REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 404 of 2005

MICHAEL MBUGUA NGARUIYA ……..……...…. APPELLANT

VERSUS

REPUBLIC ……..……..RESPONDENT

(From Original Conviction and Sentence in Criminal Case No. 1706 of 2004 of the

Senior Principal Magistrate's Court at Githunguri – Ms Lucy Mutai – SRM) **JUDGMENT**

MICHAEL MBUGUA NGARUIYA was charged before the subordinate court with the offence of defilement of a girl under the age of 16 years contrary to Section 145(1) of the Penal Code. The particulars of the charge were that –

"**On the 8th day of November 2004 at *[Particulars withheld]* village in Kiambu district within the Central Province, had carnal knowledge of J W E a girl under the age of 16 years".**

After a full trial, the learned trial magistrate found him guilty of the lesser offence of indecent assault contrary to section 144(1) of the Penal Code and sentenced him to serve seven (7) years imprisonment. Being dissatisfied with the decision of the trial magistrate, the appellant preferred this appeal.

The main grounds of appeal were firstly, that the learned trial magistrate failed to consider that the evidence of the complainant PW1 was not consistent. The second ground is that the learned trial magistrate erred in relying on the evidence of PW4, who was not trustworthy, as she was not the first to examine the complainant. The third ground of appeal is that the learned trial magistrate erred in failing to consider the appellant's defence.

Learned State Counsel, Mr. Makura, supported the conviction and sentence. It was his contention that the offence of indecent assault was proved beyond reasonable doubt. He submitted that the incident occurred during day time and the evidence of the complainant was corroborated by the evidence of PW2 who took the complainant to hospital. He contended that the Clinical Officer PW5 also corroborated the evidence of the complainant that she was sexually assaulted. He further submitted that the learned trial magistrate considered the defence of the appellant in the judgment. He further submitted that the sentence of seven years imprisonment was legal, as the maximum sentence for the offence was 21 years imprisonment.

I have considered the grounds of appeal and the submissions of the learned State Counsel. I have also perused the record of the proceedings and the judgment. The appellant was convicted of the offence of indecent assault on a female below 16 years of age.

The prosecution was required to prove beyond any reasonable doubt, that the complainant was below 16

years of age. Secondly the prosecution had to prove that there was indeed unlawful and indecent assault.

The evidence pertaining to the assault was that of PW1, who was the complainant. She was sworn before giving evidence. She stated that she was 13 years of age. That she was carried by the appellant and defiled. That her skirt was torn by the appellant before he defiled her in a coffee plantation.

That evidence of a single witness has to be tested with care, and has to be believable. The court has to warn itself of the dangers of relying on evidence of a single identifying witness, before convicting on the same (see **CLEOPHAS OTIENO WAMUNGA – vs – REPUBLIC C.A. NO. 20 of 1989** (Ksm)). Though PW1, the complainant stated that the appellant removed her pants and unzipped his trouser and defiled her, there is no corroborative evidence of such defilement. The complainant was taken to the Nairobi Women's Hospital the same day. The report from that hospital dated 16.11.2004 states that the hymen was intact, and that there were no perennial tears or lacerations. Though the report talks of non-penetrative sexual assault, nobody from the Nairobi Women's Hospital testified in court how they came to that conclusion. The police surgeon who later filled the P3 form, which was produced in court, repeats the same remarks made by the Nairobi Women hospital, without stating how he came to that conclusion. Secondly, through the complainant talked about her skirt being torn, that skirt does not appear to have been produced in court as an exhibit, though it was identified.

In my view, if a girl of 12 years states that she was actually defiled after her pants were removed, and the medical evidence shows no evidence of sexual contract, that goes to the credibility of that witness. That witness cannot be a truthful witness. Secondly, contrary to what the learned State Counsel submitted, there is no corroboration of the complainant's story that she was defiled by the appellant. The technical medical evidence of PW3 Dr. Samson Gitonga, and PW4 the Clinical Officer Faith Mungai, is that there was no laceration or penetration. Evidence of indecent assault is also lacking. I cannot and it is not safe for me to assume that there was any defilement or indecent assault in the absence of evidence to support the same.

The, the learned trial magistrate also shifted the burden of proof on the appellant and misdirected herself. On page J 4 of the judgment the learned trial magistrate stated –

"I found that the action of the accused person who did not dispute his presence at the scene of crime at all material time amounted to indecent assault on the person complained of".

It is trite that the burden of proof is always on the prosecution to prove its case beyond any reasonable doubt. It was for the prosecution to prove that the appellant was at the scene and also that he committed the offence. It was not for him to dispute his presence there.

More importantly, the above misdirection of the magistrate is not borne by the evidence as tendered by the appellant in his defence. The appellant said this in his defence –

"On 8.11.2004, I was at home. In the evening, I went to sell milk. It was about 6.00 p.m.".

Clearly, the above defence by the appelant showed that the appellant was not at the scene, where the incident is said to have occurred at 5.00 p.m. He was at home and then later went to sell milk. This was in effect a defence of alibi.

In the case of **KARANJA – vs – REPUBLIC [1983] KLR 501** at page 506, the Court of Appeal stated –

"**It is true that it is better to comply as nearly as possible with the direction laid down in *Republic – vs – Kipkering Koske* (supra) but the judge clearly had this in mind, and moreover, had only a moment before completed a summary of the prosecution case and had set out the appellant's defence before him in considerable derail. It is not, in our view, possible to say that he did not have well in mind that the burden of proving the falsity of the defence lay wholly on the prosecution, and the standard to which he had to be satisfied before reaching a finding of guilt".**

Once the appellant raised a reasonable defence of alibi, the burden was on the prosecution to disprove that defence of alibi. Though the appellant gave an unsworn statement, the prosecution had a chance, if they so wished, to call evidence to disprove that he was not at home when the incident occurred. The prosecution does not appear to have made any attempt to disapprove the appellant's defence of alibi. Therefore the benefit has to be given to the appellant, and I do so.

Having reviewed the evidence on record, I find that the conviction against the appellant is unsafe and cannot be sustained.

Consequently, I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and Delivered at Nairobi this 30th day of April, 2007.

George Dulu

Judge

In the presence of –

Appellant in person

No appearance for State