



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Appeal 8 of 2005

(From original conviction and sentence in criminal Case No.1717 OF 2004 of the Chief Magistrate's Court at Nakuru – T. WEKULO, SRM)

RICHARD EKIRU KALOLA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was charged with indecent assault contrary to **Section 144(1)** of the **Penal Code**. The particulars of the offence were that on the 22nd July 2004, at [*Particulars withheld*] Village in Nakuru District of the Valley Province, he unlawfully and indecently assaulted V.W., a girl under the age of 14 years by touching her private parts.

The complainant, V.W. was 9 years old. She was in Class two at M.N. Primary School. The trial court conducted "*voire dire*" examination on the complainant and ordered that she be affirmed. She testified that she knew the appellant as he was employed by one of the neighbours known as Mama Kinyanjui. She used to pass near the home of Mama Kinyanjui on her way to school and often saw the appellant. PW1 said that the appellant used to look at her and do something with his mouth. On the material day, as she was going to school, she saw the appellant who approached her and said that he wanted to do something to her. She told the court that he wanted to do "*tabia mbaya*" to her meaning, bad things. She refused his advances. As it was raining she went to seek shelter at Mama Kinyanjui's kitchen. The appellant followed her there and he began to touch her private parts and she told him not to do so. He insisted that he wanted to do "*tabia mbaya*" to her. It can be inferred that he wanted to have sex with her but she refused. Sometimes later, the appellant gave the complainant Kshs.25/- and told her that he wanted to have sex with her and again she refused. The complainant told the court that she had earlier been defiled by somebody else known as David but the man had since disappeared. In view of her earlier experience with David, she decided to report to her teachers what the appellant had done to her. She was emphatic that the appellant did not defile her but had indecently assaulted her by touching her private parts.

When the complainant's teachers were informed of the said incident, they reported the matter to the complainant's mother, M.W. (PW2). PW2 took her daughter to the hospital and it was confirmed that there was evidence that she had earlier been sexually assaulted.

When the appellant was put on his defence, he chose to say nothing and left the matter to the court to decide as it deemed fit. The trial court found that the complainant's evidence was unchallenged and

proceeded to convict the appellant and sentenced him to 15 years imprisonment.

In his written submissions, the appellant stated that there was no sufficient evidence to warrant his conviction because PW2 testified that PW1 had never reported to her that she had ever been defiled by the person who was referred to as David or that she had been indecently assaulted by the appellant. He further stated that the teacher to whom the offence was reported by PW1 was not called as a prosecution witness. Lastly, he submitted that no medical evidence was produced to show that the complainant had ever been sexually assaulted.

Mr. Mugambi, learned state counsel, submitted that the appellant was well known to the complainant and she testified very clearly as to how the appellant indecently assaulted her. In his view, therefore, the appellant's conviction was safe and the sentence that was handed down by the trial court was appropriate. He therefore urged the court to disallow the appeal.

Having considered the submissions made by the appellant and the state counsel and having carefully perused the record of appeal, it is not in dispute that the appellant was well known to the complainant. The complainant gave a detailed account of what transpired on the material day and in my view, her evidence was unchallenged by the appellant. The appellant had severally seen the complainant going to school and had made improper gestures to her. Prior to the indecent assault, he had attempted to seduce the complainant but she had refused his advances. It would appear that he followed her to the kitchen of Mama Kinyanjui when she was sheltering there and made sexual advances at her. It was in the process of so doing that he indecently assaulted her by touching her private parts. He had even attempted to seduce her by giving her money but she always turned down his advances. Even though the appellant was not under any obligation to say anything in his defence, it is instructive to note that he had nothing to say against serious allegations that had been made against him by PW1. It can therefore be concluded that the evidence of PW1 was true. It was not necessary to call the teacher to whom the complainant had reported about the indecent assault. Equally, it was unnecessary to adduce medical evidence to show that the complainant had been sexually assaulted sometimes before the appellant indecently assaulted her. The appellant was not being tried for defilement of the minor but was on trial for indecently assaulting her. The conviction of the appellant by the trial court was consequently safe.

With regard to the sentence that was handed down by the trial court, the maximum sentence for the offence that the appellant was convicted for is 21 years. The sentence of 15 years was therefore reasonable considering the seriousness of the offence. I see no basis of interfering with the same. The upshot is that the appeal is dismissed in its totality. Right of appeal within 14 days from the date hereof.

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

D. MUSINGA

JUDGE

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

D. MUSINGA

JUDGE