



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
CRIMINAL APPEAL 51 OF 2006

JAMES MOLE APPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

The appellant James Mole, was charged with:

Defilement of a girl under the age of 16 years contrary to section 145 (1) of the Penal Code.

The particulars on count 1 are that on the 25th day of November 2005 at about 4.00 am at Maweni village in Mtwapa location in Kilifi district within Coast Province had carnal knowledge of, Winnie Anyango, a girl under the age of 16 years.

The alternative charge was indescient assault on a female contrary to section 144 (1) of the Penal Code.

The particulars are that on the 25th day of November 2005 at 4.00 am at Maweni village in Mtwapa location within Kilifi district of the Coast Province unlawfully and indesciently assaulted, Winnie Anyango, a girl under the age of 16 years by touching her private parts, namely, vagina.

He was acquitted on the main count but convicted on the alternative charge by the Senior Resident Magistrate Kilifi (C.O. Obulutsa Esq) .

At the hearing the appellant was unrepresented. He adopted his home made grounds of appeal in addition to oral submissions.

Dr.Ondieki Otworu (PW1), examined the complainant and came to a conclusion that she had no hymen. There was not tear or lacerations, no discharge or spermatozoa. He produced the P3 form as exhibit 1.

Winnie Anyango (PW2), a girl of 12 years gave sworn testimony after *vior dire*. She recalled that on 25th November 2005 at about 4.00 am, the appellant, whom he described as a friend to her mother, came into her room in the middle of the night stark naked. He then gagged and defiled her. Thereafter he returned to her mother's room. After appellant left for work she told the mother of the incident. That was

the third time. The matter was reported to Mtwapa police station and she was taken for medical examination whose results are embodied in exhibit 1.

Millicent Atieno (PW3), was at her bedroom with appellant. She woke up but did not find him by her side. She checked around and met the appellant coming from the room of **Winnie Anyango (PW2)**. In the morning, the complainant told her that the appellant had done similar acts on her three times. She then reported the incident to the police who referred the complainant to Jocham Hospital for examination which was done by Dr. Ondieki Otwori (PW1).

No. 74904 PC Fundo (PW4), received and booked a report of defilement of complaint by the mother's lover. He issued the complainant with a P3 form and referred her to hospital. He talked to the complainant who confirmed that the appellant had defiled her on two previous occasions.

The learned trial magistrate having evaluated the evidence found that a prima facie case had been established and put the accused on his defence.

In his unsworn statement, the appellant admitted having been in the house of her lover, the complainant's mother, but denied that he indecently assaulted the complainant at all.

At the close of the defence case the learned trial magistrate found the appellant guilty as charged and thus provoked this appeal.

The appellant relied on his home-made grounds of appeal and equally handed over written submissions which he adopted at the hearing in addition to oral submissions.

Miss Amenge, for the prosecution, supported the conviction and the sentence. She argued that the appellant was with PW3 in bed. She was asleep when he disappeared. When she woke up she saw the appellant coming from the direction of the complainant's room stark naked. The same morning the complainant complained that the appellant had defiled her. She reported the matter to the police which culminated in the arrest and prosecution of the appellant.

I have evaluated the evidence in great detail as I am bound to do on a first appeal.

It is the prosecution's case that the complainant was defiled by her mother's lover. Both the complainant and the mother testified in detail how the episode took place.

Dr Otuori Ondieki, examined the complainant on the same day. The medical report notes bruises to the head on the right temporal areas, several wounds on palm and arms, shoulder and elbow bruises with tenderness and several bruises on the back. Vaginal examination – no tears or laceration, no hymen membrane nor fresh tears. There was thus no evidence to sustain the main count.

On the evidence, the learned trial magistrate found that the offence disclosed was indecent assault as opposed to defilement.

I am prepared to hold that the appellant's conviction on the alternative charge of indecent assault was in order. The appellant was seen by complainant's mother coming from the room of the complainant stark naked. Even though there is no evidence of sexual intercourse having taken place the act of the appellant in exposing himself stark naked to the complainant in law amounts to indecent assault.

I therefore find no merit in the appellants appeal against conviction. With regard to sentence, I hold the view that the same is lenient in view of the fact that the offence attracts a maximum sentence of five (5) years with hard labour.

In the result, I dismiss both the appeal on conviction and sentence.

Dated and delivered at Malindi this 6th day of September 2007.

N.R.O. OMBIJA

JUDGE