



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 271 OF 2002

FROM ORIGINAL CONVICTION AND SENTENCE IN THE  
CRIMINAL CASE NO.1511 OF 2002 OF THE SENIOR PRINCIPLE  
MAGISTRATE'S COURT AT NAIVASHA

KITAKA OLE SIRAI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Kitaka ole Sirai, was charged with the offence of defilement of a girl contrary to **Section 145 (1) of the Penal Code**. The particulars of charge were that on the 22nd of June 2002 at [particulars withheld], Naivasha the Appellant unlawfully had carnal knowledge of TN a girl under the age of fourteen years. The Appellant was alternatively charged with the offence of indecent assault of a female contrary to **Section 144 (1) of the Penal Code**. The particulars of the alternative charge were that on the same day at the same place the Appellant unlawfully and indecently assaulted TN a girl under the age of fourteen years by touching her private parts. The Appellant pleaded not guilty to both counts. After a full trial the Appellant was convicted as charged on the main charge. The Appellant was sentenced to serve seven years imprisonment with hard labour. He was also sentenced to receive four strokes of the cane. The Appellant was aggrieved by the said conviction and sentence. He has appealed to this Court against the said conviction and sentence.

In his Petition of Appeal, the Appellant has faulted the trial Magistrate for convicting him where no evidence was adduced to connect him with the offence. The Appellant further faulted the trial Magistrate for convicting him on uncorroborated evidence. The Appellant was further aggrieved by the sentence which was meted out on him. In the Appellant's view the sentence was harsh and unsustainable in the circumstances. At the hearing of the Appeal, Mr Nyamwange learned Counsel for the Appellant urged this Court to allow the Appeal whilst Mr Gumo, the Assistant Deputy Public Prosecutor submitted that the conviction and the sentence of the trial Magistrate should not be disturbed in view of the fact that the same was properly and legally arrived at.

It is imperative to set out the facts of this case before giving reasons for the decision that this Court has arrived at. On the 22nd of June 2002 at about 6.00 p.m. PW 2 DK sent PW 1 TN (his niece who was staying with him) to the market to buy kale i.e. sukuma wiki. PW 1 a minor, ten years of age, testified that she went to the market with two other girls. When she reached a place near the Rift farm she was accosted by the Appellant who got hold of her and took her to a grading house at [particulars withheld]. The Appellant held PW 1's mouth and threatened her with dire consequences if she screamed. The Appellant

then removed the trousers that PW 1 was wearing. He then removed her pants. He then removed his trousers. He then had carnal knowledge of the Complainant (PW 1). According to PW 1 the Appellant pushed his penis into her vagina. After the sexual act, the Appellant gave PW 1 her trousers to wear but retained her pants. He then left the Complainant. PW 1 got out of the grading house and went and reported the incident to an askari who was nearby. The Appellant was thereafter arrested.

PW 1 was taken to Naivasha Sher Hospital and later taken to the Naivasha District Hospital where she was examined by PW 4 Dr. Musalia who formed an opinion that PW 1 had indeed been defiled. He examined PW 1's genitalia and found some tears on the labia minora. PW 1's vagina could admit an adult's finger. She had no hymen. She had a blood stained discharge. Laboratory tests undertaken showed that there was spermatozoa in her vagina. He produced a duly filled P3 form. PW 2 DK was informed that PW 1 had been sexually assaulted. He took PW 1 to hospital where she was treated and discharged. PW 1 identified the Appellant to PW 2.

PW 5 Karen Wanyonyi a security officer at [particulars withheld] testified that she was on duty on the 22nd of June 2002 at about 7.00 p.m. when she saw the Appellant emerge from a green house with PW 1 following behind. PW 1 was walking with difficulty. When the Appellant saw PW 5, he ran to his place of work. PW 5 went to where PW 1 was. She was crying. PW 1 told PW 5 that she had been taken to the green house by the Appellant and defiled. PW 5 examined PW 1 and saw blood in her pants. She organised for PW 1 to be taken to hospital. Later the Appellant was arrested and taken to the Kongoni Police Station where he was subsequently booked by PW 3 Police Constable Peter Wachira and charged with the offence that he was convicted.

When the Appellant was put on his defence, he denied that he committed the offence. His *alibi* defence was that at the material time when the offence was being committed he was at his place of work. He testified that after completing his duty, he went home.

This is a first Appeal. As the first Appellate Court in Criminal Cases this Court is mandated to look afresh at the evidence adduced before the trial Magistrate's Court, re-evaluate and re-examine the same and reach its own independent conclusion whether or not to uphold the conviction of the Appellant. In reaching its decision this Court has put into mind the fact that it did not have an opportunity of seeing the witnesses as they testified before the trial Court and therefore cannot be expected to make any decision as regards the demeanour of the witnesses. This Court is further mandated to consider the grounds of Appeal put forth by the Appellant in reaching its decision. See **Njoroge –versus- Republic [1987] KLR 19, Pandya –versus- Republic [1957] E A 336 and Ruwala –versus- Republic [1957] E A 570.**

In the instant appeal, the Appellant through his Counsel Mr Nyamwange has argued that material witnesses were not called to corroborate the evidence of PW 1. It was the Appellant's submission that the two girls who accompanied the Complainant ought to have been called to give evidence for the prosecution. The Appellant submitted that the failure by the Prosecution to call the said witnesses should lead this Court to infer that the evidence that was omitted by the Prosecution was going to be adverse to its case. The Appellant referred the Court to the decision by the Court of Appeal in the case of **Joseph Peltun Losur –versus- Republic C. A. Cr. App. No. 168 of 2001** (Nakuru) where it was held that:

***“The position as pointed out in Bukenya & Others –versus- Uganda [1973] EA 549 is that where the Prosecution fails to call a material witness and no explanation is offered for such failure, the Court would be entitled to draw the inference that had such witness been called his evidence would have been adverse to them”***

Mr Gumo the Assistant Deputy Public Prosecutor countered the submission by the Appellant by stating that the calling of the two girls as witnesses would not have assisted the Prosecution's case in so

far as the offence of defilement was concerned. It was his submission that the two girls ran away when they were confronted by the Appellant. Their evidence would not have been material. I have re-evaluated the evidence on record. The position as regards the withholding of material evidence by the Prosecution as stated by the above quoted decision of the Court of Appeal is the correct position of the law. I however do not see how the failure by the Prosecution to call the two girls who did not witness the commission of the offence would occasion any miscarriage of justice on the part of the Appellant's case. I am inclined to agree with the submission by the State that it was unnecessary to call the two girls who ran away when they were accosted by the Appellant.

The Appellant further submitted that the evidence of PW 1 was taken by the trial Court before voire dire was undertaken to establish whether or not PW 1 could give sworn or unsworn evidence. In **Michael Muriithi Kinyua –versus- Republic C. A. Criminal Appeal No. 38 of 2002** (Nyeri) (unreported), the Court of Appeal stated at page 11 as hereunder:

*“The passages we have quoted from the Nyasani s/o Gichana case (i.e. Nyasani s/o Gichana –versus- R [1958] E.A. 190) and in the Kibangeny Arap Kolil case (i.e. Kibangeny arap Kolil –versus- R [1959] E.A. 92) (insertions mine) deal with the procedures which a trial Court should follow when receiving evidence of a child of tender years. We would summarise the position thus. There are two steps to be borne in mind. The first step is for the Court to ascertain whether the child understands the nature of an oath. An investigation to this effect must be done by the Court immediately the child witness appears in Court. The investigation need not be a long one but it has to be done and has to be directed to the particular question whether the child understands the nature of the oath. If the answer to this question is in the affirmative, then, the Court proceeds to swear or affirm the child and to take his or her evidence upon oath. On the other hand, if the child witness does not understand the nature of the oath, he or she is not necessarily disqualified from giving evidence. The second step then follows. The Court may still receive his evidence if the Court is satisfied, upon investigation, that he is possessed of sufficient intelligence and understands the duty of speaking the truth. Again investigation in this respect need not be a long one but it must be done and when done, it must appear on record. Some basic but elementary questions may be asked of the child to assess the level of his intelligence and whether he understands the duty of speaking the truth or otherwise. When the*

***Court is so satisfied, then, the Court will proceed to record unsworn evidence from the child witness.”***

From my reading of the record of the lower Court, it is evident that the trial Magistrate was alive to the fact that he ought to conduct a preliminary inquiry to establish whether or not the Complainant was to give sworn evidence or to establish the fact that the Complainant was possessed of sufficient intelligence to understand the meaning of telling the truth. The trial Magistrate did conduct the preliminary inquiry after which he was of the view that the Complainant could give unsworn evidence. The record of the trial Magistrate's Court appears to indicate that the Complainant gave sworn testimony; yet the trial Court itself had indicated that the Complainant was to give unsworn evidence.

Mr Gumo for the State has submitted that the Appellant was not prejudiced by this apparent error of the record. It was his submission that the Appellant had the opportunity to cross-examine the Complainant to test the credibility of her evidence. This fact, according to Mr Gumo, cured the apparent error on the record. I have re-evaluated the evidence on record and I am of the view that the submission by the learned Assistant Deputy

Public Prosecutor is the correct position as regards the said evidence.

The testimony given by the Complainant was lucid and was a clear narration of the events as they took place on the material day. The Appellant was not prejudiced by the fact that the record indicated that the Complainant had given sworn evidence yet in actual fact she had given unsworn evidence. The Appellant did cross-examine the Complainant and therefore any apparent error on the record was thus cured by the Appellant being given the opportunity to test the veracity of the evidence adduced by the Complainant.

The Appellant has further submitted that the evidence of the Complainant was not sufficiently corroborated to enable the trial Court to convict the Appellant on the charge of defilement. The Appellant submitted that the evidence adduced by the Prosecution did not establish beyond any reasonable doubt that the hymen was broken during the alleged defilement of the Complainant by the Appellant. The Appellant relied on the decision of **Njuguna s/o Wangurumu –versus- Regina C. A. Cr. App. No. 32 of 1952** to support this proposition.

I have examined the evidence on record. The requirement of the law that the evidence of the Complainant be corroborated was satisfied by the evidence of PW 5 Karen Wanyonyi who saw the Appellant emerge from the green house followed by the Complainant. It was her evidence that the Complainant was walking with difficulty when the Appellant saw PW 5, he ran away and left the Complainant. PW 5 went to where the Complainant was and saw her crying. PW 1 told PW 5 that she had been defiled by the Complainant. PW 5 examined PW 1 and saw blood on her pants. The evidence of PW 5 corroborated the evidence of PW 1 the Complainant.

The allegation by the Appellant that there existed a grudge between him and PW 5 is not plausible. Even if the Court were to discount the evidence of PW 5, the evidence of PW 4 Dr Musalia would still corroborate the evidence of the Complainant. The period between the time of the defilement and the examination by the Doctors at Naivasha Sher Hospital who found the spermatozoa in the vagina of the Complainant is such that there cannot be any doubt that it is the Appellant who defiled the Complainant. The Complainant identified him without any difficulty. It was in broad daylight.

It is the finding of this Court that the Prosecution proved its case beyond any reasonable doubt. In the premises therefore I do find that the Appeal filed by the Appellant lacks merit. The same is dismissed. The conviction by the lower Court is confirmed. On sentence, save for the imposition of corporal punishment which is hereby set aside on account of the amendment to the Criminal Procedure Code, the custodial sentence imposed is hereby confirmed.

It is so ordered.

**DATED at NAKURU this day of 2004.**

**L. KIMARU**

**AG. JUDGE**