

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL NO. 18 OF 2005

MICHAEL LOKWARA AYAN
APPELLANT.

VERSUS

REPUBLIC RESPONDENT.

(An appeal from the original conviction and sentence of G.M. ONG'ONDO – SRM. In Criminal case No. 545 of 2004 delivered on 23rd February, 2005 at Lodwar.)

J U D G M E N T.

The appellant Michael Lokwara Ayan was charged before the Senior Resident Magistrate Lodwar with the offence of defilement of a girl under the age of 16 years contrary to section 145 (1) of the penal code. He denied both the main and alternative counts. The matter proceeded to full trial with the prosecution calling 4 witnesses. The appellant on his part made an unsworn statement of defence and called no witnesses. The complainant was aged 9 ½ years. She testified on oath after the learned trial magistrate conducted a voire dire and satisfied himself that she was possessed of sufficient evidence to understand the nature of the oath. She narrated to the trial court how she had been sent by her grandmother – PW2 to fetch water at the tap. She filled her bucket but the appellant is said to have gone to her, held her hands and led her to his house. He is said to have armed himself with a knife. He closed the door and placed the complainant on his bed. He held her mouth, undressed her, removed his trousers and then had carnal knowledge of her. She said she felt pain in her genitalia. Just then, PW2 noticed that she had taken rather long at the tap she went to check on her. She got there just in time to see the complainant coming out of the appellant's house. They went home. The complainant went to her parents are reported that the appellant who she was referring to by his nickname of 'Afro' had defiled her.

The matter was reported to the police station the following day. Complainant was taken to hospital for treatment. She was examined by Dr. Philip Kipkorir Tonui who confirmed that she had been defiled. He completed a P3 form to that effect and produced it before the trial court as exhibit. The appellant was arrested and charged as earlier stated. In his defence, he admitted that the complainant was 10 years old. He denied having known her before. He denied having defiled her saying that she was too young for him.

The learned trial magistrate assessed this evidence and found PW1's evidence truthful. He found that the same was corroborated by that of PW2 and the Doctor. He proceeded to convict the appellant and sentenced him to 28 years imprisonment.

Aggrieved by that conviction and sentence, he filed this appeal. He has raised a total of 9 grounds of appeal. He also tendered an 11 page written submission expounding on those grounds. I have considered those grounds and the said submission very carefully. The gist of his grounds of appeal is that the evidence of the witnesses of contradictory and that he was not medically examined to prove that he is the one who defiled the complainant.

The learned state counsel supports both the conviction and the sentence. He submitted that the P3 form corroborated her evidence that she had been defiled and further that her evidence was corroborated by that of PW2. He also contended that there was no grudge between the 2 families to necessitate any fabrication. He said that the complainant knew the appellant well and it was not dark.

I have considered the evidence adduced before the trial court as analysed above. I have considered the same along with the appellant's grounds of appeal and the submissions by the appellant and the learned counsel for the state. To start with, there is no dispute that the complainant was aged approximately 10 years old, and that she was defiled on the night in question. Her evidence was corroborated by the medical evidence adduced through PW4. The only issue for determination is whether it was the appellant who defiled her. From the evidence on record, it was not dark. Indeed the complainant could not have been sent to fetch water if it was dark. She could therefore see clearly. PW2 also said it was not dark. She saw the complainant emerging from the appellant's house. She told her then that it was he appellant who had taken her there but she did not disclose immediately that she had been defiled. The complainant and her grandmother both knew the appellant well before that date. The issue of possible mistaken identity does not therefore arise. The fact that the complainant told her parents and PW2 that she had been defiled by the appellant immediately after she got home corroborates her evidence to the effect that it was the appellant who defiled her. The evidence of the complainant was tendered on oath. It was properly tested by the appellant on cross-examination and it was not dented. The learned trial magistrate found her evidence truthful. I have no reason to fault that finding my finding is that the learned trial magistrate analysed the evidence before him properly. He also considered the appellant's defence but found it unsustainable. He also applied the relevant case law appropriately. I find that he arrived at the right decision.

I am satisfied that the appellant was properly convicted. I also find that the sentence of 28 years imprisonment was lawful and not excessive given the fact that the offence carries a life sentence. I therefore find no need to interfere with the same.

Consequently, I hold that this appeal lacks merit and the same is hereby dismissed. I uphold the conviction and the imprisonment of 28 years plus hard labour.

W. KARANJA.

JUDGE.

Delivered, signed and dated at Kitale this day of February, 2006 in presence of:-