



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIM CASE 130 OF 2004

DONATO NJUE M'NDUI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was charged with the offence of defilement of a girl under the age of 16 years. The minor was 2 ½ years. The grounds of appeal set down by the appellant in summary were that no proof was established since DNA report was not carried out properly and the evidence available was not sufficient and that the Trial Magistrate failed to appreciate Appellant evidence in defence which was cogent and true.

On the day of hearing the appellant said he did not know how to read and therefore he filed some written submissions. However the state counsel after considering the submissions and the evidence on record he conceded the appeal on the ground that there was no preliminary inquiry in respect of the complainant's ability to give evidence as she was only 2 ½ years. The complainant's evidence and other evidence was hearsay. The appellant was sentenced to 7 years imprisonment and had already served 3 therefore there was no request for a retrial.

I have perused the record. The Trial Magistrate remarked **“Because of the age of the minor her evidence will be taken in camera”** without carrying out a preliminary inquiry he ordered the minor to give an unsworn statement which was of course not challenged in cross examination. The evidence of the mother was that she had left her complainant daughter with another person in another home. Then when she came to collect her she did not find her. The minor was said to have been sent on an errand. This was about midday. Later the child came home crying and she told the mother that the accused had squeezed her in her private parts. After examination the mother washed the child and her pants after she had noticed that the child was swollen in her private parts and had a rupture in the vagina. Then she went to report to authorities and eventually she took the child to Runyenjes Sub-district Hospital where the minor was treated. She obtained P3 form. Medical evidence was given by PW3 clinical officer attached at Runyenjes. He found bruises and redness covered the vulva. He found there was no penetration but he concluded the child had already been defiled. However he did not find the rupture the mother (PW2) talked about. There is also contradiction on the evidence of PW2 and PW4. PW2 said the child came to her at home PW4 said the child came as they were talking. It is also said that the child was carrying a jerrican. The accused denied having committed the offence. Section 124 Evidence Act Cap. 80 requires corroboration of the evidence of a child of tender years. In this case the child is of 2 ½ years and that is a child of tender years. However there is no evidence that there was carnal knowledge of the child. The medical evidence talks of finding bruises around the vulva. No further evidence is offered. The mother talks of rupture but this is not supported by medical evidence.

I have come to the conclusion that there was no sufficient evidence to convict the appellant. Since the state does not support conviction, I allow the appeal quash conviction and set aside the sentence. The appellant shall be set at liberty forthwith unless otherwise lawfully detained.

Dated this 24th September, 2007.

J. N. KHAMINWA

JUDGE

24/9/2007

Khaminwa – Judge

Njue – Clerk

Appellant present in person

Mr. Kimathi for state

Read in open court.

J. N. KHAMINWA

JUDGE