



IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 31 of 2006

JOSEPH KIMANI KASRI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No.2812 of 2004 of the Chief Magistrate's Court at NAKURU – A. B. MONGARE, RM)

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 3rd day of November 2004, the appellant had carnal knowledge of **P. W.**, a girl under the age of 16 years, [*particulars withheld pursuant to section 76 (5) of the Children Act, 2001*]. After a full trial, the appellant was convicted of the said offence and sentenced to 7 years imprisonment. The appellant was aggrieved by the said conviction and sentence and preferred this appeal.

During the hearing of the appeal, the appellant relied on written submissions that he had filed. I will revert to the grounds of appeal and the submissions in support thereof after setting out the evidence that was adduced before the trial court, albeit briefly.

The complainant, **P. W.**, **PW1** was 16 years old at the time of the hearing. She testified that on 3rd November 2004, she was at home with her step-father, the appellant, and other siblings but their mother was not there, having gone to hospital to deliver a baby. The appellant married the complainant's mother when the complainant was already born and the appellant had lived together with the complainant and her mother for eight years. Sometimes during the day the appellant asked her whether she had any sex experience and she told him that she had never engaged in any affair. At about 11.00 p.m. while she was asleep the appellant went to her bed and raped her. She screamed and called out her brother known as **J.G.** who was about 9 years old. She requested him to escort her to a neighbour's house so that she could sleep there. The appellant rushed to the gate to stop her from leaving the house. He ordered her not to tell anyone what had happened. On the following day the complainant went to their neighbour's house and explained what had been done to her. The neighbour took her to hospital and the matter was later reported to the police station. PW1 further testified that the appellant had been defiling her since she was ten years old and she had informed her mother. The mother had however, down played the issue. For that reason, she chose not to inform her mother but she told another lady who informed one Pastor N. about the incident. The Pastor talked about the issue with the complainant's mother but the mother was not happy that the complainant had revealed the issue to the said Pastor. The complainant's mother told PW1 she could leave if she was tired of staying with her. Pastor N. offered to stay with the complainant and took her into his house for two years.

Pastor M. M. N., PW2, of New Life Gospel Church testified that the complainant was a member of his church. He was also a neighbour of the appellant. Sometimes in November 2004, PW2 was called by Rosemary Mwangi and he went to her house in the company of his wife. He met the complainant and other ladies from the area. The complainant was crying. When he enquired from her she told him that the appellant had defiled her. They collected some money and took the complainant to the hospital and later reported the matter to the police.

Dr. Joseph Kangethe, PW3, testified on behalf of Dr. Rotich who had examined the complainant when she was taken to Nakuru Provincial General Hospital after she had been defiled by the appellant on the material day. He produced a P3 Form. There was medical evidence that she had repeatedly been defiled. She had told Dr. Rotich that the appellant started defiling her when she was ten years old.

E. W. N., PW4, testified that her husband was Pastor N. of Worship Centre. She met the complainant on 8th July 2002 at about 8.00 p.m. when the complainant went to her house. She had gone there because her parents had chased her away. PW4 interviewed the complainant and the complainant told her that she had repeatedly been defiled by the appellant. They decided to report the matter to the police. When the complainant's mother and the appellant were summoned by the police, the complainant's mother was very hostile. PW4 and her husband took in the complainant and stayed with her for about two years.

When the appellant was put on his defence, he denied having defiled the complainant. He said he was incapable of getting an erection when it was cold and his wife had to use hot water on him before he could get an erection. His defence was to the effect that he could not have been capable of defiling the complainant. He called as witnesses his 9 year old son, **J. G., DW2**, and his wife, **DW3**.

His son testified that he did not hear the complainant screaming on the material night.

The appellant's wife testified that the appellant could not have sex without some assistance. She said that she used to massage him with hot water and apply oil to his penis. A Doctor had also advised her to be sleeping over him, she testified.

The learned trial magistrate analysed all the evidence that had been tendered before the court and was satisfied that the appellant had defiled the complainant.

This being the first appellate court, it is under an obligation to reconsider all the evidence that was adduced before the trial court, evaluate it and draw its own conclusion in deciding whether the judgment of the trial court should be upheld or not, see **OKENO VS REPUBLIC [1972] EA 32**.

I have carefully reconsidered all the evidence on record. The complainant alleged that she had repeatedly been defiled by the appellant, a person they had lived with for over 8 years. The appellant is married to the complainant's mother but is not the father to the complainant. On 23rd November, 2004 the complainant's mother had gone to hospital for delivery of a baby. The complainant testified that on the night of the aforesaid day, she was woken up by a sharp pain in her vagina and on waking up, she found the appellant on her bed. She woke up her brother, DW2 so that he could escort her to their neighbour's house but the appellant stopped them from doing so. Infact he pleaded with her not to tell anyone. Although DW2 testified as a defence witness and thereby supported his father, it is worth noting that at the time he was testifying, the relationship between the appellant and his wife on the one hand and the complainant on the other had got so strained that the complainant was no longer living in their home. The complainant's mother had severally been told by her daughter about her defilement by the appellant but the complainant's mother would not take any action. She would only talk to the appellant and resolve the issue quietly.

In my view, the complainant could not have decided to invent a story about her defilement by the appellant. I believe she was telling the truth. Her evidence was corroborated by PW2, PW3 and PW4.

The appellant's defence was that he was incapable of engaging in any sexual activity without some assistance. His wife also advanced the same evidence. However, that kind of defence cannot, in my

view, exonerate the appellant. No medical evidence was brought in support of that allegation. The appellant said that his penis needed to be massaged with hot water and oil before he could get an erection. Even if that was true, there was nothing to stop the appellant from massaging himself on the material night then proceed to defile the complainant. I am satisfied that the appellant was properly convicted. The sentence that was passed by the trial court cannot be said to be harsh. I think it was very lenient, considering the seriousness of the offence that was committed by the appellant. I therefore dismiss the appeal in its entirety.

DATED, SIGNED and DELIVERED at Nakuru this 15th day of December, 2006.

D. MUSINGA

JUDGE

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

D. MUSINGA

JUDGE