IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 296 of 2005

(From original conviction (s) and Sentence(s) in Criminal Case No. 275 of 2005 of the Senior Resident Magistrate's Court at Limuru (M. W. Mwai - SRM)

STEPHEN KIARIE THANDI……...……..APPELLANT

VERSUS

REPUBLIC……....…….…...RESPONDENT

J U D G M E N T

STEPHEN KIARIE THANDI was charged and convicted for **ATTEMPTED DEFILEMENT** contrary to **Section 145(2)** of the **Penal Code**. He was sentenced to 30 years imprisonment. He challenges both the conviction and sentence.

There are 8 grounds of appeal in the amended petition dated 16th February 2006. These can be summarized as follows: -

1. The learned trial magistrate erred in relying on circumstantial evidence.

2. The Complainant's evidence was not tested as to credibility.

3. The sentence imposed was manifestly harsh and excessive.

The facts of the case were that the Complainant went into the forest with the Appellant, who was the worker to the Complainant's father, PW2. The trip was made at 6.00 a.m. because the night before, the Appellant had informed the Complainant that he had seen firewood in the forest. They reached where the firewood was and when the Complainant started collecting it, the Appellant demanded; "give me" as he pulled down his trouser. The Complainant on realizing that the Appellant wanted to have sex with her started running away and she fell down. The Appellant caught up with her and struggled with her turning her over and demanding that she removes her clothes. The Complainant was screaming all along and her screams attracted the attention of PW3 who was walking on the road going to work. When PW3 went into the forest to investigate, he saw the Appellant struggling with the Complainant who was already on the ground. The Appellant eventually ran away. He was not seen again at PW2's house until the area chief, PW4 apprehended him on 21st February 2005 one month after the offence.

In the Appellant's defence, he stated that the case was a frame up and was motivated by PW2's desire not to pay him his salary.

The first issue argued was not raised in the petition. Being a legal point I have considered it. The

Appellant's Advocate **Mr. Wariuki** submitted that there was no documentary proof that the Complainant was 15 years old as she alleged and that this rendered the case doubtful whether the Complainant was telling the truth. **Mrs. Obuo**, learned State Counsel who represented the State and opposed this appeal, submitted that age did not go to the root of the charge before the court since if the Complainant was proved to be above 16 years, then the offence of **ATTEMPTED RAPE** was still available as a substitute, if proved.

I have evaluated and analyzed the evidence afresh. Nowhere was the Complainant's age raised either with the Complainant herself or her father who was PW2. The issue is an afterthought. Under **Section 382** of the **Criminal Procedure Code** which deals with "finding or sentence when reversible by reason of error or omission or other proceedings", provides that no finding or sentence should be reversed by reason of an error, omission or irregularity unless it has occasioned a failure of justice. There is a proviso to that section which guides the court to also consider whether the issue should have been raised earlier in the proceedings. Guided by the section and the proviso, I do believe that the omission alleged, of requiring documentary proof of the Complainant's age was a matter that should have been raised at the trial in the lower court. In any event, I do not see which prejudice the Appellant suffered by this omission. I find that no failure of justice has been caused and therefore dismiss this ground. I must however conclude that point by stating that the issue of the Complainant's age cannot be a basis of discrediting the Complainant's evidence.

Mr. Wariuki submitted that a charge of defilement must in its particulars include the word "unlawfully". He relied on the case of **NGENO vs. REPUBLIC [2002] 1 KLR 457**.

Mrs. Obuo on her part submitted that the case cited did not apply to the instant case since the charge before court was **ATTEMPTED DEFILEMENT** contrary to **Section 145(2)** while charge in cited case was **DEFILEMEN**T contrary **to Section 145(1)** of the **Penal Code**. The decision in **NGENO vs. REPUBLIC**, Supra, was with due respect to my learned sister *per incunam*. I do not foresee any situation when defiling a girl under the age of 16 years could be a lawful act. The fact that the words "unlawful" are omitted in the charge would not make the charge defective. That would appear to me to be a matter of semantics and totally irrelevant to the issue of the framing of the charge and its defectiveness. Under the proviso for Section 145 of the Penal Code. it is only when the accused person raises a defence that he though that the girl was his wife or above 1 years of age that age becomes an issue. In this case no such a defence was raised. In the cited case, the learned trial magistrate seemed to suggest that a child could be married, making the sexual act if committed, lawful. In **MUSYOKI vs. REPUBLIC [1981] KLR 160**, the Court of Appeal, **MADAN, LAW & MILLER JJA** stated thus: -

"***2. The romantic letter by the girl to the Appellant should have been produced, as this would have guided the court in sentencing, failure to produce it by the prosecution caused an error of principle.***

3. There was error in principle in sentencing, the error can only be corrected by reducing the sentence; sentence is accordingly reduced."

Our senior brothers of the Court of Appeal were of the view that the issue of a Complainant having entered into an amourous relationship with the accused person did not affect the charge but could only serve as a mitigating factor to be considered in sentencing. The Court of Appeal judges felt that the fact that a relationship existed between the Complainant and the Appellant could not serve as a defence to the charge. The issue of the act being lawful would therefore not arise.

The learned Advocate for the Appellant submitted that there were material contradictions in the prosecution evidence. He raised issue with the Complainant's evidence that she interpreted the Appellant's words "give me" to mean the Appellant wanted to rape her but later changed to say she did not know what those words meant. He also submitted that nowhere did the Complainant say she cried and therefore such finding in the judgment was erroneous.

Mrs. Obuo submitted that there was evidence that the Complainant was crying from the evidence of the Complainant's father and therefore the courts finding to that effect was not created. I agree with the

learned State Counsel.

The learned trial magistrate delivered herself at page J2 of Judgment thus:

"***She (complainant) told the Court how accused tried to push her to the ground in the forest and how he tried to remove her clothes. She also said that the accused removed his own trousers. The Complainant's testimony was corroborated by rare eye witness in this kind of sexual case… so what was the accused doing in the forest pushing the girl to the ground with his pants way down? We can rightly conclude like PW1 did that accused intention must have been to have carnal knowledge of the Complainant…"***

The learned trial magistrate was very clear in her mind that what led to the conclusion that the Appellant wanted to forcefully have sex with the Complainant was not the words complained of -"give me" but the *acteus reus* of the Appellant. He had pulled down his trousers and was forcefully pinning down the Complainant and demanding that she removes her clothes as they struggled. I do find that the words "give me" were not the basis of finding that the Appellant had an intention to defile the Complainant but the compromising position in which he was, removing his pants and pinning down the Complainant. I find no contradictions or inconsistencies in the evidence of the Complainant.

Mr. Wariuki also submitted that PW3 was not a credible witness on grounds that he contradicted himself initially by saying he saw the Appellant and Complainant struggling on the ground inside the forest from a distance of 30 metres. That later he said he saw them from 20 metres. Advocate also submitted that the evidence by PW3 that he escorted the Complainant home was not supported by the Complainant or PW2's evidence.

Mrs. Obuo disagreed that the witness PW3 was incredible and submitted that inconsistency in distances could not have affected credibility.

Inconsistencies in evidence are bound to happen. The test to apply in such case is whether they are fundamental and affect the conviction and sentence or whether they are inconsequential. See **JOSEPH MAINA MWANGI vs. REPUBLIC CA No. 73 of 1992** (unreported).

The evidence of PW3 that he saw the struggle between the Appellant and the Complainant did not end there and it is important in the circumstances of this case to consider what followed what he saw. Upon seeing the struggle, PW3 walked towards the two prompting the Appellant to release the Complainant, collect his trousers and run away from the scene. As the Appellant ran away, the Complainant ran towards PW3 who says he decided to escort her home. Since PW3 moved towards the scene and by doing so interrupted the Appellant, in those circumstances I do not think that the difference in the distance he stated he was when he first sighted the two is material. It is a discrepancy of minute detail which doesn't affect the substance or tenor of the prosecution case. I find the inconsistency in distance inconsequential to the conviction and sentence.

As to whether PW3 escorted the Complainant home or not, I do not see any serious relevance to whether he escorted her halfway or fully. PW3 was describing how he rescued the Complainant from being defiled. It is immaterial in my view whether he escorted the Complainant halfway or fully back home. I fail to see how this issue affects the evidence of the attempted defilement or how it could possibly have caused prejudice to the Appellant.

Mr. Wariuki submitted that due to the Appellant's alibi defence which the learned trial magistrate ignored, the sentence passed was harsh and excessive. **Mrs. Obuo** stated that she thought that the sentence was not harsh and added that she would urge the court to complete it by ordering hard labour which the court omitted to do.

Section 145 of **Penal Code** provides: -

"***145(1) Any person who unlawfully and carnally knows any girl under the age of sixteen years is***

guilty of a felony and is liable to imprisonment with hard labour for life.

(2) Any person who attempts to have unlawful carnal knowledge of a girl under the age of sixteen years is guilty of a felony and is liable to imprisonment with hard labour for life.

Provided that it shall be a sufficient defence to any charge under this section if it is made to appear to the court before whom the charge is brought that the person so charged had reasonable cause to believe and did in fact believe that the girl was above the age of sixteen years or was his wife."

I did not see how alibi defence would affect sentence in such a case. As for alibi defence in **KARANJA VS. REPUBLIC [1983] KLR 501, HANCOX, JA, CHESONI & PLATT AG**. JJA held: -

"***1. The word "alibi" is a Latin word meaning "elsewhere" or "at another place". Therefore where an accused person alleged he was at a place other than where the offence was committed at the time when the offence was committed and hence cannot be guilty, then it can be said that the accused has set up an alibi."***

Considering the Appellant's sworn defence I do not see any alibi defence raised. He did not say he was "elsewhere" at the time the offence was alleged to have been committed. He merely denied committing it and said it was a frame up in order for PW2 not to pay him his salary.

Learned Counsel for the State submitted that there was overwhelming evidence against the Appellant in the case. Learned Counsel submitted that the fact that the Appellant had removed his trousers and struggled with Complainant so that she could remove her clothes, and the fact that he ran away on seeing PW3, the said conduct was inconsistent with innocence.

Learned Counsel submitted that the Appellant never cross-examined PW2 on the issue of lack of payment even though he had an opportunity to do so.

It is quite correct to say that nowhere in the whole cross-examination of PW2 did the Appellant ask about any payment of salary due to him nor any suggestion that the case was a frame up.

The Appellant's defence on that point was purely an afterthought. I find the Complainant's evidence was clear, it was corroborated by PW3, a person who was an independent witness. PW2 also corroborated certain aspects of the Complainant's evidence, the fact that she was crying and traumatized by the time she reached home indicating that there had been an incident which had upset her. She also reported the matter the moment she had an opportunity to do so, to PW2 her father. I find the conduct of the Complainant consistent with one who had had a traumatizing and unpleasant incident.

I also considered the Appellant's conduct. It was that of a person with a guilty mind. After running away when PW3 went to the scene, he abandoned his employment with PW2 and went back home. It was one month later when the Area Chief, with authority from the police, finally arrested the Appellant.

Having considered the appeal against conviction, I find that the evidence against the Appellant was overwhelming and that the conviction was quite safe. I find no merit in the appeal against conviction.

On appeal against sentence, I do think that 30 years imprisonment for an attempt to commit the offence charged is manifestly excessive and cannot be justified in the circumstances of this offence. There was no aggravating circumstances involved and none is mentioned anywhere in evidence. The sentence is not justifiable at all and therefore, there is reason to disturb it. I set aside the sentence of 30 years imprisonment and in substitution thereof impose a sentence of 12 years imprisonment together with hard labour which is mandatory to be made and which should go with the sentence of imprisonment under **Section 145** of the **Penal Code**.

Subject to the reduction of sentence to 12 years imprisonment with hard labour, the Appellant's appeal is dismissed.

Dated at Nairobi this 14th day of March 2007.

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LESIIT, J.

JUDGE

Read, signed and delivered in the presence of;

Appellant present

Mr. Wariuki for the Appellant

Mrs. Oubo for the State

Tabitha: CC

…….**……**

LESIIT, J.

JUDGE