



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA
APPELLATE SIDE

Criminal Appeal 196 of 2004

(From Original Conviction and Sentence in Criminal Case No. 148 of 2004 of the
Resident Magistrate's Court at Wundanyi E, Mwaita, Resident Magistrate)

JONATHAN KATUKU APPELLANT

- Versus -

REPUBLIC RESPONDENT

J U D G M E N T

The appellant was charged with the offence under Section 145(1) Penal Code in that on 15/4/2004 at [*particulars withheld*] Taita – Taveta, he had unlawful carnal knowledge of DM, a girl under 16 years of age. He was tried, convicted and ordered to serve 7 years imprisonment plus hard labour.

In the amended grounds of appeal it was stated that the learned trial magistrate relied on the complainant's (P.W.1) false evidence when she alleged that she was tricked, lured and forced into sexual intercourse. That there were glaring "impossibilities" in P.W.1's evidence and that a medical officer who examined P.W.1 did not find her a virgin. She was used to sex. That the complainant's age of 13 years was not reliably assessed. That he himself was under age – a matter not cleared by the prosecution. That the prosecution case was not proved beyond a reasonable doubt and the sentence was harsh and excessive.

The appellant relied on his written submission, to which the learned state counsel had a reply and a response followed. The complainant (P.W.1) testified that she was 13 years of age. She lived with her sister where the appellant was a worker in a neighbouring house. That the appellant lured P.W.1 in the house where he worked promising to give her her sister's luggage there. That once inside the house, the appellant who was with another boy, threatened her if she screamed; he tied her hands and removed P.W.1's clothes. He too did the same. It was 10 a.m. and the appellant defiled her. They stayed in the house all day and overnight. The following day the appellant's friend told him that P.W.1's mother was looking for her. That is when the appellant released and warned her not to tell anybody. When she got home she explained all that had taken place to her mother and sister. She took a shower and later went to the police station. She was taken to hospital.

In cross-examination the complainant denied that the encounter was by previous arrangement with the appellant. And that she was threatened if she screamed and her hands were tied to the bed in the bedroom. Christine Kalema (P.W.2) a clinical officer at Wundanyi Health Centre received the complaint on 16/4/2004 with a history of defilement by a person known to her. P.W.2 put P.W.1's age at 13 years. She had been there also on 15/4/2004 for examination. P.W.1 had no injuries but P.W.2 noted signs of sexual assault – bruises on the external genitalia. She was in pain but there were no traces of blood or vaginal

infection (Exh.P1). J N (P.W.3), P.W.1's mother said that D, her daughter, was 13 years old. That D lived with her sister at the said quarters but had been missing from home for 2 days. They began to look for her. When she showed up P.W.1 told the mother and sister that Katuku (the appellant) had locked her up in a house, tied her hands and defiled her until she bled. P.W.3 checked her daughter (P.W.1) and noticed blood and some discharge. She took a shower and they went to report at the police station. Then a doctor (medical officer?) examined her.

FM (P.W.4), the complainant's sister, also gave more or less the same kind of evidence. P.C. Muli (P.W.5), is the police officer who took up the complaint from P.W.1. He gave her a P3 form which was filled at Wundanyi Health Centre. The appellant was later charged with the offence. The appellant gave an unsworn statement. He lived at the [*particulars withheld*], Wundanyi. That a girl came to the house (the complainant) and the two watched T.V. That in the evening she chose not to go home. The two stayed overnight until 1 p.m. the following day. That she left to go to her sister's place. She was not crying but on reaching the sisters place she cried. He called Prison Warden Kimei as a defence witness. He himself saw nothing on material day.

The learned trial magistrate wrote a judgment which this court has perused. But on its own evaluation of the evidence, the girl who went to the appellant's place is the complainant. The clinical officer put her age at 13 years so did she and her mother. The lower court believed the evidence of P.W.1 so does this court. The appellant detained P.W.1 in his house and had carnal knowledge of her. She was below 16 years of age; she could not consent to it. Besides saying that the appellant defiled her, there was corroborated by the clinical officer who found bruises on the external genitalia on the day she left the appellant's house.

That day her mother also checked P.W.1 and noticed blood, and discharge. This followed P.W.1's complaint to her mother that Katuku, the appellant whom he knew before, had defiled her. She took a shower before being examined. The learned trial magistrate regarded the defence of the appellant and his witness. He was satisfied that the prosecution case was proved beyond a reasonable doubt. He could not see the defence casting any doubt over the prosecution case at all. There was corroboration in that case. As stated earlier, this court is of the view that the learned trial magistrate arrived at a proper end to convict. He also got a doctor's report that the appellant was over 18 years of age. The appellant brought in the issue of grudges between his and P.W.1's parents. But that did not feature in the lower court. He did not avail here evidence of being below age at the time the sentence was passed. He claimed that his mother went with the relevant card. But no matter, that was settled before the learned trial magistrate.

The sentence given by the lower court is similarly upheld. The maximum is life imprisonment while the appellant only got 7 years plus hard labour.

In the result that this appeal is dismissed.

Judgment on 11th October 2005.

J.W. MWERA

JUDGE