



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU**

Criminal Appeal 212 of 2004

(From original conviction and sentence in Criminal Case No. 707 of 2004 of the Chief Magistrate's Court at NAKURU – H. WASILWA, P.M.)

LAWRENCE OCHIENG.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was charged with defilement of a girl contrary to **Section 145(1)** of the **Penal Code**. The particulars of the offence were that on the 22nd day of March 2004 [*particulars withheld*] Estate in Nakuru District of the Rift Valley Province he unlawfully had carnal knowledge of EWM, a girl under the age of 14 years. He was tried and convicted and sentenced to 40 years imprisonment with hard labour. The appellant was aggrieved by the said conviction and sentence and preferred an appeal to this court.

A first appellate court is under an obligation to reconsider all the evidence that was adduced before the trial court and re-evaluate the same and reach its own independent findings regarding the conviction and sentence.

The prosecution case was that **PW1, EWM**, a nursery school child aged 4 years, was staying with her mother, **CMM (PW4)**. The appellant was a boyfriend to CMMf or over 4 years and they were staying together. PW4 said that the appellant was not the father of the complainant, EWM. PW4 testified that in the evening of 22nd March 2004 she quarreled with the appellant while they were in the house where they were staying together with the complainant, PW1. PW4 said that she went to a neighbour's house and told her to stay with her daughter and then she left. She did not indicate the name of the neighbour whom she requested to look after her child. On the following morning she returned to her house and was informed that the appellant had defiled her daughter. When PW4 was cross examined by the appellant, she denied that they made love with the appellant that evening before she left and she further stated that when she returned to the house in the morning she did not talk to her daughter. PW1 also did not tell her whether the appellant had defiled her. PW4 further testified that she was arrested and charged for neglecting her child, PW1 and was convicted and put on probation for 3 years.

On the other hand, PW1 said that when her mother left, she remained in the house with the appellant. She alleged that the appellant put his thumb in her private parts and she felt pain but she did not bleed. She

further stated that she did not cry and neither did she tell her mother what had been done to her. She testified that a lantern lamp was on and she was wearing her clothes but the appellant was naked. The trial court was shown a blood stained sheet which was alleged to have been on the bed where PW1 was sleeping. The court was also shown a white stained trouser which was alleged to belong to the appellant.

PW2, testified that she was a neighbour of PW4. She stated that on 22nd March 2004 at 6.30 p.m. PW1 went to her house and she gave her food and took her to bed. It was not clear whether PW1 was taken to bed at the house of PW2 or in the house of PW4 but from the evidence of PW4, it would appear that PW1 was left in the house of PW2 because PW2 testified that the mother of PW1 was not there at the time. At about 9 p.m., PW2 saw PW1 carrying her pair of trousers in her hands. The witness did not tell the court where PW1 was coming from. PW2 said that the complainant was bending and when PW2 asked her what was wrong, she said "**Ochieng**", then cried. She later said that Ochieng (the appellant) had put a big finger in her private parts. PW2 went on to state that she called a neighbour and asked PW1 to repeat her story which she did. They checked PW1 and found something that looked like water on her thighs and the trouser that she carried had sperms. They went to the house of PW1 where they allegedly found the appellant naked on a bed and his inner wear and trouser were on the ground. PW2 called neighbours and told them that the appellant had defiled the complainant and the appellant was beaten and frog matched to the police station. She said that the police went to the house and took the complainant to Nakuru Provincial General Hospital. She further testified that the complainant's mother, PW4, returned to her house at 11 p.m. and they took her to the police station and was arrested and charged for neglecting her daughter. PW2 further stated that the complainant was seen by a doctor the following day and the doctor said that the complainant had not been penetrated but there was a mark in her private parts and was given some treatment and later taken to Arap Moi Children's Home. She further told the court that she did not know where the blood that she saw on the bed sheet came from.

PW3, testified that she was a neighbour of PW2 and PW4 and that on 22nd March 2004 at about 9.30 p.m. she was in the house having supper when PW2 called her and asked her to listen to what PW1 was saying. She heard PW1 say that the appellant had put one of his thumbs in her private parts. She further stated that PW1 had a trouser on her thighs which she alleged had sperms. PW3 then went out and called other neighbours and told them the appellant had defiled the complainant. When a group of people went to the house where the appellant was, they allegedly found the appellant covering himself with a bed sheet that had some blood. PW3 said that he was naked and his pants and trouser were on the ground. Police were called and they arrested the appellant and they took him to Central Police Station. PW1 was taken to Nakuru Provincial General Hospital where she was examined and allowed to go back home. PW3 said that she took the complainant back to the hospital on the following day.

PW5, Police Constable Hellen Bii, testified that on 23rd March 2004 she was at Nakuru Police Station when the complainant was brought in by some ladies who said that she had been defiled by the appellant. The neighbour of PW4 who had taken the complainant to the police station had also arrested the appellant and taken him to the station as well. PW5 issued a P3 Form to the neighbour of PW4. On the following morning, PW5 was given a bed sheet which had blood and a pair of trousers belonging to the complainant which she said had stains of sperms. She recorded a statement and observed that PW1 was in pain and could not walk well.

PW6, Dr. Gachunga Paul, testified that on 24th March 2004 he examined the complainant who alleged that she had been defiled by a person known to her. His findings were that the genitalia had a feature of chronic inflammation of the labia minora and the hymen was partially torn but there was no discharge. He further testified that the complainant's genital had no spermatozoa but some bacteria was seen. He produced the P3 form which he had filled and signed.

In his defence, the appellant said that on the material day he went to the house where he was staying with PW4 and the complainant. He alleged that PW4 was his wife and that they made love and thereafter quarreled and PW4 left the house together with her child, PW1. After 15 minutes while he was still naked and in bed, he heard some people knocking at the door violently and it was pushed open and he was beaten up. The people alleged that he had defiled PW1 which he denied. He said that he was taken to the chief and later to the police where he was beaten up again. He said that the previous night he had

gone home at 2 a.m. and found PW1 alone. He further testified that he had quarreled with PW2 and PW3 and they had decided to gang up with PW4 and plant the case of child defilement on him.

The trial magistrate summarised the evidence of all the prosecution witnesses and that of the appellant and then stated as follows:-

“I have examined the evidence on record. The evidence of prosecution is corroborated and convincing. It is overwhelming against accused. Accused’s defence is merely denial. I find prosecution had established their case as required. I find accused guilty as charged on main count and I convict him under Section 215 of CPC.”

The appellant stated in his petition of appeal that the trial magistrate erred in law and facts by relying on the evidence of PW1, PW2, PW3 and PW4 to convict him saying that the evidence was contradictory. He further stated that PW4 was his wife and they had a serious quarrel on the material night when he was alleged to have committed the offence and the trial magistrate should have taken that into consideration. He denied having defiled PW1.

Section 169 of the **Criminal Procedure Code** states *inter alia* that a judgment should contain the points for determination, the decision thereon and the reasons for the decision. The judgment of the trial court as quoted hereinabove did not satisfy the aforesaid requirements. The learned trial magistrate did not give any reasons for the decision which she reached.

I have carefully considered all the evidence on record and it is evident that there were some glaring contradictions in the evidence of the prosecution witnesses. PW1 said that on the material night she remained with the appellant when her mother went away but on the other hand, her mother, PW4 said that when she quarreled with the appellant she left with her daughter and requested one of her neighbours to take care of her. The complainant said that the appellant put his thumb in her private parts but she did not bleed yet the bed sheet which was produced in court and which was allegedly on the bed on which the complainant was allegedly defiled had blood. It was not clear where the blood came from. The complainant further told the court that she did not cry when the appellant put his thumb in her private parts. According to the evidence of PW2, PW1 was carrying her trouser and the same was said to be having sperms but that was not confirmed by any scientific evidence to be so. There was no confirmation whether indeed there were any sperms on the trouser of PW1. PW2 further told the court that PW1 had sperms on her thighs but again there was no positive truth to that effect. According to the doctor who examined PW1, there was no spermatozoa that was found in the genitals of PW1. According to the evidence of PW2, when the complainant was taken to the hospital the doctor said that there was no evidence to indicate that she had been penetrated. The evidence of PW3 regarding her observations on PW1 was similar to that of PW2.

PW4 testified that she was living with the appellant and that they quarreled and she decided to move out of the house. It would appear that the disagreement between the two was serious if it caused PW4 to decide to move out of the house in the evening hours. As earlier indicated, she left with her daughter. She did not tell the court where she slept. If the complainant’s mother had left with her daughter and requested a friend of hers to take care of PW1, it was not clear how the same child was defiled by the appellant after her mother had left. There was no evidence that the complainant went back to the house where the appellant was after she left with her mother neither was there any evidence that the appellant followed up the complainant to the house of PW2. Given the fact that PW2 and PW3 were friends of PW4 who had a serious quarrel with the appellant on the material night when the appellant was alleged to have defiled PW1, the defence of the appellant was credible. It cannot be ruled out that PW4 conspired with her friends, PW2 and PW3, to bring up a false charge against the appellant. It may be observed that PW1 was a young girl of 4 years and given the strained relationship that existed between PW4 and the appellant, PW4 and her friends may have coached PW1 on the evidence which she was to give in court. PW4 was even charged for neglecting her child and was found guilty and convicted and this aspect of her character should have caused the trial court to treat her evidence with caution particularly in such a serious case as the one which the appellant was facing and where he ended up being sentenced to serve 40 years imprisonment with hard labour.

All in all, I find that the appellant's conviction was unsafe for the reasons as stated herein and I allow the appeal, quash the conviction and set aside the sentence that had been handed down to the appellant by the trial court. The appellant should be set at liberty unless otherwise lawfully held.

DATED, SIGNED and DELIVERED at Nakuru this 18th day of July, 2006.

D. MUSINGA

JUDGE

Judgment delivered in open court in the presence of the appellant and N/A for the state.

D. MUSINGA

JUDGE