REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 452 of 2005

SAMSON KOILEL KIPAIN……..…...……..APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

(From the original conviction and sentence in Criminal Case NO. 5713 of 2004 of the

Chief Magistrate's Court at Kibera – MS. MUCHIRA - SRM)

JUDGMENT

SAMSON KOILEL KIPAIN the appellant was charged before the subordinate court with one count of rape contrary to Section 140 of the Penal Code. He was in the same case charged with two other counts of defilement of a girl under the age of sixteen years contrary to Section 145(1) of the Penal Code. After a full trial, he was convicted on all the three counts. He was ordered to serve a jail term of 5 years imprisonment with hard labour on each count, the sentences to run concurrently. Being aggrieved by the decision of the learned trial magistrate, he has appealed to this court. He listed seven (7) grounds of appeal, which can be reduced to four (4) grounds that –

(1) The learned trial magistrate should not have relied on the evidence of PW2 who had to be put in custody in order to give evidence.

(2) The learned trial magistrate erred in convicting him while the complainants were found to have contracted venereal disease but he was not medically examined.

(3) That the learned trial magistrate erred in ordering the sentences to run consecutively in the same file, especially that the case had gone for a retrial.

(4) The learned trial magistrate failed to consider his defence as required by law.

The appellant also filed written submissions.

Before the appeal was heard, the appellant, at the request of learned State Counsel Mrs. Kagiri, was given notice by the court that the state would ask for enhancement of sentence. The appellant however, opted to proceed with his appeal.

The appellant submitted that PW1 and PW3 never reported the incident. In his view that went to the not of their credibility. He sought to rely on the case of **NATHAN BROWNE BIRUNDI – vs – REPUBLIC** – Nairobi High Court Criminal Appeal No. 588 of 2001.

Learned State Counsel, Mrs. Kagiri, opposed the appeal. It was also counsel's contention that the sentence was too lenient.

Counsel submitted that the prosecution proved its case beyond any reasonable doubt on the three counts. The complainants PW1, PW2 and PW3 adduced detailed evidence on how the offence were committed. On the issue that the complainants never reported the acts complained of, her contention that they were all pupils and the appellant was their teacher. The complainants testified that the appellant had threatened to beat them if they refused to have sex with him.

Counsel submitted that it was PW4, the father of the complainants, who saw the appellant coming from the Manyatta of the complainants. The appellant confessed to PW4, and asked for forgiveness. However, PW 4 decided to report the matter to the police. Counsel contended that intercourse was established by the evidence of PW 5 the doctor, who found that the three complainants had contracted venereal diseases. The doctor concluded that there must have been sexual intercourse.

On the complaint that PW2 was coerced by the court to give evidence, counsel contended that PW2 was merely put in custody to answer questions.

On the sentence, counsel contended that each of the offences carried a sentence of life imprisonment. Therefore the sentence of 5 years imprisonment on each count was too lenient, considering that the appellant was a head teacher, who exercised authority over the complainants. That meant that the appellant had a higher duty towards the complainants who had been placed under him. The evidence was also that the complainants were threatened with beating by the appellant to coerce them to have sexual intercourse with him. Counsel also submitted that the fact that the complainants contracted sexually transmitted diseases had to be taken into account in sentencing.

In reply, the appellant stated that he was arrested on 7.10.2002. The complainants were taken to the doctor for examination on 14.10.2002, while he was in custody but was never medically examined for sexually transmitted diseases. The sentence was ordered to run consecutively and, in his view, it should have run concurrently.

The facts of the prosecution case are that the appellant was a teacher at ***[Particulars withheld]*** Primary School, Masai Mara. The three complainants were his pupils in 2002.

It was the evidence of PW1 that the appellant was her class teacher in standard 4. That the appellant used to call her to the staff room to send exercise books. She testified that the appellant had sexual intercourse with her in the staff room a number of times without her consent. She also testified that there was a bed in the staff room. PW2 was also a pupil of the appellant in the same school. It was her testimony that she used to sleep in the same Masai traditional house with her sisters PW1 and PW3 – who were all pupils in the same primary school. Initially, she disowned her police statement and was declared a hostile witness. She was confined by the court and later testified against the appellant. It was her testimony also that the appellant had sexual intercourse with her several times. She testified that on 22.8.2002 the appellant came into their house at night and had sexual intercourse with her. She was 14 years of age then. There was no light but she knew it was him. It was her father PW4 who noticed the appellant and chased him.

PW3 was also a girl below 16 years of age. It was her evidence that she was also in the same school. She testified that between February and August 2002 the appellant used to send her to bring him text books to the staff room. There the appellant had sexual intercourse with her a number of times.

All the three girls testified that they did not report the incidents of sexual intercourse because the appellant was their teacher. They also feared that their father would admonish them as being mannerless under Masai customs.

PW4 was the father of the three girls. It was his testimony that the appellant was the teacher of his three complainants, his daughters. One day, in August 2002 at 2.00 a.m., he was laying ambush outside his

manyatta for leopards who were bothering his herd. He saw someone amongst the cattle. He called out thinking it was one of his daughters or sons. The person ran away and he gave chase. The person went into one of the houses in which his son and adopted sons lived. He entered the house and asked who had just entered. The appellant volunteered and said he was the one and was coming from the house occupied by his daughters. The appellant then asked for forgiveness. He enquired from his daughters and they said that the appellant had sexual intercourse with them. He therefore reported the incident to the police, and the appellant was arrested.

The three complainants were taken for medical examination. PW5 doctor Z. Kamau examined them on 14.10.2002 and acted on notes, which were not produced in court, to conclude in P3 forms that all the complainants suffered from venereal diseases.

In his defence the appellant gave sworn testimony. It was his defence that he was arrested on 7.10.2002 by two police officers accompanied by the complainant's brother. He had an earlier quarrel with PW4, who was the father of the complainants because PW4 had given him cows to sell, and was not pleased by the low price at which the said cows were sold. He stated that on 22.8.2002 he was at Embakasi in Nairobi. The charges against him were fabricated. He challenged why the mother of the complainant was not called to testify. He denied committing the offences.

I have evaluated the evidence on record as is required of me in a first appeal – see **OKENO – vs – REPUBLIC [1972] EA 32**.

The learned trial magistrate stated thus at page J6 of the judgment

"The court however notes the probability does exist that accused had sexual intercourse with them over a long period. The circumstances under which the defilement was perpetrated defeats any medical exams as the 3 never reported on time to anyone. In the absence of such links to accused I had let him scot-free, but as said above other material facts corroborate the complainant's story. I cannot run away from any of the girls who truly told the court of their ordeal in accused's hands. I find therefore the prosecutor has proved its case and I have no doubts the 3 were raped and defiled respectively, and that by the accused person".

One can easily see the predicament that the learned trial magistrate was in, and it is understandable. There were various issues relating to gaps and credibility of witnesses in the evidence.

I will start with the issue of credibility. In **NDUNGU KIMANI – vs – REPUBLIC [1979] KLR 282** – the court held –

"The witness upon whose evidence it is proposed to rely should not create the impression in the mind of the court that he is not a straight forward person, or raise a suspicion about his trustworthiness or do (or say) something which indicates that he is a person of doubtful integrity and therefore an unreliable witness which makes it unsafe to accept his evidence….."

My evaluation of the three complainant's evidence clearly shows that it is less than candid. All the three of them are sisters. They all claim that the appellant had carnal knowledge of them, without their consent from February to August 2002. However, none of them reported the incident to anyone for all that period, though they appear to have known the affair of their common teacher with all of them for sometime. They did not in fact report at all until their father supposedly saw the appellant that night in August 2002 at their manyatta. In fact PW2, who claimed she was the one who was defiled by the appellant that night, was reluctant to testify until she was locked in for about two days. There is no evidence that the complainant even mentioned the behaviour of the appellant to their mother. Of course they stated that they feared to tell their father, but what about their mother? They do not say anything like fearing their mother. What about fellow pupils? In my view, the evidence of the complainants is highly suspect, especially taking into account that it was their father who went to ask them about their relationship with the appellant. It is highly likely that they were prevailed upon and feared their father. In my view, it was dangerous for the learned trial magistrate to have relied on the evidence of the

complainants to found a conviction. The learned magistrate should have considered the circumstances under which the complainants were made to testify. The magistrate should have given the benefit of credibility to the applicant.

The second issue is on gaps in the prosecution case, which mainly arise from failure to call material witnesses. In **BUKENYA – vs – REPUBLIC [1972] EA 549** Lutta Ag. V – P held –

"(ii) The prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent.

(iv) Where the evidence called is barely adequate, the court may infar that the evidence of uncalled witnesses would have tended to be adverse to the prosecution."

In our present case the sons of the father of the complainants PW4, were not called to testify. PW4 testified that he found applicant in the same house with his sons. He also had a discussion with the appellant who is said to have admitted and asked for forgiveness. The sons most probably would have attested to the discussions between the appellant and PW4. They were crucial witnesses. They were not called and no explanation was given for failure to call them. The doctor who filled the P3 form, DR. Z. KAMAU (PW5) was clearly not the one who treated the complainants and diagnosed the venereal disease. The person who treated the three complainants was also not called to testify in court to confirm that, indeed, the complainants were suffering from a venereal disease. That is not all, the evidence of the complainants is that at least two of them had sexual intercourse with the appellant in the school staff room, which had a bed. No witness from the school was called to confirm whether indeed there was a bed in the staff room at the school. In my view, all these were crucial witnesses.

The failure to call these crucial witneses leads me to the inference that if the said witnesses were called, their evidence would have been adverse to the prosecution case. The benefit of the doubt has to be given to the appellant, and I do so.

I find that it is not safe to sustain a conviction on the evidence on record.

On the sentence, it is a lenient sentence, for offences whose sentence is life imprisonment. However, the learned trial magistrate ordered that the three five (5) year sentence terms which she imposed, should run consecutively. That is a total period of fifteen (15) years imprisonment. As I have decided that I will quash the conviction, there is no need to say more on the propriety of the sentence – as it will have to be set aside.

For the above reasons, 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 23rd day of May 2007.

George Dulu

Judge

In the presence of –