



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 124 of 2005

(From original conviction (s) and Sentence(s) in Criminal Case No. 378 of 2004 of the Principal Magistrate's Court at Kikuyu (M. W. Murage - PM)

JOHN MUIRURI KARANJA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

JOHN MUIRURI KARANJA was found guilty and convicted of **DEFILEMENT OF A GIRL** contrary to **Section 145(1)** of the **Penal Code**. He was sentenced to life imprisonment with hard labour. He was aggrieved by the conviction and sentence and so lodged this appeal.

The Appellants petition of appeal raises three grounds of appeal namely: -

1. That the learned trial magistrate erred in basing the conviction on the evidence of the Complainant which was not sufficient or trustworthy to establish the offence charged.
2. That the prosecution made critical error by failing to avail a crucial witness namely the father of the Complainant who led to the Appellant's arrest.
3. That the appellant's defence was not properly taken into account.

The appeal was opposed.

The facts of the case were that the Complainant was walking to a hotel where she was to wait for her mother at 9.00 p.m. on the material evening. The Complainant, a girl of 14 years then was intercepted by three men among them the Appellant whom she knew before. The three had sex with her in turns while covering her mouth so that she could not scream. This was at the railway line. After that the three men left her there bleeding profusely. The Complainant sent for her father who took her to hospital where she was admitted. She described the Appellant and he was arrested. PW1, the Doctor who examined the Complainant said that the Complainant was bleeding profusely and had both her hymen and birth canal torn. Her abdomen was painful and tender. He referred her for further treatment. He examined her the same day of the incident and concluded that she had been defiled. The Appellant denied the charge and said that the Complainant had him arrested over a debt she owed him.

I have carefully considered this appeal together with the evidence adduced before the trial court which I have analyzed and evaluated afresh while bearing in mind that I neither saw nor heard the witnesses and giving due allowance. See **OKENO vs. REPUBLIC 1972 EA 32**.

The Appellant challenged the trustworthiness and sufficiency of the Complainant's evidence. The Appellant submitted that it was true that the Complainant knew him before the attack. Appellant submitted that the Complainant did not say how she identified the Appellant or where the alleged defilement took place emphasizing that it was at 9.00p.m. and therefore late. He relied on **MAITANY vs. REPUBLIC (1986) 2 KAR 75** and **WANGOMBE vs. REPUBLIC 1980 KLR 149**. On the first cited case, the court dealt with the issue of identification and the need to ascertain the nature of the light available, its size and position relative to the accused person. The second cited case deals with the need for a trial court to consider the length of time under which a witness observes an accused person.

Miss Nyamosi for the State submitted that the evidence adduced by the prosecution was strong to support the conviction.

In the instant case the Complainant told the court that she was walking to a hotel where she was to meet with her mother when the 3 men intercepted her. The Complainant said that the Appellant, whom she knew before, introduced the other 2 co-accomplices as his friends from Gitaru. They then dragged her to the railway line where they defiled her in turns after removing her trouser and pant. The Complainant's evidence was clear that she knew the Appellant before. On the day in question, she conversed with him before he attacked during which time the Appellant said that his two friends were from Gitaru. The Complainant was candid in her evidence. She knew the Appellant before and also knew where he worked. Given the evidence that they conversed before the attack, and given the fact that the sexual assault was committed a distance from the place they met, and further given the fact that the defilement must have taken some time to be accomplished, I find that for a person she knew before, in all these circumstances, the identification of the Appellant by the Complainant was quite safe. The Complainant was found to be a truthful and believable witness by the trial court which had the opportunity to see and examine her demeanor. This court finds no basis of disagreeing with the learned trial magistrate's finding. The two cited cases while they relate to robbery nonetheless the tests suggested to be applied in them, when applied to this case, adds re-assurance of the safety of the Complainant's evidence.

On failure to avail the Complainant's father as a witness, that failure is not critical in this case. The father of the Complainant did not witness the incident. He only took her to hospital. Further, since the Complainant identified the Appellant by recognition the fact that her father led to the Appellant's arrest would not in my view add any more weight to the Complainant's evidence than it already has. I find the failure to call the Complainant's father as a witness would not justify an adverse inference being made that his evidence may have been adverse to the prosecution case as there was no justification to come to such a holding. PW1 saw her the same day and so did the Police Officers, PW3 and they confirmed that she was bleeding profusely from her private parts.

The last ground was that the Appellant's defence was not given due consideration. The learned trial magistrate not only summarized the Appellant's defence but also evaluated and analyzed it vis-à-vis the evidence of the prosecution before finding that in view of the overwhelming evidence of the prosecution which was unchallenged, the case was proved against him. I have also considered his defence afresh. He dwelt on the events leading to his arrest on 30th saying he had gone to collect money from the Complainant which she owed him when instead, the Complainant called the police. Besides, in cross-examination, the Appellant did not pose the issue of any debt owed to him by the Complainant neither did he question her whether she called police to arrest him. In fact PW3 who arrested the Appellant said that the Complainant was admitted at Kenyatta National Hospital on the same day of this attack. Clearly the Appellant's defence was an afterthought and the learned trial magistrate was correct in dismissing the same.

On the sentence the Appellant urged the court to find it too long. **Miss Nyamosi** for the State submitted it was made after the court considered his mitigation. I have looked at the sentence and the

remarks of the learned trial magistrate before passing the life sentence on the Appellant. The learned trial magistrate did not refer to the Appellant's mitigation that he was sick and his plea for leniency. I have taken that into account and the fact that he was serving another sentence at the time of sentence. The nature of the sentence he was serving is not disclosed nor the nature of the conviction which led to this. The learned trial magistrate seems to have been dismissive of the Appellant's previous conviction. It may have been irrelevant to present the charge. For that reason the sentence of life imprisonment is set aside and in substitution thereof a sentence of 20 years imprisonment with hard labour is ordered. To that extent only the appeal succeeds otherwise the appeal against conviction is dismissed.

Dated at Nairobi this 19th day of July 2006.

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LESIT, J.

JUDGE

Read, signed and delivered in the presence of;

Appellant - present

Miss Nyamosi for the State present

Tabitha: Court Clerk

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LESIT, J.

JUDGE