



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA
Criminal Appeal 307 of 2004

WILSON NASAMBI APPELLANT

- Versus -

REPUBLIC RESPONDENT

Coram: Before Hon. Justice Mwera

In person for State/Respondent

Ademba for Accused/Applicant

Court clerk – Kazungu

J U D G M E N T

The appellant was charged under section 145 (1) Penal Code in that on 22/8/2004 at [*particulars withheld*], Taita-Taveta he had carnal knowledge of MM a girl under the age of 16 years.

After trial he was convicted of the lesser offence of indecent assault contrary to section 144(1) of the Penal Code and given 3 years imprisonment with hard labour on 16/11/2004.

In his petition of appeal it was claimed that the complainant (P.W.1) contradicted herself in her evidence. That her mother (MM, P.W.2) had a grudge with the appellant arising from P.W.2's livestock destroying his crops. That there was no evidence that the complainant was defiled (he was convicted of indecent assault) and that only stains (not said to be of what) were found on P.W.1's under garment.

The learned State Counsel supported conviction and sentence – on the indecent assault charge, in that the complainant's evidence was reliable and besides, it was corroborated by Restituta Mghoi (P.W.4), a clinical officer.

To convict one for the offence of indecent assault, it must be proved that the offender, with his hand(s) touched the female's sexual organ (the genitalia) and not otherwise (see Isaac Omambia Vs Republic CR.APPEAL 47 of 1995 C.A. unreported).

The complainant told the learned trial magistrate:

“The accused followed me from behind and he pulled me by force and took me to his house. He removed his trouser (sic) and also removed my pant. Then he defiled me inside his house.”

In cross examination she said:

“You removed your penis and inserted (sic) into my organ.”

The clinical officer found no injury to P.W.1’s genitalia but she noted some discharge she did not ascertain whether it was normal discharge or spermatozoa. There was no penetration; the hymen was not broken.

From all the above the learned trial magistrate probably could have convicted the appellant of attempted defilement but not indecent assault because there was no evidence that the appellant with his own hand touched the complainant’s organ.

In sum this appeal is allowed. The conviction is quashed and the sentence set aside. The appellant to be set at liberty unless otherwise lawfully held.

Judgment accordingly.

Delivered on 31st October 2005.

J.W. MWERA

JUDGE