



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISII

Criminal Appeal 164 of 2004

MUKAMI NYAKERORE APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From original conviction and sentence of the RM's court at Kehancha in criminal case No. 246 of 2004)

JUDGMENT:

The appellant MUKAMI NYAKERORE was charged before Kehancha Resident Magistrate court with two offences the first being that of attempted defilement of a girl contrary to s. 145 (2) Penal Code and the second that of indecent assault contrary to s.144 (1) Penal Code. Particulars were that on 12th April 2004 in Kuria District, attempted to have carnal knowledge of AN a girl under age of fourteen (sic) years. Further it was alleged that on the same day and place he unlawfully and indecently assaulted AN girl under 10 years by touching her private parts. He was convicted on both counts. He was sentenced to 10 years imprisonment.

Complainant (PW1) had told the court that on the material day at 8 p.m. she had been sent by her mother GMM (PW2) to buy milk. On her way home she met with appellant who is her uncle.

He held her down and removed her clothes and panties and defiled her. She screamed for help and the mother rushed to the scene and accused ran away. The mother screamed and other people arrived. She was taken to hospital for treatment.

Her mother pW2 said that she had sent complainant to buy milk and she overstayed. She followed her and heard a Radio inside a maize plantation. She called her and she told her she was with an old man. She went and found appellant putting on his trousers. He ran away.

The court after assessing the evidence convicted the appellant. This being a first appellate court I have re-evaluated the evidence. The state counsel supported the conviction and said appellant was properly identified. I am however doubtful about the identification. PW1 said the incident took place at 8 p.m. Obviously it was dark. Though the appellant is a relative she did not say what enabled her to identify him. She did not say if there was light from any source. Neither did she say her attacker talked to her. She just said that he met her and pinned her down. The incident having taken place at night there was need for evidence to corroborate that of the complainant. The evidence by her mother on identification also needed corroborations. Infact the mother said that the incident took place inside a maize plantation.

This must have made identification even more difficult inside the maize farm. It was therefore unsafe for the trial magistrate to convict on uncorroborated evidence on identification. There was no evidence that appellant was arrested at the scene. Both PW1 & 2 said he ran away from the scene. None of those who arrested him were called to state where they arrested him from. PW3 the area chief only said he found him already arrested.

The judgment by the magistrate was a very superficial one. It did not seem to set out the issues to consider and properly analyze them in the light of the provisions of s. 169 (1) C.P.C. The magistrate did not even say if he found the appellant guilty on both charges or not. Worse still the court did not say if it was sentencing the appellant to 10 years imprisonment on each count or not. The magistrate simply stated:

“Accused to serve 10 years imprisonment with hard labour.

Orders accordingly.”

It is not indicated if that sentence is for the first or the second count. In short the judgment was shoddy and did not carefully analyze the evidence and issues.

In the circumstances I find the conviction was not based on proper evidence. I allow the appeal, quash the conviction and set aside the sentence of 10 years imprisonment with hard labour.

Appellant be set at liberty forthwith unless otherwise legally held.

Dated 18th May 2006.

KABURU BAUNI

JUDGE

Cc – Mobisa

Chirchir for Republic

Appellant present

KABURU BAUNI

JUDGE