



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL APPEAL NO. 264 OF 2003

DAVID GITAU NDUNG’U.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

The Appellant has appealed against the original conviction and sentence in Criminal Case No. 2 of 2003 of the RM Court, Naivasha. In that case, the Appellant had been charged for the offence of Defilement of a Girl contrary to sec. 145 (1) of the Penal Code. The Alternative Charge against the Appellant was indecent assault on Female contrary to Sec. 144 (1) of the Penal Code.

The facts of the prosecution case as stated in the charge sheet for the main charge are as follows:-

“On diverse dates of August, 2002 at [particulars withheld] Village in Nakuru District within Rift Valley Province unlawfully carnal knowledge of EW a girl under the age of fourteen.”

After a full trial, the Appellant was found **“Guilty”** and convicted accordingly. Consequently, the Appellant was sentenced to 8 years imprisonment, hard labour and 3 strokes of the cane.

During the appeal, the Appellant stated that the evidence of the PW1, PW2 and PW3 was **not** consistent. He further pointed out that the complainant had stated that it was the Doctor who knew the name of the Appellant. Besides the above, the Appellant complained that the investigations were **not** carried out properly and that the Investigating Officer had failed to give evidence. The Appellant further narrated how he was arrested and taken to the home of the complainant before being taken to Naivasha Police Station. Apart from the above, the Appellant also explained that his father had been married to the sister of the PW2 and later separated. According to the Appellant, the PW2 blamed him for the separation on the ground that he had been feeding the father with some information.

On the other hand, the State through Mr. Koech, State Counsel never supported the conviction on the ground that the evidence of the complainant was contradictory. Mr. Koech pointed out that during cross-examination the complainant had revealed that she had been coached on the evidence to adduce. That apart, Mr. Koech also submitted that whereas the complainant had initially informed the Court she knew the Appellant, she later changed her story and claimed that she had seen him for the first time.

Lastly, the Learned Counsel concluded that the complainant had claimed to have been defiled in the presence of her grandfather.

This Court has carefully perused the above together with the entire record of appeal. Having done so, the Court hereby concurs with the Learned State Counsel that the complainant contradicted herself during cross-examination. Whereas she initially denied having been coached to give evidence, she later conceded to the above. Besides the above, it is obvious that the alleged offence was committed on diverse dated in August, 2002. Unfortunately, the complainant was examined by the PW4 – Joseph Nakuro - a Clinical Officer on 31st December, 2002. That was a period of over 4 months after the alleged commission of the offence. Therefore, it was not appropriate and reasonable for the Learned Magistrate to state that the evidence of the complainant had been corroborated by that of the PW4. This Court cannot hazard a guess on what may have happened during the passage of 4 months.

Lastly, it is not clear what the complainant meant when she stated:

“The doctor who examined me was the first one to know about Gitau.....”

A plain reading of the above show that it was the doctor who suggested to her that she had been defiled by the Appellant.

In view of the above, the Court is of the considered opinion that the conviction is unsafe since the above doubts should have been resolved in favour of the Appellant. The upshot is that I hereby allow the appeal and **“Quash”** the conviction. I also set aside the sentence of 8 years with hard labour and 3 strokes of the cane. The Appellant should be released forthwith unless lawfully held.

MUGA APONDI

JUDGE

Judgement read, signed and delivered in Open Court in the presence of the Appellant and Mr. Gumo, Asst. DPP.

MUGA APONDI

JUDGE

31ST MARCH, 2005