



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

Criminal Appeal 95 of 2006

(From Original Conviction and Sentence in Criminal Case No. 491 of 2005

of the Resident Magistrate's Court at Wundanyi: E. Mwaita – R.M.)

ERICKSON HERI MBAJO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

ERICKSON HERI MBAJO, the Appellant, was upon trial for the offence of defilement of an imbecile contrary to section 146 of the Penal Code and in the alternative indecent assault of a female contrary to section 322(2) of the Penal Code convicted on the main count and sentenced to seven years imprisonment. He has appealed against both that conviction and sentence on seven grounds, four of which are on conviction and two on sentence. The four grounds on conviction are to the effect that there was no sufficient and credible evidence to warrant a conviction and that this was a trumped charge instigated by PW2 arising from a long standing land dispute she has had with him. The remaining two grounds on sentence are that considering that he is a first offender with poor health a sentence of seven years imprisonment is harsh.

In his submissions before me the Appellant argued that the complainant could not have been defiled on 10th November 2005 at 2.00 p.m. and wait until 6.00 p.m. the following day to report. According to him given the pain she must have suffered, if she was indeed defiled, she should have reported the matter immediately.

The Appellant further submitted that there was no medical evidence to show that the complainant, on examination, had no injuries on her genitalia. Moreover, he said, she was not a virgin as she was found to be three months pregnant. The whitish substance the P3 form shows that was found in her vagina does not prove anything. The Appellant also took issue with the production of the P3 form by a police officer instead of the doctor who examined the complainant.

The Appellant denied ever having committed the offence. He said he was not at home at the material time as is confirmed by the evidence of PW3 who said he had left home in the morning.

Finally the Appellant submitted that he was framed up by PW4 and her sister who have had a long

standing land dispute and decided to use the complainant to get rid of him.

Opposing the appeal Mr. Monda, learned State Counsel, submitted that with the coming into operation of Act No. 10 which abolished the requirement for corroboration in sexual offences even with the evidence of the complainant alone whom the trial magistrate believed, the Appellant could still have been convicted. But the prosecution called PW1 and PW3 who confirmed that the complainant had reported her defilement by the Appellant to them. On conviction Mr. Monda concluded that even if medical evidence were excluded the complainant's evidence was enough to convict the Appellant as she knew the Appellant well and the issue of mistaken identity did not therefore arise. He said it was due to her imbecility that she did not report the matter immediately.

On sentence Mr. Monda submitted that seven years imprisonment against a life term cannot by any stretch of imagination be said to be harsh.

I have considered these arguments along with the evidence on record. I agree with the Appellant that nobody saw him defile the complainant. That notwithstanding, however, since the enactment of the Statute Law Miscellaneous Amendments Act No. 10 of 2003, in sexual offences corroboration, even of the evidence of a child victim, is not required if the trial court believes the victim's evidence. So even though the complainant in this case is a child of tender years who after vire doire examination was found not to understand the meaning of an oath, her unsworn testimony did not require corroboration as the trial court believed it. Besides that, as Mr. Monda said the evidence of PW1 and PW4 amply corroborated her testimony. These witnesses separately interviewed the complainant and she narrated her ordeal to them.

Although the learned trial magistrate took into account the alleged confession by the Appellant to PW1 and PW4 that he indeed defiled the complainant which, by dint of Section 25A of the Evidence Act, was clearly inadmissible, I am satisfied that that did not occasion a failure of justice and is curable by Section 382 of the Criminal Procedure Code. Even if that were not considered, the consistent story of the complainant was alone enough to convict the Appellant.

The complainant was a relative of the Appellant who lived with him in the same home and I think she had no reason to trump up charges against him. In any case it is inconceivable that the complainant, an imbecile, could even have imagined to frame-up the Appellant.

The Appellant's story that he was framed-up is clearly an afterthought. In the lower court he said it is the complainant who framed him up for scolding her. Before me the Appellant changed the story and said it is PW1 and PW4 who decided to use the complainant and trumped up these charges to get him out of the family land that he had a dispute over with them. I do not believe his story that he was sick during his trial and that is why he did not raise the issue of the land dispute in the lower court. What that means is that he did not understand the proceedings in that court which, in the absence of anything on record in support of that allegation, is obviously not true.

For these reasons I find no merit in the Appellant's appeal against conviction and I accordingly dismiss it.

On sentence, Section 146 of the Penal Code under which the Appellant was charged provides a maximum sentence of 14 years imprisonment. Seven years imprisonment that the Appellant was given is therefore not harsh. The Appellant took advantage of the imbecility of the complainant who, being his relative, he should have been protecting. His appeal against sentence is also dismissed.

In the upshot this appeal and for the reasons given this appeal is hereby dismissed in its entirety.

DATED and delivered this 30th day of October 2007.

D.K. MARAGA

JUDGE