

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 112 of 2004

SAMUEL NJOROGE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, Samuel Njoroge was charged with **defilement of a girl under the age of fourteen (14) years contrary to Section 145** of the **Penal Code**. The particulars of the charge were that on the 31st of March 2003 at [*particulars withheld*], Elburgon, the appellant unlawfully had carnal knowledge of TWN, a girl under the age of fourteen years. The appellant was alternatively charged with **indecent assault of a female contrary to Section 144** of the **Penal Code**. The particulars of the charge were that on the same day and at the same place, the appellant unlawfully and indecently assaulted the said TWN. After a full trial, the appellant was found guilty as charged on the main charge and was sentenced to serve ten (10) years imprisonment with hard labour and one stroke of the cane. The appellant was aggrieved by his conviction and sentence and has appealed to this court.

In his petition of appeal, the appellant has raised several grounds of appeal faulting the decision of the trial magistrate in convicting him. He was aggrieved that he had been convicted without the evidence of his medical examination being adduced to establish that he had actually defiled the complainant. He faulted the trial magistrate for not considering the fact that no witness had been called from his neighbourhood who could have corroborated the evidence of the complainant that he had kept her in his house for five days. He was further aggrieved that the trial magistrate had not considered the fact that the complainant had been his girlfriend and further that he had given false testimony as a cover up for her promiscuous behaviour. The appellant faulted the trial magistrate for sentencing him to a harsh custodial sentence. He urged this court to allow the appeal. At the hearing of the appeal the appellant with the leave of the court presented to this court written submissions in support of his appeal. Mr Gumo, the Assistant Deputy Public Prosecutor made oral submissions urging this court to dismiss the appeal. He submitted that the prosecution had proved its case against the appellant to the required standard. This court will give the reasons for its findings after briefly setting out the facts of this case.

On 31st of March 2003 at about 7.00 p.m., PW2 MG sent her daughter PW1 TW (*hereinafter referred to as the complainant*) to buy milk from a dairy in the neighbourhood. PW3 JW who was also present when the complainant was being sent by her mother, also gave her money to buy her milk. At the material time the complainant was twelve years old. The complainant went to the dairy but did not get the milk. As she was returning home, she was accosted by the appellant and who forced her to go to his house. According to the complainant the appellant threatened to kill her if she screamed. At the time the complainant knew the appellant by appearance but not by name.

She testified that the complainant raped her repeatedly the whole of the night and for the next five days. It was her testimony that she felt pain when the appellant had sex with her. She wanted to scream for help, but the appellant threatened her with a knife. He told her that he would kill her if she ever screamed. During the time that the appellant detained the complainant against her will, he brought her food and also gave her other clothes when the clothes she was wearing were stained by blood. After five

days, the appellant escorted the complainant to the bus stage and gave her Kshs. 50/= and told her to disappear from the Elburgon area and never to return back.

According to the complainant, the appellant told her that if she ever returned to Elburgon he would stab her. The complainant went to her Grandmother's house at Molo. Her grandmother PW4, MWK told the court how the complainant went to her house on the 4th of April 2003 at about 3.00 p.m. when she was in a distressed condition. PW4 was able to extract what had transpired after persuading the complainant to talk. PW4 then informed PW2 the mother of the complainant to fetch the complainant. The complainant narrated the events to her mother. During the period that the complainant disappeared from home, PW2 looked for her everywhere including at her grandmother's house in vain.

PW2 then took the complainant to the police where a report was made to PW5 PC Githinji of Elburgon Police Station. The said police officer accompanied the complainant to the house of the appellant and had him arrested. PW5 then instructed the complainant to be taken to the hospital so that she could be examined by a doctor. The complainant was examined by PW6 Roseline Nyangol a Clinical Officer who established that the complainant had indeed been defiled. She found that the labia was swollen and tender. There was a whitish discharge and blood was seen in the complainant's vagina. She also established that the complainant was twelve years old.

When the appellant was put on his defence, he denied that he had defiled the complainant. He testified that although he knew the complainant he had not interacted with her in anyway. He further testified that if indeed it was true that he had abducted the complainant and held her against her will in his house, there was nothing which could have prevented the complainant from screaming to attract attention. He further testified that it could have been impossible for him to detain the complainant against her will due to the fact he lived in the crowded [*particulars withheld*] within Elburgon Township. He testified that he was arrested and charged on a false claim by the complainant.

This being a first appeal, this court is mandated to reconsider and re-evaluate the evidence adduced by the witnesses before the trial magistrate so as to reach its own independent determination whether or not to uphold the conviction of the appellant. In reaching its decision, this court is required to put in mind the fact that it neither saw nor heard the witnesses as they testified (See *Njoroge -vs- Republic [1987]KLR 19*). The issue for determination by this court is whether the prosecution proved its case on the charge against the appellant to the required standard of proof beyond reasonable doubt. This court has read the written submissions presented to it by the appellant. It has also considered the oral submissions made by Mr Gumo on behalf of the State.

The complainant in this case testified that the appellant who was known to her before the incident abducted her and took her to his house while she was walking home from an errand which she had been sent by her mother. The complainant testified that the appellant threatened to kill her if she screamed or resisted his sexual advances. At the time of the incident the complainant was twelve years old. The complainant testified that the appellant repeatedly raped her for a period of five days after which he gave her Kshs 50/= and told her to disappear from Elburgon never to be seen again. The appellant threatened that he would stab the complainant if she ever returned to Elburgon. The complainant traveled to Molo to her grandmother's where she was able to narrate the ordeal that she had undergone at the hands of the appellant.

PW4, the complainant's grandmother told the court how the complainant appeared distressed when she went to visit her on the 4th of April 2003. PW4 then informed PW2 the mother of the complainant who had looked for the complainant for five days without success. PW2 and PW3 narrated how on the material day of the 31st of March 2003 they had sent the complainant to buy milk at a local dairy. The complainant did not however return back. PW6 examined the complainant and established that indeed she had been defiled. The P3 form which had been filled by PW6 was produced in evidence by the prosecution.

Does this evidence by the prosecution establish that it was the appellant who defiled the complainant? Certain aspects of this case are not in dispute. It is not disputed that the complainant was twelve years at

the time of the incident. It is further not disputed that indeed the complainant was defiled. This was established by the evidence of PW6 the Clinical Officer who examined her and produced the P3 form duly filled in evidence. What has been disputed by the appellant however is the prosecution's allegation that he was the one who had defiled the complainant. Evidence was adduced by the prosecution that prior to the 31st of March 2003 the appellant was known to the complainant. The complainant testified that she knew the appellant. The complainant gave a graphic description of how the appellant abducted her threatened her and finally defiled her for a period of five consecutive days. During this period the appellant threatened the complainant with a knife. The complainant soiled her skirt with blood. The appellant gave her another skirt. After five days the appellant gave the complainant money and told her to disappear from Elburgon and not back again. The appellant told the complainant if she ever came back he would stab her.

Upon re-evaluating this evidence it is clear that the only evidence that the prosecution relied on in its case against the appellant is that of the complainant. Although the complainant in this case is a child and whose evidence would require corroboration in certain instances, this court after evaluating the evidence is convinced that the complainant was telling the truth. The complainant could not be said to be a child of young and tender years. At the time of the offence the complainant was a standard six pupil at [particulars withheld]. She knew the appellant. There was no reason why she could give false testimony against the appellant. Her demeanour when she went to her grandmother's house clearly showed that the appellant had threatened her to the extent that she actually believed that if she went back to her mother's house she would be stabbed. No evidence was adduced that could remotely suggest the allegation by the appellant that the complainant had sexual experience prior to the material time of the incident.

The complainant's evidence was corroborated by the evidence of PW2 her mother, PW3, and PW4 her grandmother. All the three witnesses corroborated the complainant's evidence as relates to the circumstances of her disappearance and her re-appearance. There is no doubt that the complainant properly identified the appellant as her assailant. There can never arise a case of mistaken identity. After re-evaluating the evidence adduced, this court holds that the prosecution has proved its case against the appellant to the required standard of proof of beyond reasonable doubt. The defence offered by the appellant was rightly dismissed by the trial magistrate as a mere denial. It is the view of this court that the said defence does not raise any issue that would dent the otherwise watertight evidence adduced against him by the prosecution.

In the premises therefore and for the reasons stated above the appeal herein is dismissed. This court will not interfere with the sentence meted out on the appellant. In my opinion the said sentence was lenient in the circumstances. I will however set aside the corporal punishment meted out which was abolished by the law. As regard the imprisonment term, I will let the sleeping dogs lie. The conviction of the appellant by the trial magistrate and the sentence imposed thereto is confirmed.

DATED at NAKURU this 22nd day of February 2006.

L. KIMARU

JUDGE