



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

Criminal Appeal 372 of 2005

WYCLIFFE AMUNDUBAAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No. 18714 of 2005 of the Chief Magistrate's court at Makadara)

JUDGMENT

WYCLIFFE AMUNDUBA the appellant was charged before the subordinate court with defilement of a girl under 14 years of age contrary to Section 145(1) of the Penal Code. After a full trial, he was convicted and sentenced to life imprisonment. Being dissatisfied with the decision of the learned trial magistrate he has appealed to this court on the following grounds –

1. The learned magistrate erred in law and fact by convicting him while failing to bear in mind that there was no medical evidence in respect of any examination upon the appellant brought forward by the prosecution in establishing or linking him to participation in the offence.
2. The case of the prosecution was not proved beyond reasonable doubt.
3. The defence statement was not properly taken into account.

At the hearing of the appeal the appellant submitted that the

magistrate who imprisoned him, was different from the magistrate who heard his case. He also submitted that, other than for the testimony of the complainant, when other witnesses testified he was not present in court.

Learned state counsel, Ms. Gateru, opposed the appeal against conviction but conceded to variation of the sentence as the appellant, who was a first offender, was sentenced to the maximum penalty of life imprisonment. It was counsel's contention that the evidence on record proved the offence against the appellant beyond any reasonable doubt.

I have evaluated the evidence on record as I am required to do in a first appeal – see **OKENO –vs- REPUBLIC [1972] E A 32.**

The evidence of PW1 A L, is that the complainant was detained and defiled by the appellant. They reported the incident to the chief, then to the police and took the complainant to Nairobi Women's hospital where she was examined and found to have been defiled with a broken hymen. This witness produced the letter or medical reported from Nairobi Women's Hospital as exhibit 1. PW2, F L, was the complainant. Her evidence was consistent with that of PW1. She testified that she was detained by the appellant for 3 days who defiled her. The complainant was examined about 10 days later by the police doctor PW3 DR. ZEPHANIA KAMAU, who found her to have no injuries. A P3 form was filled and produced as exhibit 2. The appellant was therefore charged with the offence.

In his defence, the appellant gave an unsworn statement. It was his defence that he worked at a hospital in Korogocho. That on 2/9/2004 he went to ask for his money from his employer. He did not appear to have got his money and was to go back the next day. When he went back, the chief locked him up and then he was taken to Buru Buru Police station and later charged.

Having evaluated the evidence on record, I find that there was sufficient evidence to sustain the charge of defilement. The evidence of PW1 and PW2 is consistent. The appellant detained the complainant for there days and had the opportunity to defile her. The medical evidence from Nairobi Women's hospital confirms that the complainant was defiled. There was indeed penetration, which was an essential ingredient of the offence. The penetration was established by the fact that the hymen of the of the complainant was broken. The appellant claims that he was not himself medically examined to connect him to the offence. In my view, that was not necessary and it is doubtful whether examining him medically would have proved anything. I also find no basis for the appellant's allegation that he was not in court when some witnesses testified. He was recorded as being present throughout the proceedings.

The appellant complains that he was tried by one magistrate and convicted by another. Indeed, the trial magistrate who tried him was Mrs. MBUGUA a Resident Magistrate. At the sentencing stage, the trial magistrate referred the case to MRS. NZIOKA a Principal Magistrate for sentencing.

That was an error committed with regard to the procedure adopted in sentencing. The trial magistrate was a Resident magistrate. Under section 221 of the Criminal Procedure Code only the subordinate of the 2nd class can commit an accused person to a Resident Magistrates court, for sentencing. The trial court, being a Resident Magistrate did not have powers to transfer the case to the Principal Magistrate for sentencing. The sentence imposed of life imprisonment, other than being excessive, is unlawful. I will therefore quash that sentence and substitute for it a sentence of seven (7) years imprisonment which I consider to be reasonable in the circumstances.

Consequently, I dismiss the appeal on conviction and uphold the conviction by the trial magistrate. I however set aside the sentence imposed and substitute thereon a sentence of seven (7) years imprisonment to run with effect from the date of conviction by the subordinate court.

It is so ordered.

Dated and delivered at Nairobi this 11th day of July 2007.

George Dulu

Judge

In the presence of –

Appellant

Ms. Gateru

Eric - court clerk