REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA
Criminal Case 4 of 2004

(FROM ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL CASE NUMBER 579 OF 2003)

JAMES SHEHE……...…….APPELLANT

VERSUS

REPUBLIC…..……....RESPONDENT

J U D G M E N T

This is an appeal against the judgment of the Principal Magistrate delivered on the 18th December 2003 in Mombasa CMCR Number 579 of 2003. The Appellant was in that case charged with defilement of a girl contrary to section 145(1) of the Penal Code. After trial he was convicted and sentenced to 25 years imprisonment with hard labour. He has appealed to this court against both the conviction and sentence and has listed six grounds of appeal four which are on conviction and the other two are on sentence.

The four grounds of appeal on conviction are to the effect that the learned trial magistrate erred in convicting the Appellant on the basis of the evidence of the complainant who was a minor without first complying with Section 124 of the Evidence Act; that no birth certificate was produced to prove that the complainant was indeed a minor; that having himself not been examined by a doctor there was no proof that the Appellant was the one who defiled the complainant and that the learned trial magistrate erred in rejecting the Appellant's defence and relying on the evidence of PW2 and PW4 who were unreliable witnesses. The two grounds of appeal on sentence are to the effect that the sentence of 25 years imprisonment meted out the Appellant is inordinately excessive and that the learned trial magistrate erred in sentencing him to imprisonment when he was only 17 years old.

Section 124 of the Evidence Act which the Appellant has referred to in ground 1 requires the evidence of a child of tender years to be corroborated by other evidence before founding a conviction. The proviso to that section which was added by Act Number…. of 2003 states that in Sexual Offences the evidence of such child can nonetheless found a conviction if it is believed by the court.

I have examined the evidence of PW1, the complainant. Like the trial magistrate I find that she is an intelligent and though she was only 9 years old she understood the meaning of an oath.

In her testimony she related the whole episode in detail. She said that while she was in the communal latrine in the Swahili premises where she lived the Appellant, a neighbour whose voice she knew, knocked on the door of the latrine and demanded to use it. As she came out Appellant held her mouth and dragged her to his room. There he tied her hands with a sisal string and gagged her mouth with a bedsheet. He then defiled her for over an hour before running out while sweating profusely. PW4 who saw the Appellant run out of the room went to his room and found the complainant there. She told her

what Appellant had done to her. When the complainant's mother PW2 went home at about 9.00p.m. the matter was reported to her. She took the complainant to Nyali Police Station and later to hospital.

The Appellant cross examined her at lengthy but her story was consistent throughout. I find that she told the court the truth.

Besides the fact that the minor complainant's evidence was credible and could, on its own, in a sexual offence like the one in this case, found a conviction it was amply corroborated by the evidence of PW4 who saw the Appellant running out of his house and talked with the complainant who told her that Appellant had defiled her. It was also corroborated by the evidence of the doctor, PW5, who examined the complainant and found that she had been defiled. In the circumstances I find no merit in ground 1of the appeal and I accordingly dismiss it.

The other issue the Appellant raised regarding the complainant's age is that no birth certificate was produced to prove her age. In his cross-examination of the complainant and the other prosecution witnesses or even in his unsworn statement he Appellant did not as much as even suggest that he thought the complainant was over 14 years old. The complainant herself said she was nine. If she appeared to have been over 14 years old, I do not think that the learned trial magistrate could have subjected her as she did to ***vire dore*** examination. I find no merit in this point either.

The third ground of appeal is that the appellant was himself not examined by a doctor to determine if he was the one who infected the complainant with a venereal disease. Whereas I agree with the Appellant that having been arrested so soon after the commission of the offence he should himself have been subjected to a medical examinations. I do not think that the failure to do so has occasion any failure of justice. That piece of evidence could have been crucial if there was no other credible evidence. In this case as I have said apart from the complainant's consistent story there is the evidence of PW4 and PW5 which lent corroboration to her story. That ground also therefore fails.

The other ground of appeal is that the learned trial magistrate erred in rejecting the Appellant's defence and instead relied on the unsafe evidence of PW2 the mother of the complainant and that of PW4. The reason why he said the evidence of those two witnesses should not have been relied upon is that PW2 held a grudge against him because he refused to store the goods of her tenant and that PW2 and PW4 are friends. Like the learned trial magistrate I cannot imagine how a mere refusal to store for the complainant's mother some goods would have actuated her to frame up such a serious criminal charge against the Appellant.

Regarding the Appellant's defence, his complaint is not that the learned trial magistrate failed to consider it. It is that she erred in rejecting it. She did not have to accept it if she did not find any substance in it. Having perused the judgment I find that she considered it but found it incredible and rightly rejected it. That ground must also fail.

I have as a whole re-evaluated the evidence tendered before the learned trial magistrate and carefully considered the Appellant's written submissions. I find that the Appellant was convicted on sound evidence and I accordingly dismiss his appeal against conviction.

As regards sentence, the Appellant was sentenced to 25 years imprisonment for an offence which carries a life sentence. The learned magistrate loathed, as I do, the Appellant's beastly act and his unremorseful attitude. The Appellant subjected the little girl to more than an hour's excruciating pain. In the circumstances she thought he did not deserve any mercy. She cannot be faulted for that. However, given the fact that the appellant is a young man aged twenty four years and in the hope that he will have reformed after his stay in prison, I reduce his sentence to fifteen years imprisonment.

In result, save for the sentence which is reduced to fifteen years imprisonment this appeal is dismissed in its entirety.

DATED AND DELIVERED THIS 29TH DAY OF NOVEMBER 2006

D.K. MARAGA

JUDGE