REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 450 of 2003

(From original conviction and sentence of the Senior Resident Magistrate's Court at Narok in Criminal Case No. 458 of 2003 – S. M. Githinji [SRM]

KOYA KOTIKASH…….....…….APPELLANT

VERSUS

REPUBLIC…….....…..……RESPONDENT

JUDGMENT

The appellant, Koya Kotikash was charged with offence of defilement of an imbecile contrary to **Section 146 of the Penal Code.** The particulars of the charge were that on the 19th of July 2003, at Lorian Ololulunga, Narok District, the appellant unlawfully had carnal knowledge of ***[name withheld pursuant to section 76(5) of the Children Act, 2001]*** who is an imbecile. The appellant denied the charge and after a full trial was found guilty as charged and sentenced to serve fourteen years imprisonment with hard labour. The appellant was aggrieved by his conviction and sentence and has appealed to this court.

In his petition of appeal, the appellant raised several grounds of appeal challenging the decision of the trial magistrate in convicting him. He was aggrieved that the trial magistrate had relied on the evidence of PW1, the mother of the complainant, who was not at the scene at the time the defilement is alleged to have taken place. He was further aggrieved that no medical evidence was adduced by the prosecution to establish that he had in fact defiled the complainant. He was further aggrieved that the trial magistrate had considered the evidence of the complainant to arrive at the decision convicting him even though the complainant was dumb and could not talk and therefore was not in a position to identify her assaillant. He faulted the trial magistrate for disregarding the evidence offered in his defence and thereby found him guilty of the charge. He was finally aggrieved that the trial magistrate had relied on contradictory and incredible evidence of the prosecution witnesses to convict him of the charge of defilement. He therefore urged the court to allow his appeal.

At the hearing of the appeal, the appellant reiterated the contents of his petition of appeal. He submitted that he was drunk when he was alleged to have committed the offence. It was his argument that no one saw him commit the offence. He reiterated that the evidence that was adduced against him was contradictory and did not connect him with the offence for which he was charged. He pleaded with the court to re-evaluate the evidence and allow his appeal against conviction. He further pleaded for the

court to consider reducing the sentence that was imposed upon him which in his opinion was harsh and excessive.

Mr Koech, Learned Counsel for the State supported both conviction and sentence. He submitted that there was overwhelming evidence which supported the prosecutions case against the appellant. He argued that there were eye witnesses who saw the appellant defile the complainant. He further submitted that when the appellant was confronted by the father of the complainant, he admitted having defiled the complainant and sought forgiveness. He further submitted that there was no issue of mistaken identity as the appellant was known to the witnesses prior to the defilement incident. He submitted that in the circumstances of the case, the sentence that was imposed upon the appellant was appropriate.

This being a first appeal, this court is mandated to reconsider and re-evaluate the evidence that was adduced by the prosecution witnesses before the trial magistrate so as to arrive at its own independent decision whether or not to uphold the conviction of the appellant. In reaching its decision, this court is required to put into mind the fact that it neither saw nor heard the witnesses as they testified (*See* **Okeno –vs- Republic [1972] E.A. 32**). In this appeal, the issue for determination by this court is whether the prosecution adduced sufficient evidence to enable this court find the appellant guilty for the offence for which he was charged. This court is further required to determine whether the defence which was offered by the appellant was sufficient to raise doubt on the evidence that was adduced by the prosecution witnesses.

The evidence that was adduced by the prosecution witnesses can be summarized as follows: PW2 TM, a boy aged fifteen years and PW3 NM, a girl aged thirteen years were at their home on the 19th of July 2003 at about 2.00 p.m. together with the complainant called [***name withheld pursuant to section 76(5) of the Children Act, 2001***] . The complainant is mentally retarded and disabled. At the material time, she was aged sixteen years old. According to the evidence which was adduced by PW1 NM, the mother of the complainant, the complainant was born with mental retardation. The complainant could not talk but could communicate by sign language. The complainant could not walk by herself and was always carried inside and outside the house as the occasion would require.

On the material day, PW1 went to work leaving the complainant under the care of PW2 and PW3. PW2 and PW3 testified that while they were outside their house the appellant who was known to them came to the house and cut open the door of the house. He then entered the house and locked the door from inside. After a short while, they heard the complainant screaming from the house. PW3 peeped through the window and saw the appellant removing his trousers. She further saw him remove the underpants of the complainant. She screamed and attracted the attention of the neighbours. The appellant threatened her with a sword. The screams of PW3 attracted PW4 OO, the father of the complainant who was grazing cattle nearby. He came to his house and before he could reach the house, he saw the appellant jump out of the window and disappear into a maize plantation.

PW4 went inside the house and saw that the complainant had been defiled because there was a discharge which was oozing from her private parts. PW4 went looking for the appellant but could not find him until two days later when he found him at his place of employment. When he asked him why he had defiled his sick child, the appellant sought forgiveness from PW4. PW4 reported the incident to PW7 Police Constable Martin Matiti based at Narok police station who investigated the case and later had the appellant arrested and charged for the offence. PW5 Jackline Kipleting, a Clinical Officer based at Narok District Hospital examined the complainant and confirmed that indeed the complainant had been defiled. She filled the P3 form which was produced in evidence by the prosecution.

When the appellant was put on his defence, he denied that he had defiled the complainant. He testified that he had been arrested for no reason as he had not been to the homestead of the complainant at the material time when the defilement is said to have taken place.

I have carefully re-evaluated the evidence that was adduced by the prosecution and also considered the submissions that were made by the appellant and Mr Koech on behalf of the State in this appeal. There is no doubt that the complainant, who is mentally retarded, was defiled. The defilement was

confirmed by the evidence of PW5 who examined her and formed the opinion that she had been sexually assaulted. The issue for determination by this court is whether it is the appellant who defiled the complainant. PW2 and PW3 testified that they saw the appellant, who appeared to be in a combatant mood, enter their house where the complainant was asleep. The appellant was well known to PW2 and PW3. The appellant locked the door of the house from the inside. After a short while, PW2 and PW3 heard the complainant screaming. When PW3 went to investigate what was going on in the house by peeping through the window, he saw the appellant remove his trousers and also remove the underpants of the complainant. PW3 screamed and alerted PW4 who was herding his cattle nearby. PW4 came to the rescue of the complainant. But before he could reach the house, he saw the appellant jump through the window and rush in to a nearby maize plantation. PW4 went inside his house and saw that the complainant had been defiled. He saw a discharge was oozing from the private parts of the complainant.

Upon re-evaluation of the evidence adduced by the prosecution witnesses, there is no doubt in my mind that it is the appellant who defiled the complainant. The events narrated by PW2, PW3 and PW4 happened within a short time and explained the circumstances under which the complainant was found having been defiled so soon after the appellant was seen escaping from the house where the complainant was sleeping. The evidence adduced by the three witnesses proves beyond reasonable doubt that no one else other than the appellant defiled the complainant. He was inside the house where the complainant was sleeping alone with the complainant. He was seen by PW3 removing his trousers and removing the underpants of the complainant. Although PW3 did not see the appellant actually defiling the complainant (*the appellant having threatened PW3 with a sword*), when the appellant escaped from the house after seeing PW4, PW4 realised that the complainant had been defiled.

The irrefutable conclusion which the trial magistrate reached, and which this court has also reached after independently re-evaluating the evidence, is that it is the appellant who defiled the complainant. His conduct after escaping from the house where the complainant was found having been defiled is further proof that it is the appellant who defiled the complainant. The appellant disappeared from his place of employment for about two days after the incident. When he returned and was confronted by PW4, he admitted having defiled the complainant and sought forgiveness from PW4. Having re-evaluated the evidence, it is clear that the prosecution proved its case against the appellant to the required standard of proof beyond reasonable doubt. The appellant's defence was a mere denial and did not in any way dent the otherwise strong prosecution case against him. I find no merit in his appeal against conviction and I consequently dismiss the appeal against conviction.

On sentence, I find no ground that would make this court interfere with the exercise of discretion by the trial magistrate in sentencing the appellant to the custodial sentence that he did. The appellant defiled the complainant, a mentally retarded child, and who was also disabled without regard to her state of mind and her physical condition. The appellant had no excuse whatsoever to defile such a defenseless child. The sentence meted out on him by the trial magistrate in my view was lenient in the circumstances. I will however not interfere with it. The trial magistrate took into account all the relevant circumstances in reaching the decision sentencing the appellant. The appeal against sentence is therefore dismissed. The conviction and sentence of the trial magistrate are hereby confirmed.

DATED at NAKURU this 10th day of May 2006.

L. KIMARU

JUDGE