



EZEKIEL DANIEL MWAKIO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

EZEKIEL DANIEL MWAKIO was convicted for the offence of DEFILEMENT OF A GIRL UNDER 16 YEARS, contrary to Section 145 of the Penal code, and sentenced to six years imprisonment.

He has appealed against both conviction and sentence. His primary complaint is that PW5, who is the doctor who examined the complainant had testified that he did not find any evidence of defilement.

PW5, Dr Jack Omondi had testified that he examined PW1 (the complainant) on 18th March 2003. PW1 had been taken to the Magadi Soda Company Hospital, for treatment. According to PW5, the clothes of PW1 were okay, and she did not have any physical injuries. PW5 examined her private parts, but found no injuries. He also took urine specimens and a vaginal swab, but found no spermatozoa. In the circumstances, and also because PW1 was not a virgin, the doctor did not find any evidence of defilement. It is for that reason that the appellant now submits that the learned trial Magistrate erred in convicting him.

On the other hand, the learned State Counsel, Mr. Makura submits that the evidence of PW5 could be disregarded altogether, but that the appellant would still have been properly convicted. As far as Mr. Makura was concerned, the evidence of PW5, if it had been supportive would have provided further corroboration.

To my mind, the prosecutor at the trial of the appellant cannot be faulted for having put forward PW5 as a witness, even though his evidence was not necessarily supportive of the prosecution case. The conduct of the prosecution, in that regard, is laudible, insofar as it placed before the court all the evidence at its disposal.

What did PW1 say in her evidence? She said that the appellant had approached her at about 12.00 noon, at [*particulars withheld*], where PW1 usually sold milk. The appellant followed PW1 after she finished selling milk, and tried to engage her in conversation, but PW1 refused to speak to him. The appellant then held PW1, covered her mouth and pulled her into a bush, where he raped her. PW1 was unable to scream during the ordeal, as her mouth was covered. But immediately after the appellant let go of her, she screamed, attracting the attention of PW2.

PW2, G S, was a herds boy. On the material date, at 12.00 noon, PW2 was herding his father's cattle, at [*particulars withheld*]. He then heard a scream, and approached the place where it came from. PW2 found the appellant pulling up his trousers, while PW1 was on the ground. When PW2 asked PW1 what had happened, she told him that the appellant had defiled her. The matter was then reported to PW1's parents, PW2's parents and the police. PW3, APC George Maina, re-arrested the appellant at the District Officer's office, Magadi.

PW4, E N, was a cousin to PW1. After PW1's mother told him that PW1 had been defiled, PW4 talked to

the complainant. PW1 then led PW4 and other people, to look for the appellant. When PW1 saw the appellant, she pointed him out, and the appellant was arrested. PW4 was then advised to take PW1 to hospital for treatment. The advice was given by some policemen, and PW4 complied. Later the police issued a P3 form which PW5 filled in.

In the said P3 form, PW5 made the following conclusions:

“Although there is no evidence of rape, I cannot rule out a sexual intercourse (offence) because the girl is not a virgin. When I saw her (48 hours later) it was too late for spermatozoa to be recovered.”

When the appellant was put on his defence, he denied committing the offence. He said that on the material day he stayed with his friend, in Ngong Town until 4.00p.m. When he returned home, 6 young men arrested him for this offence, which he knew nothing about, he said.

In her judgment, the learned trial magistrate held that the prosecution was obliged to prove that the appellant had had carnal knowledge of PW1. He held that it did not matter whether or not PW1 consented to the act, provided that she was below 14 years of age.

In giving consideration to the doctor’s evidence, the learned trial magistrate found it strange that PW5 had taken it upon himself to conclude that there was no evidence of defilement. At the same time, PW5 also said that he could not rule out “a sexual intercourse (offence).”

What is the offence of defilement? The learned trial magistrate held as follows:

“Simply put, defilement is having carnal knowledge of a girl under the age of 14 years.”

Section 145(1) of the Penal Code reads as follows:

“Any person who unlawfully and carnally knows any girl under the age of sixteen years is guilty of a felony and is liable to imprisonment with hard labour for life.”

The provision above was incorporated into the Penal Code, by way of Act No. 5 of 2003, which amended Section 145 of the Penal Code. Prior to the amendment, the punishment for the offence of defilement was 14 years imprisonment together with corporal punishment.

As the appellant was convicted and sentenced on 17th June 2003, the punishment to be meted out to him was the one which was in existence before the statutory provision was amended. I say so because Act No. 5 of 2003 came into effect from 25th July 2003. But, in any event, the learned trial magistrate cannot be faulted for her understanding of the ingredients of the offence of defilement.

In this case, PW5 ascertained that the complainant was eleven (11) years old. Clearly, she was within the age-bracket contemplated by section 145(1) of the Penal Code.

PW5 also found that PW1 was not a virgin. That finding by the doctor is irrelevant to the offence of defilement. The fact that the complainant’s private parts did not have any injuries was also irrelevant to the offence.

As the learned trial Magistrate held, correctly in my understanding, the offence of defilement is deemed as proved once there is proof that the victim was below the age of sixteen, and had been carnally known.

In this case, PW5 said that he found no evidence of rape. That is a totally different offence from defilement, as in the offence of rape the prosecution must also prove that the victim had not consented to be carnally known. Ordinarily, therefore, in rape offences, doctors do find evidence of injury to the victim. Such evidence usually goes to prove the victim’s lack of consent. Therefore, as the complainant in a case of defilement need not prove that she resisted the acts of the accused person, the finding by PW5 that there was no evidence of rape, is wholly irrelevant. In effect, the finding did not necessarily negate

the finding by the learned trial Magistrate, that PW1 was defiled. I therefore find no merit in the appellant's submissions. He was positively identified by the complainant, as the offence occurred at 12.00 noon. The complainant had been seeing the appellant in the general area of [*particulars withheld*] prior to the incident. PW1 was approached by the appellant in a friendly manner, and therefore the circumstances prevailing were very conducive for positive identification. And when PW1 reported the incident to her cousin, PW4, she told him that she could definitely identify her assailant. She later did so.

Also, when PW1 was taken to Magadi Soda Company Hospital for treatment, she told PW5 that she had been assaulted by someone who she could identify physically. In effect, PW1 was consistent all through. Her identification of the appellant is thus solid, and without any possibility of doubt. In the circumstances, the conviction is well founded, and I therefore uphold it.

As regards sentence, the maximum penalty, at the material time was 14 years imprisonment. The appellant was jailed for 6 years, with 3 strokes of the cane. I find the jail term to be lawful, and have no reason to vary it. However, as corporal punishment has been outlawed in Kenya, I vacate the same. Save for that, conviction and sentence are upheld.

Dated at Nairobi this 25th day of May, 2005

FRED A. OCHEING

JUDGE