understood the meaning and essence of speaking the truth. The complainant gave a detailed account of how she was defiled by the appellant after she was threatened by

the appellant; he also forced the complainant to leave the house at night while she was carrying a young baby on her back. Along the way the appellant ordered the brother of the complainant to return home, that gave him an opportunity to defile the complainant.

The trial court that heard the evidence believed the complainant was telling the truth, the court also believed the evidence of PW3 the mother of the complainant. Her testimony is also clear as to how she took the complainant to the police station where they issued with a P3 form. Thereafter they went to a health centre and complainant was treated. It is after the visit to the health centre that she spotted the appellant. She raised an alarm and she was helped by the members of the public to arrest the appellant who was also taken to the police station. PW 4 escorted him to the same health centre where the blood, saliva and clothe samples were taken and forwarded to the government chemist for forensic analysis.

As the regards the credibility of these witnesses, this court cannot fault the assessment by the trial court. The trial court had a greater advantage than an appellant court in examining the demeanour of the witnesses. It was held in the case of **Republic –vs. - Oyier (1985 KLR) page 353**

“In a rape case the fact that a complaint is made by the victim shortly after the alleged offence is merely evidence of the consistency of the conduct of the victim with her evidence given at the trial and it cannot be regarded as corroboration of the story of the complainant... The 1st appellate court could not interfere with those findings by the lower court which was based on the credibility of witnesses unless no reasonable tribunal could make such findings or it was shown that there existed errors of law.”

When evaluating the evidence before the trial court, it is also important to bear in mind that evidence of children in sexual offences is admissible in criminal cases as long as the court is satisfied that the child is telling the truth. According to **section 124** of the **Evidence Act Cap 80** it is provided as follows:–

“provided that wherein a criminal case involving a sexual offence the only evidence is that a child of tender years who is the alleged victim of the offence, the court shall receive the evidence of the child and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the child is telling the truth.”

In this case the complainant was able to complain to her, mother how she was defiled by the appellant, her testimony in court is candid. Further evidence that was taken into consideration by the trial court was given by PW1 the government analyst who found the petticoat and under pants of the complainant was stained with semen of group O secretor and a few degenerated spermatozoa. The appellant was found to be of Blood Group O, his cell pus was found to have gonorrhoea infection which coincidentally was also found with complainant.

I agree with the trial court that the evidence before the court was overwhelming. This evidence was not dented by the defence of the appellant. I find the conviction safe and free from any error. As regards the sentence, the principals to bring to bear are also settled, the trial court cannot ordinarily interfere with the trial court’s discretion in determining the sentence, unless the sentence can be said to be excessive in view of the circumstances of the case or the trial court can be said to have acted on the wrong principals. (See the case of **Ogalo s/o Owuor (1954) E.A.C.A at page 270** where the court of Appeal held as follows:

“The court does not alter a sentence on a mere ground that if the member of the court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless it is evident that the judge acted upon some wrong principle or overlooked some material facts if the sentence is manifestly excessive in view of the circumstances of the case.”

The sentence provided by the law for the offence is life imprisonment. I see no justification why this court should interfere with the trial court’s exercise of its discretion in sentencing the appellant.

The upshot of the above is that the appeal is dismissed. The conviction and the sentence imposed by the trial court are upheld.

Judgment read and signed on 12th day of June, 2008.

M. KOOME

JUDGE