

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 22 of 2005

(From original conviction and sentence in Criminal Case No.784 of 2004 of the Resident Magistrate's Court at Eldama Ravine – KAGENDO W. M., RM)

JOSEPH NDUNGU MWANGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was charged with the offence of defilement of a girl under 14 years contrary to **Section 145(1)** of the **Penal Code**. The particulars of the offence were that on the night of 9th and 10th June 2004 in Koibatek District, the appellant had carnal knowledge of SM, a girl under the age of 14 years. The appellant denied the charge and after a full trial where the prosecution called five witnesses, he was convicted and sentenced to seven years imprisonment. He was aggrieved by the said conviction and sentence and preferred an appeal to this court. In his petition of appeal, the appellant faulted the learned trial magistrate for convicting him without considering that the prosecution evidence that linked him to the offence was uncorroborated. He further lamented that the learned trial magistrate did not consider that three prosecution witnesses, PW1, PW2 and PW3 were the appellant's relatives and had a grudge against him. He further stated that the learned trial magistrate erred in law and in fact in rejecting his statement of defence without giving any cogent reasons for so doing. Lastly, he faulted the learned trial magistrate for failing to consider medical evidence which showed that the girl he was alleged to have defiled had not been raped or injured.

This being the first appellate court, it is duty bound to evaluate the evidence that was tendered before the trial court and re-examine the same and reach an independent decision on the matter.

PW1 was 7 years old. She knew the appellant very well as he was her uncle. On the material day the appellant called PW1 and asked her to accompany him to a house of a neighbour known as John. When they arrived there the appellant locked the door and while they were inside, a relative came to the home and he entered the kitchen and wondered what they were doing there in the absence of the owner of the house. The appellant and PW1 walked out and PW1 returned to their home. The appellant followed her there and he pulled her into some bushes, removed her underpants and defiled her. The appellant then escorted PW1 to the home of John where they were given some food and PW1 slept there. She did not tell John that the appellant had defiled her as she was afraid. The following day as she was going home she met with her mother who was going to look for her and she reported that the appellant had defiled her. The complainant's mother took her to a hospital where she was examined and treated and the matter was later reported to the police.

PW2 was PW1's father and brother to the appellant. He testified that on 9th June 2004, at around 6.00 p.m. he went home and found that his daughter, PW1, was not there. They looked for her all over but could not find her. When she showed up the following day he said that she had been defiled by the appellant and he went and reported the matter at Makutano Police Post and the appellant was arrested.

PW3, was the mother to PW1. Her evidence was that on 9th June 2004 at about 5.30 p.m. she went to church at [M] and when she returned home at about 7.00 p.m. she found that PW1 was missing. They looked for her until midnight but did not get her. Early in the morning they went out to look for her and she met PW1 at the gate. She asked PW1 where she had slept and she answered that she slept at John's house. PW3 further testified that she observed that PW1 was not walking properly and when she asked PW1 what was wrong she said that the appellant had told her not to say anything. She examined PW1 and realised that she had been defiled. PW1 told her mother that the appellant had defiled her and that he had severally done so in the past. She further told PW3 that she had been scared to report the appellant to them.

PW4, PC David Mugunda, and PW5, PC Stephen Kimose, were the arresting officers and they testified as to how they arrested the appellant.

PW6, Dr. Francis Kimego Kioo produced a P3 form in respect of PW1 which showed that PW1 had been defiled. He added that the appellant was HIV positive and so he referred PW1 for examination and treatment at Nakuru Provincial General Hospital.

In his unsworn statement of defence, the appellant testified that there were family quarrels over land and that some of his family members had fabricated the case against him so that he could be jailed and the land divided in his absence. He said nothing in rebuttal to the evidence of PW1.

The trial court was satisfied that there was sufficient evidence to warrant a conviction.

When the appeal came up for hearing, the appellant told the court that he was no longer challenging his conviction and urged the court to reduce sentence saying that the same was harsh and excessive. He told the court that he was remorseful for the offence that he had committed. Miss Opati, learned stated counsel, opposed the appeal saying that there was overwhelming evidence against the appellant and that the sentence that was handed down to him was very lenient. I agree with Miss Opati. The appellant committed a very serious offence and the maximum sentence for such an offence is life imprisonment with hard labour. The sentence of 7 years was therefore a rather light one and particularly considering that the appellant was HIV positive at the time he committed the said offence against the young innocent girl. It is not certain whether he infected the complainant or not. In my view, the court would have been inclined to enhance the sentence if the Attorney General had appealed against this sentence and prayed for enhancement of the same. In the circumstances as aforesaid, I cannot interfere with the sentence and consequently I dismiss the appeal.

DATED, SIGNED and DELIVERED at Nakuru this 17th day of November, 2006.

D. MUSINGA

JUDGE

Judgment delivered in open court in the presence of Miss Opati for the state and the appellant.

D. MUSINGA

JUDGE