REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KISII
CRIMINAL APPEAL NO.288 OF 2003

(From original conviction and sentence of the Senior Resident Magistrate's Court at Nyamira in Criminal Case No.626 of 2003 – K. W. KIARIE ESQ., S.R.M)

STEPHEN ONDIEKI NYAKUNDI …………………………………… APPELLANT

VERSUS

REPUBLIC …………………………………………………………….RESPONDENT

JUDGMENT

The appellant was convicted by the Principal Magistrate Nyamira for the offence of defilement contrary to section 145(1) of the Penal Code. He was sentenced to 14 years imprisonment. His appeal is against both conviction and sentence.

There are three main grounds of appeal:

1. That the charge and every particular was not read, explained to me and that I did not understand the same before entering/taking plea.

2. That the learned trial magistrate erred in law and facts in recording a conviction against me in a case I did not understand the true facts.

3. That the sentence of 14 years in overly harsh and excessive in the foregoing. The appellant during the hearing of the appeal did not submit and said he was relying on the grounds in his petition. The state counsel opposed the appeal and supported both the conviction and sentence. He submitted that the evidence in the lower court was candid and the appellant was convicted properly.

In ground one the appellant states that the charge and particulars were not read to him. Record however shows that the charge and particulars were read to the appellant and he replied:

"Not true"

The appellant did not plead guilty and the conviction was after full hearing.

Records also shows appellant participated fully in the hearing. Witnesses were called and appellant cross-examined all of them. It cannot be true that all along he did not know the charge he was facing. I therefore find no substance in his first ground of appeal.

In the second ground he states that the magistrate erred in law and facts in recording a conviction against him in a case he did not understand the true facts thereof.

As I have stated above appellant did not plead guilty to the charge and as such the magistrate therefore did not record a conviction.

He was found guilty after a full hearing. He was not convicted on facts but on evidence which was adduced by witnesses. Eight prosecution witnesses testified. The evidence was very candid. PW1 the complainant a girl of 13 years narrated how the appellant caught up with her as she was going home. He held her hands and mouth to stop her from screaming. He knocked her down and carried her on his shoulders into some trees.He removed her pants and had carnal knowledge of her twice. He then ran away. The complainant stated walking home crying. She was bleeding from her private parts. She met his brother and she told him what happened. They went and saw the appellant whom the complainant identified to his brother. The brother B A (PW2) knew the appellant. They then went and reported to the village elder one N M (PW4). They gave him the name of the appellant. The incident took place at about 11 a.m. and PW1 the complainant said she saw the appellant well.She identified him soon thereafter to his brother – PW2. They gave his name to the village elder soon thereafter. It is therefore not in doubt that appellant is the one who defiled the complainant. The complainant was taken to hospital the same day. The clinical officer who examined her JULIET MANYAGA (PW7) confirmed that she had been raped. There was clotted blood on her pants and on her external genetalia. There was also a tear and blood in her vagina. She concluded that there was evidence of penetration.

The appellant disappeared from home after the incident. He was only arrested on 4th August 2003 when he re-appeared at home. The evidence was therefore strong and the learned trial magistrate reached a proper conclusion that the appellant was guilty. I therefore uphold the conviction.

As for sentence the appellant defiled a girl of 13 years. Though he was a first offender the offence is serious and carried a maximum of life imprisonment. The magistrate properly addressed himself before he passed the sentence. It is not excessive in the circumstances and there is no reason for this court to interfere with it.

In the circumstances the appeal against both the conviction and sentence is dismissed.

KABURU BAUNI

JUDGE.

Delivered on 24th day of September 2004.

KABURU BAUNI

JUDGE.