REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)
CRIMINAL APPEAL NO. 235 OF 2004

EMMANUEL MUSHINA MWALILI .....
ACCUSED

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

The Appellant **EMANUEL MUSHINA MALILI** was charged with two Counts. In the main Count he was charged with **Defilement contrary to Section 145 (1) of the Penal Code**. In the alternative Count he was charged with **indecent assault on a female contrary to Section 144 (1) of the Penal Code.** After the case was heard, the learned trial magistrate convicted him for the main Count of **Defilement** and sentenced him to 15 years imprisonment. It is against the conviction and sentence that the Appellant now appeals.

In his petition of appeal the Appellant raised four grounds as follows:-

1) That the learned trial magistrate erred in law and facts in failing to appreciate that the evidence adduced did not point to the Appellant as the offender for reasons:-

(i) Incident took place on 9th October, 2003 and yet he was arrested on 26th October, 2003

(ii) P.W.5 and the complainant both did not inform their teachers or anybody else of the incident and were therefore incredible witnesses.

2) That the learned trial magistrate did not adhere to Section 169 (1) of the Criminal Procedure Code.

3) That the prosecution case was not corroborated and therefore not proved.

4) ***That the sentence imposed was unsafe and bad in law, hash and excessive***.

The brief facts of the prosecution case was that the complainant, P.W.1, a child of 12 years left her home to go and borrow a jembe from a neighbour, one Mama Consila. She did not find anyone in that home. She decided to walk back home and that is when she met the Appellant who took her to an abandoned house and defiled her. The complainant gave graphic details of the incident and how the Appellant first removed a knife to threaten her with death before knocking her down and removing her pants and then his and how he defiled her. The complainant said that the Appellant then abandoned her and but before leaving he used his knife to threaten her with death if he divulged that information to anyone. P.W.6, the complainants friend and age mate later found the complainant lying beside the road unable to walk and bleeding. PW.6 said that she carried her home, bathed her, washed her clothes and left her sleeping.

P.W.1 told P.W.6 about the matter but she, and the complainant, told no one. The complainant later reported the matter to the counselor/teacher in her school. The complainant was taken to hospital by P.W.2 her grandmother who lives with her, after the teacher informed her everything. Eventually P.W.5, Dr. Kamau, the Police surgeon examined the complainant and confirmed that her hymen was broken and that she had been defiled.

The Appellant in his defence denied that he defiled the complainant. The Appellant said he heard of it only when the complainants grandmother called him and caused his arrest. He claimed that the complainants grandmother implicated him with the offence because she wanted him.

The appeal was opposed by the state. Miss GATERU for the sate submitted that the state was supporting both the conviction and the sentence.

I have carefully considered this appeal together with the record of the proceedings and judgment and re-evaluated the evidence on record bearing in mind that I neither saw nor heard the witnesses and giving due allowance for same as required of this Court in the case of **OKENO V REPUBLIC 1972 E.A. 32.**

The first issue raised by the Appellant seems to be that of identity. The Appellant argued that the evidence adduced by the prosecution did not point at him as the culprit. On the issue of identity, learned Counsel for the State submitted that the Appellant was positively identified. That the offence occurred in broad day light and that the complainant knew the Appellant very well. Further that P.W.6, the complaints friend and age mate corroborated the complainants evidence by the fact that she found the complainant unable to walk due to pain and bleeding from her private parts. P.W.5 also confirmed that the complainant had suffered defilement at some point.

The Appellant challenged the evidence of the complainant on grounds that he could not have committed the offence since he knew very well that the complainant knew him and would eventually lead to his arrest. He also faulted the complainants evidence on the basis that she did not tell her grandmother P.W.2, soon after the incident and that she told the teachers only afterwards and so was lying. P.W.6, the Appellant submission, also told no one despite having been informed by P.W.1 about the incident.

I have considered the learned trial magistrate's judgment. At page J3 the Learned trial magistrate concluded thus about the complainants demeanour and evidence.

"***Having considered all the evidence in its entirety as given by the prosecution witnesses and more so the complainant and the change after the assault, e.g. the grandmother and the teacher said that when they first inquired from her why she was limping, she just started crying showing her distressed state. I would find it as a fact that indeed the complainant was telling the truth. That she was actually defiled… I do not trust that there was any mistake on the identification of the accused person."***

The learned trial magistrate found that the complainant was telling the truth and that she was satisfied that her evidence that the Appellant had defiled her was true and believable. The learned trial magistrate after analyzing the entire evidence which she did quite well, together with the Appellants defence and having considered the demenour of all who testified before her concluded that the complainant was an honest witness and that she was telling the truth. I have on my part re-evaluated the entire evidence once more. The complainant was knocked down by the Appellant and she described him both in terms of where he worked and where he lived at the time the offence was committed. Even the Appellant does not deny that the complainant knew him very well. The Appellant went ahead to threaten the complainant with a knife both before and after defiling her. The complainants evidence could not be faulted. The complainant was 12 years old. The learned trial magistrate was impressed by her and found her possessed of sufficient knowledge and understanding as to know the duty to tell the truth. She gave her evidence forthrightly. The account was vivid and graphic. That cannot be the evidence of one who was coached or told what to say as the Appellant tried to suggest. It was an account given by a person narrating what had befallen her and how she felt about it, reacted to and how later on it affected her. From the grandmother P.W.2, the complainant all of a sudden started limping and crying without divulging anything. From the teachers evidence P.W.3, the complainant was withdrawn, moody, depressed, crying and walking with

difficulties. The evidence of both witnesses shows clearly that the complainant was affected physically, emotionally and mentally and was traumatized by her experience. It is not a wonder that she became withdrawn and did not immediately tell the adults in her life what had befallen her. It is not a wonder taking into account the complainants evidence that she had been threatened by the Appellant with a knife and warned not to tell anyone unless she wanted to die.

I am persuaded fully that the complainant was telling the truth. As for P.W.6 not telling anyone what the complainant had told her. P.W.6's role is very clear. She helped her age mate to calm down and be comfortable after the incident. P.W.6 impressed me as one who did not want to interfere with peoples private affairs. She had no interest in telling anyone and from her evidence she was not apologetic about it. Considering that the complainant feared her grandmother so much and did not immediately tell her what had happened could as well explain why PW.6 also failed to tell her. I do not think that P.W.6's failure to report to anyone what the complainant told her was of any material effect to the prosecution case.

The Appellant submitted that the prosecution case was not corroborated. The complainant's evidence that she was defiled received corroboration from PW.6 who saw her bleeding from her private parts and unable to walk. P.W.5, the Dr. who examined her three weeks after the incident confirmed that the complainant had been defiled. The evidence of the teacher P.W.3 supports the complainants evidence concerning the attack and goes to show that the complainant remained consistent in her evidence in Court as in her story to P.W.3. The Appellants ground that the prosecution case was not corroborated cannot stand.

The Appellant also raised issue with the trial magistrate's judgment and submitted that she did not comply with **Section 169 (1) of the Criminal Procedure Code.**

Section 169 (1) of Criminal Procedure Code provides:

"***169.(1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the Court in the language of the Court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open Court at the time of pronouncing it.***

(2) In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.

(3) In the case of an acquittal, the judgment shall state the offence of which the accused person is acquitted, and shall direct that he be set at liberty."

I do not find merit in this ground. The learned trial magistrate exhaustively complied with this Section. The learned trial magistrate had analyzed entire evidence before her, stated the issues for determination and gave reasons for her determination among other features. The judgment was excellent and could not be said to have fallen short of the requirement of **S.169 (1) of the Criminal Procedure Code.**

Finally the Appellant urged the Court to find that the sentence was hash, excessive and bad in law. Learned Counsel for the State submitted that the sentence was neither harsh nor excessive. That the offence carried a maximum of life imprisonment. That the sentence of 15 years was lenient and urged the Court to dismiss the entire appeal. **Defilement contrary to section 145 (1) of Penal Code** carried a maximum of life imprisonment with hard labour. Even though the Appellant was a first offender, I find that the offence was aggravated in that the Appellant was armed with a knife.

The sentence of 15 years imprisonment was too lenient in the circumstances. It was bad enough that the Appellant knocked the complainant down and defiled her leaving her bleeding and unable to walk. To worsen the situation further, the Appellant used a knife to both intimidate and threaten the complainant first in order to defile her and then in order to ensure she told no one. In the circumstances I find that the

offence was aggravated and that the Appellant deserved a more severe sentence. I will set aside the sentence of 15 years imprisonment and in substitution thereof sentence him to 20 years imprisonment with hard labour. Subject to the enhancement of the sentence, the Appellants appeal is dismissed. He can appeal against this judgment and sentence to the Court of Appeal.

DATED AND DELIVERED THIS 15TH OF MARCH 2006

J. LESIIT

JUDGE

Read, signed and delivered in the presence of

Appellant

Miss Gateru for State

Huka – Court Clerk

J. LESIIT

JUDGE