



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII

Criminal Appeal 225 of 2004

CHARLES WAMBURA APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From original conviction and sentence of the Resident Magistrate's Court at Kehancha in Criminal Case No.76 of 2004 – M. K. K. SEREM ESQ., R.M)

JUDGMENT

The appellant CHARLES WAMBURA was charged before the Kehancha Resident Magistrate with the offence of defilement of a girl under the age of 16 years contrary to S.145(1) Penal Code. He faced an alternative charge of indecent assault contrary to S.144(1) of The Penal Code.

He was said to have on 18th February 2004 at Mohatu Sub Location in Kuria District had carnal knowledge of Betty Wambura a girl under the age of 16 years. In the alternative he was said to have touched her Private parts.

The court acquitted the appellant on the main charge but convicted him on the alternative charge of indecent assault. He was sentenced to 10 years.

Mr. Abisai submitted that the trial magistrate erred in relying on evidence of the complainant to convict the appellant yet he had rejected the same evidence and acquitted him for the offence of defilement.

He said there were contradictions which should have been resolved in favour of the appellant. Mr. Kemo the learned Senior State Counsel conceded to the appeal. I have considered the appeal and re-evaluated the evidence on record. There are clear contradictions in the evidence and the trial magistrate erred in convicting the appellant. He rejected the evidence of the complainant as far as the charge of defilement was concerned. He stated that the charge was proved yet the complainant had insisted that the appellant had defiled her. That meant the magistrate did not believe the complainants evidence yet he used the same to convict on the alternative charge. She was either telling the truth on both charges or not and once he found he could not believe her on the charge of defilement there is no way he could have believed the same evidence on issue of indecent assault.

There were other contradictions. Samuel Mwita (PW3) the Clinical Officer said he examined complainant on 23rd February 2004.

He said she had gone there with her torn pants yet CPL. SYLKESTER OLALO (PW5) told court that the torn pants were taken to him on 22nd February 2004 by the area assistant chief and he kept them until he produced them in court. If this was so then the pants the complainant took to the Clinical Officer on 23rd February 2004 a day later were different ones.

The magistrate seemed to have placed a lot of emphasis on the torn pants produced as evidence but did not consider if they were the ones worn by the complainant on the day she alleged to have been defiled. One should note that the offence was reported 5 days after the incident. Anything could have happened in between.

There was also the issue of identification which the trial magistrate did not deal with. The incident happened at 7 p.m. It must have been dark by then. The complainant did not say what means enabled her to see and identify her attacker. Her father PW2 on cross examination said he saw the appellant from 150 meters and there were bushes in between. His son CHARLES WAMBURA (PW4) had said he arrived at the scene before his father but said he only saw a man ran away. He could not identify him.

It is therefore suspect that his father who was behind him identified the man PW4 saw running away as the appellant yet PW4 was not able to identify him.

As I said there were many contradictions and discrepancies in the prosecution evidence which should have raised reasonable doubts in the mind of magistrate. The conviction was clearly unsafe.

As for the sentence ten years it was clearly illegal.

S. 7(2) (a) of C. P.C. clearly provides that the maximum sentence a Resident Magistrate can impose in an offence like this was seven years.

He had no jurisdiction to impose sentence of 10 years.

From the above therefore I find the appeal is merited. The same is allowed. The conviction is quashed and sentence of ten years set aside.

Appellant be set at liberty forthwith unless otherwise lawfully held.

Dated 27th October 2006.

KABURU BAUNI.

JUDGE

Delivered in presence of

cc. Mobisa

Mr. Chirchir for State

Appellant P.I.P