REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL 92 OF 2005

KIMBO LIGALE IBRAHIM.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence of W.A. JUMA (Mrs.), SPM in Criminal Case No.6339 of 2004 delivered on 17/8/2005 at Kitale)

J U D G M E N T

KIMBO LIGALE IBRAHIM was convicted for the offence of defilement of a girl contrary to section 145 (1) of the Penal Code. He was then sentenced to 23 years imprisonment with hard labour.

As this is his first appeal, this court will undertake a re-evaluation of all the evidence on record, and then draw its own conclusions therefrom. In the course of that exercise, I shall bear in mind the fact that I did not have the advantage of observing the witnesses as they testified. I will also give due consideration to the submissions made before me, by both the appellant and the learned state counsel, Mr. Mutuku.

However, I will first endeavour to summarise the submissions of the appellant. The first one was to the effect that **PW1, CYPRINE ANYANGO ODUOR**, was not the complainant, as she never did lodge any complaint with either her father or with any of the neighbours.

As far as the appellant was concerned, PW1 was beaten and tortured, in order to say that she had been defiled. Therefore, the appellant contends that the whole story against him, had been fabricated.

He pointed out that the girl's father, PW2, admitted not having seen the appellant committing the offence. Therefore, the mere fact that the girl had been inside his house could not imply that the appellant had had carnal knowledge of her.

When PW1 ran away from both PW5 and PW6, when they had asked her to tell them what she had been doing inside the appellant's house, the appellant says that that is a sign of bad blood between PW1 and those two witnesses.

Another issue raised by the appellant was that it was never established by the prosecution whether PW1 had been found in his house in April or in October 2004. On the one hand, he says that PW5 and PW6 talked about October 2004, whilst on the other hand PW1 talked of April 2004. Therefore, the appellant asserts that there were contradictions in the prosecution case.

It is also the appellant's case that the age of PW1 was never ascertained accurately, as no Birth Certificate was produced in evidence. Also, because PW7, who is a clinical officer, had simply said that PW1 was " ***about 12 years old",*** without giving details of the examinations which he had carried out.

The appellant also drew attention to the fact that when PW7 examined the young girl, he found no spermatozoa. As the said examination was carried out some 48 hours after the incident, the appellant contends that spermatozoa should have been found because they do last for between 72 and 96 hours, after intercourse.

The medical officer who examined PW1 is also faulted for failing to state what, in his view, had caused the injuries which he detected on PW1's private parts. In any event, PW1 had not talked of any injuries.

The appellant wondered how it could have been possible for PW1 to have been injured only on the occasion in October 2004, if indeed the complainant had been regularly having intercourse since April 2004.

Again, the medical officer is faulted for failing to specify the nature of the infection which PW1 had. In effect, the appellant submitted that the said infection could have been anything other than a venereal disease.

Meanwhile, PW4 had examined the appellant and found him to have had an infection. But he too, is faulted for not specifying the nature of the appellant's infection. Therefore, the appellant submits that there was no way for relating his infection to the infection which PW1 had.

As far as the appellant was concerned, the police officer who had escorted him to hospital, for medical examination, should have testified in court, so as to link him to the medical results which PW4 produced in court. The reason for that contention was that PW4 did not identify the appellant in court. Consequently, the appellant submits that although his name was on the medical report, the same had been forged. His contention is that he was never examined by PW4.

The appellant also submitted that it was necessary for the police officer who escorted PW1 to the hospital, to have testified in court. It is only if that happened that the court could be able to ascertain what happened between the doctor and PW1, in the absence of the police escort; that is the appellant's submission.

Finally, the appellant faulted the learned trial magistrate for shifting the burden of proof to him.

For all those reasons, the appellant urged this court to allow his appeal, by quashing the conviction and setting aside the sentence.

Having set out the appellant's case, I will now re-evaluate the evidence on record, within the context of both those submissions as well as within the context of the judgment of the trial court.

PW1, CYPRINE ANYANGO, was a pupil at Sibanga Primary School, Cherengani. She was in Std 4.

She said that in April 2004 the appellant called her to his house, at 2.00 p.m. After she sat on the bed, as she was asked to do by the appellant, he locked the door. He then told her to remove her dress and panties, and she complied. He then proceeded to have sexual intercourse with her. However, PW1 did not scream. Her explanation was that that was not the first time when he did it to her.

According to PW1, there was a day when Simiyu knocked on the appellant's door, but the appellant told her not to leave. After the said Simiyu had seen PW1 inside the appellant's house, he is said to have reported to PW2, who is the father to PW1.

In her examination-in-chief, PW1 said;

" ***That evening my father asked me and called me, and I told him what Kimbo had done to me."***

Thereafter, PW2 took PW1 to the police.

Later, during cross-examination, PW1 said;

" ***When my father beat me I said I was in your house."***

It is because of that piece of evidence that the appellant submitted that the complainant was forced to fabricate the story.

Also because PW1 testified that the appellant never used to threaten her, the appellant said that PW1 did not complain to anybody.

It is clear from the evidence on record that PW1 also stated as follows;

" ***My father did not force me to cheat for you" (Sic!)***

By way of further clarification on that issue, PW1 went on to state as follows, during re-examination;

" ***When I was beaten I said what had been done to me."***

From the aforegoing, I am satisfied that although PW1 was beaten by her father, she did not fabricate any story against the appellant. She might have been hesitant to tell the story, originally. But when she was beaten, PW1 simply said that which had been done to her by the appellant.

As the learned trial magistrate said in her judgment, the reluctance of PW1 to say the story, must have emanated from her knowledge that what she had been engaged in, was wrong.

It is also instructive to note that even though PW1 initially ran away from PW6, when she was asked about what she had been doing inside the appellant's house, the complainant eventually told her story to PW6 and the other neighbours. Those neighbours did not force PW1 to tell the story.

In the result I hold that PW1 was not forced to fabricate the story, by the alleged torture visited upon her by her father.

Meanwhile, the fact that PW1 had not lodged a complaint to her father or to her neighbours until they discovered the ongoings, does not imply that PW1 was not a complainant. In law, one is not deemed to be a complainant only because he has made a complaint. Ordinarily, a complainant is the victim of the acts of commission or of omission, which give rise to the offence with which an accused person is charged. Therefore, regardless of whether or not PW1 literally made a complaint to her father or her neighbours, was irrelevant in determining if she was the complainant in the criminal charge preferred against the appellant.

In this case, both PW1 and PW2 confirmed that they had never had any grudge against the appellant. They had never had any disagreements. Therefore, I find no basis for the appellant's assertion that the story was fabricated against him. There was no reason for any of the prosecution witnesses fabricating the story.

PW2, LUCAS ODUOR OKOTH, was the father to PW1. He testified that the appellant had been his neighbour at Sibanga Centre.

On 1/10/04, PW5, Joseph Simiyu, reported to him that the appellant had been inside his house, with PW1.

When PW2 questioned PW1, the daughter told him that the appellant used to have sexual intercourse with her in the afternoons, at about 2.00 p.m.

PW2 reported the incident at Sibanga Police Post. He was given a P3 form, which he took to Kitale District Hospital, together with PW1. The form was filled at the hospital.

PW3, CPL. SAMUEL THUKU, was a police officer attached to the Cherangani Police Station, Sibanga Patrol Base. He arrested the appellant on 4/10/04 after he had received a report that the appellant had defiled PW1.

Initially, when PW3 went to look for the appellant at his house, which was on the same plot as that where the complainant was resident, PW3 did not find him.

Eventually, PW3 arrested the appellant at Chepkorio.

PW3 also corroborated the testimony of PW2, that it was PW2 who took the child to hospital.

PW4, PETER OMBASA, was a clinical officer at Kitale District Hospital. He examined Kimbo Ligale, who had been taken to the hospital under police escort. PW4 found that the urine of the suspect contained a lost of pus cells, which was an indication of infection.

However, PW4 was unable to identify the patient in court.

PW5, JOSEPH SIMIYU, was a resident of Maili Nane, Cherangani. On 1/10/04, he was told by "***Mama Mary***" that the appellant had taken a girl to his house. He went and knocked on the appellant's door, which was locked from inside, but the door was not opened until after about 30 minutes.

PW5 asked for a knife, which he was given. He then went back to his house, but continued to observe the appellant's house. A short while later, the complainant came out of the appellant's house.

When PW5 asked her what she had been doing inside that house PW1 said she did not know.

As PW5 was suspicious, he reported the incident to PW2.

During cross-examination, PW5 confirmed that he had not seen the appellant sleeping with the complainant.

PW6, SALLY MUTAI, was a neighbour to PW2. On 1/10/2004 she saw PW1 enter the appellant's house. As the child stayed inside that house for a bit of time, and as the appellant had locked the door, PW6 became concerned.

She asked PW5 to check.

According to PW6, when PW5 knocked the door, the same was not opened until later.

Much later, when PW1 eventually left the appellant's house, PW6 called her, but PW1 refused to say anything. Indeed, PW1 ran away. But later, PW1 did tell PW6 and other neighbours that the appellant used to sleep with her after removing her clothes.

PW6 categorically denied having forced the complainant to say that the appellant had had sexual intercourse with her.

PW7, CRYSANTHUS MASINDE, was a Clinical Officer at Kitale District Hospital.

He said that when PW1 went to the hospital, she was under the escort of her father.

Upon examination, which was carried out some 48 hours after the complainant had allegedly been defiled, PW7 found that PW1 had redness in the labias minora and majora.

PW7 testified that digital examination was difficult because of pain. He also found white substances from PW1's private parts. And a high vaginal swab yielded pus and epithelial cells. Also the membranes had injury. But, no semen was seen.

PW7 concluded that PW1 was defiled.

Having given due consideration to the evidence on record, I find that there is no doubt whatsoever, that PW1 had been defiled. She said that the defilement began in April 2004. However, as she did not make any complaints to her father or to her neighbours, the defilement was not detected early.

At this point, it is important to note that the mother to PW1 had passed away in 2000. That might explain why it took another lady, who was a neighbour, to raise suspicions about the goings-on in the appellant's house.

Although the appellant asserted that he was a victim of mistaken identity, I find absolutely no basis for that contention.

He was a neighbour to the complainant. And she said that he is the one who used to have carnal knowledge of her. The appellant did not challenge that evidence at all. If anything, he seemed to suggest that because she did not complain, no offence had been committed.

In that regard, it must be emphasized that provided one has sexual intercourse with a girl under the age of sixteen years, that person would be guilty of defilement. It would matter not that the young girl gave her consent. Therefore, provided that the appellant had sexual intercourse with PW1, if she was under 16 years of age, he would be guilty of defilement, whether or not PW1 did lodge a complaint.

But, was PW1 below the age of 16 years? The appellant says that that was not proved. However, it is clear that PW1 testified that she was 13 years old. Again, the appellant did not challenge that piece of evidence.

Furthermore, PW7 assessed the age of PW1 as being "***about 12 years***."

Although the appellant now contends that that assessment was no more than an assumption, based on visual observation of PW1, that contention is not borne out from the evidence. Nowhere did PW7 say that he had assessed the complainant's age by simply observing her physical stature. It is therefore wrong of the appellant to suggest that that is the manner in which PW7 had assessed the complainant's age.

In the circumstances, as the appellant did not raise any issues which could have cast doubt on the age assessment carried out by PW7, I find no reason to doubt that PW7 had done so professionally.

As regards the question about the date when the complainant was found in the appellant's house, there is no contradiction in the prosecution case, as alleged by the appellant. Clearly, it was on 1/10/2004. None of the witnesses said that it was in April 2004.

Although PW7 did not find any spermatozoa in the complainant's private parts, that does not imply that the offence of defilement had not been proved. It is not an ingredient of the offence of defilement that the man accused of the offence, must be shown to have ejaculated inside or onto his victim.

In this case, PW1 testified that it was the appellant who had had carnal knowledge of her. Then, PW7 formed the professional opinion, upon carrying out medical examination on PW1, that the complainant had been defiled. That is the nexus between the appellant, the defilement and the complainant.

In my considered view, it is only if the defilement had occurred either in darkness or in circumstances in which the appellant had not been positively identified, that the prosecution would have needed to connect the infection on PW1 to the appellant, by proving that the same was common to both persons.

For that same reason, the fact that PW4 was unable to identify the appellant in court, would have absolutely no effect on the rest of the prosecution evidence, which had already connected the appellant to PW1.

In the result, I am satisfied that the prosecution had proved beyond any reasonable doubt that the appellant had defiled PW1 on 1/10/2004. Therefore, the conviction of the appellant was safe.

As regards sentence, I find that imprisonment for 23 years is well within the law, as the maximum sentence prescribed is life imprisonment. I therefore find no basis, in law or fact, to interfere with the said sentence.

Accordingly, the appeal herein is dismissed. I uphold both conviction and sentence.

Dated and Delivered at Kitale, this 4th day of December, 2007.

FRED A. OCHIENG

JUDGE