

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO. 98 OF 2003

(From Original Conviction and Sentence in Criminal CaseNo. 2357 of 2002
of the Chief Magistrate's Court at Mombasa L. Achode, P.M.)

PIUS OSORO APPELLANT

- Versus -

REPUBLIC RESPONDENT

J U D G M E N T

The Appellant was charged with the offence of defilement of a girl contrary to section 145(1) of the Penal Code in that on the 15th day of September 2002 at about 1.00 a.m. at [particulars withheld] in Mombasa District within Coast Province the Appellant had carnal knowledge of a girl under the age of 14 years. After trial he was convicted of the offence and sentenced to 8 years imprisonment with one stroke of the cane. He appealed against both conviction and sentence but during the hearing of the appeal he abandoned the appeal against sentence.

The facts of the case were that on the 14/9/2002 the complainant M.I a 13 year old minor and another were sleeping in a neighbour's room. The owner had gone for a funeral and had requested the minors' parents to allow them sleep in and watch her house while she was away. As they slept at about 1.00 a.m. the complainant was awakened by the weight of someone lying on her. She woke up to find a naked man pinning her down. Both the minors screamed and the complainant's parents went to the room where they were. As the main door to the building was opened the complainant's mother saw the Appellant behind the complainant. The complainant's mother asked what was happening. The Appellant allegedly said that he had been called by the minors to buy soda for them. The Appellant was locked in the room and the minors were taken to the complainant's parents' room.

At about 6.00 a.m. that morning P.W.2 P.L, the owner of the room in which the children were sleeping not knowing what had happened opened her room and found the Appellant inside. He told her he had differed with the child. He escaped but was arrested at about 8.00 p.m. that evening when he returned to pick his belongings and taken to Nyali Police Station. The complainant with her parents had earlier that morning reported the matter to the same police station and had been taken to hospital for examination and treatment. After investigations the Appellant was charged with the offence of defilement.

In his petition of Appeal the Appellant listed 6 grounds of Appeal but during the hearing of the appeal Mr. Magolo in effect condensed them to three. The first ground was that the evidence of the Appellant was not corroborated as required. He submitted that before amendment the law required the evidence of a minor to be corroborated before it could fend a conviction. I agree with him. Section 24 of the Evidence Act before amendment in 2003 made corroboration of a minor's evidence mandatory before it could found a conviction. Mr. Magolo therefore submitted that the evidence of the minors could not corroborate each other to proof that the appellant was the one who defiled the complainant. Mrs. Mwangi the Principal State Counsel agreed that corroboration was necessary but submitted that the evidence of the complainant's mother provided corroboration. Evidence that requires corroboration cannot corroborate other evidence which also requires corroboration. I therefore agree with Mr. Magolo that the evidence of

the two minor girls could not corroborate each other. However there was ample corroboration. In answer to the distress call the complainant's mother P.W.4 rushed to the plot where the complainant was and on the main door being opened she saw the Appellant with only a lesso on behind the complainant. The Appellant said he had been called by the minors to buy soda for them. He was shaking. When other people came they pushed him into the room where the minors were sleeping and bolted the door from outside. At 6.00 a.m. when the owner of that room, P.W.2 opened the door from outside she found the Appellant in her room. He told her he had differed with the two minor girls. I believe the evidence of these two witnesses and that of the minors. Although the minors said that when the complainant's mother went into the building the appellant was still in the room where they were sleeping that is a minor discrepancy which does not affect the veracity of their evidence. We are talking of an incident which must have taken 2 - 3 minutes and being related by children who were woken up from deep sleep. The appellant's assertion that he was framed up by the complainant's mother cannot be true. If that were so he could have told P.W.2 the owner of the room or the police when he was taken to the police station after arrest.

I am satisfied that the two minor girls properly identified the Appellant as the person who defiled the complainant and their evidence was corroborated by that of P.W.2 and P.W.4.

The other ground of appeal argued by Mr. Magolo was that the Appellant was not examined having been arrested on the same day. That as the trial magistrate said could have been ideal. I agree with Mrs. Mwangi that that is not mandatory.

The last ground of appeal was that the evidence only disclosed the offence of attempted defilement. According to Mr. Magolo there was no evidence of penetration. He argued that there is a possibility of intervening defilement by a third party. That argument has no support in the evidence on record. The complainant was taken to her parent's room where she slept and the following morning she went with them to the police station and to hospital. Medical evidence by Dr. Said Omar Said P.W.6 confirmed that the complainant had been defiled. The hymen had been broken and almost absent. The analysis of the vaginal swab taken from the complainant revealed the presence of spermatozoa and pus. That dislodges Mr. Magolo's argument that there was only attempted defilement. The hymen having been ruptured it cannot be said that there was no penetration. The complainant herself stated that when she woke up "the man had already inserted his genitals into mine". For these reasons I am satisfied that the appellant was properly convicted of the offence of defilement and I accordingly dismiss his appeal against conviction.

Although the appeal against sentence was abandoned I have to deal with it. At the time the offence was committed the offence of defilement carried a term of imprisonment of up to 14 years with corporal punishment. After amendment corporal punishment was outlawed but the imprisonment term was enhanced to life imprisonment. As the appellant has not received corporal punishment and the same has now been outlawed I allow the appeal on sentence in respect of corporal punishment and set aside the order requiring the Appellant to receive one stroke of the cane. The 8 years imprisonment imposed on the Appellant is not harsh considering that the maximum sentence for the offence then was 14 years. I dismiss the appeal against sentence in that respect. Save for the corporal punishment which is set aside as stated herein above, this Appeal is hereby dismissed.

DATED this 21st day of January 2004.

D.K. Maraga

Ag. JUDGE