



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Criminal Appeal 315 of 2004**

ATHANUS CHERUIYOT LANGAT APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal from original conviction and sentence in Nakuru Criminal Case No. 892 of 2004 – H. Wasilwa – PM)

JUDGMENT

The Appellant **ATHANUS CHERUIYOT LANGAT** was charged before the Principal Magistrate's court at Nakuru with two counts of Attempted Defilement of a girl contrary to section 145(2) of the Penal Code and the second count Indecent Assault of a female contrary to section 144(1) of the Penal Code.

The particulars of the offences were that on 12th April, 2004 at [*particulars withheld pursuant to section 76(5) of the Children Act, 2001*] within Rift Valley Province, the accused attempted to have carnal knowledge of [*Name withheld*] a girl under age of 14 years and the second count, that on the same day, the accused at [*particulars withheld pursuant to section 76(5) of the Children Act, 2001*] of the Rift Valley Province unlawfully and indecently assaulted [*Name withheld*] by touching her private parts.

The Appellant pleaded not guilty of the charges and the case came up for hearing before the Principal Magistrate Mrs. H. Wasilwa who after a full hearing found the Appellant guilty as charged on the 1st count, convicted him and sentenced him to 10 years in jail with hard labour.

The Appellant was dissatisfied with the conviction and sentence and thus this appeal where he raised the following grounds of appeal.

Firstly, the Appellant complained that the learned magistrate erred by convicting and sentencing him to 10 years imprisonment while relying on the evidence of the complainant and her father.

Secondly the learned trial magistrate failed to consider there was a misunderstanding between PW2 and the Appellant who had refused the PW2 the right to graze his cows in the protected premises where the Appellant was guarding.

Thirdly the learned trial magistrate erred by failing to consider the appellant sworn statement of defence and convicting him when there was no evidence that the complainant was subjected to violence.

On the part of the state, Mr. Koech opposed the appeal. He supported both the conviction and sentence on the following grounds.

Firstly, Mr. Koech submitted that there is clear evidence from PW1 regarding the Appellant's attempted defilement. The complainant was lured by the Appellant to take a calf into the protected premises of Technology Farm where the Appellant was guarding. This clearly shows the Appellant was creating an opportunity for this intended defilement. It is clear from the evidence that the Appellant tried to suppress the complainant and unzipped his trousers in readiness to commit the offence of defilement but the complainant screamed.

PW2 the father of the complainant found the Appellant while he had pinned down the complainant and he had unzipped his trousers. PW2 was only looking for his daughter who had taken long to return and he was led to the scene by the presence of the calf which he had instructed his daughter to take for grazing. Simultaneously he heard his daughter scream and found the appellant had pinned his daughter down.

Counsel for the state urged this court to ignore the defence, as lacking in common sense due to the fact that even if the Appellant were to be believed it is inconceivable that a father would like to implicate his daughter in such heinous circumstances.

I have carefully considered the facts leading to the Appellant's conviction which can carefully be stated as follows:

The Appellant was guarding the Technology farm on 12th April, 2004 at *[particulars withheld pursuant to section 76(5) of the Children Act, 2001]*. The complainant was instructed to take the calf to graze nearby the fence when she found the appellant who invited her to drive the calf into the farm where the Appellant was guarding.

The complainant complied and while inside the farm where there was long grass, the appellant pinned the complainant down, held her mouth and unzipped his trouser and attempted to defile her.

PW2 clearly explained to the court how he went searching for his daughter and was attracted by the calf and at the same time he heard screams and when he appeared at the scene he found the appellant holding the complainant while his private parts were exposed in readiness to defile the complainant

I am satisfied upon the re evaluation of the entire proceedings that there was no error when the magistrate arrived at the conclusion heading to the conviction.

I am also satisfied that the learned magistrate properly directed herself and established the intelligence of PW1 and also considered defence by the appellant which was a mere sham and defied common sense.

I have also considered the provisions of the law and it is clearly provided that under section 145(2) of the Penal Code that:

“Any person who attempts to have unlawful carnal knowledge of a girl under the age of sixteen (16) years is guilty of a felony and is liable to imprisonment with hard labour for life.”

I am therefore of the view that the sentence of 10 years is proper and in the circumstances I dismiss the appeal.

It is so ordered.

M. KOOME

JUDGE

2.3.2006