



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MACHAKOS
APPELLATE SIDE

HIGH COURT CRIMINAL APPEAL 184 OF 2002

(From Original Conviction(s) and Sentence(s) in Criminal Case No 1320 of 2001 of the Principal Magistrate's Court at Kitui E.K Makori RM(E sq.) on 21/6/04)

HAMISI SULEIMAN APPELLANT

VERSUS

REPUBLIC RESPONDENT

J U D G M E N T

This is an appeal arising from the judgment of the Principal Magistrate's Court Kitui in Criminal Case 1320/01 where the appellant faced two charges namely: Rape Contrary to Section 140 of the Penal Code and defilement of a girl Contrary to Section 145 (1) of the Penal Code. In the alternative, he faced two charges of indecent assault on a female Contrary to Section 144 (1) of the Penal Code. He was convicted on the alternative counts and sentenced to four years imprisonment on the alternative counts, 3 strokes of the cane plus hard labour. The prison sentences were ordered to run consecutively.

The appellant's petition of appeal contains seven grounds:

The said grounds can be summed up as follows:

that the prosecution evidence was not corroborated; that the appellant was not taken for medical examination to prove that he committed the offence; that the evidence before the court was contradictory; that the sentence of 8 years, 6 strokes is harsh; that he was operated upon in 2000 and is a family man and, therefore, prays for leniency.

The appellant did not make any submissions save that he continued to deny the commission of the offence, and allege that there was a grudge between him and the lady and he was, therefore, framed up.

The learned state counsel supported both conviction and sentence contending that there is overwhelming evidence against the appellant.

The facts of the prosecution case before the lower court are that the mother of the complainants PW 4 was experiencing deaths in the family. She decided to get help from an herbalist/witchdoctor who was sourced by one Kinyumbu from Mombasa. PW 4 in company of her son, mother, PW 2 and 3 and accused traveled to their rural home at Ikutha. PW 2, 3 and 4 recalled that they arrived there in the evening and the appellant purported to be treating the family. He called each one outside the house. PW 2 and 3 testified that he ordered them to remove their clothes and that he had carnal knowledge of each of them. They did not talk about it as they believed it was part of the treatment.

Later PW 2 wrote to PW 4 complaining about what had happened to her. Meanwhile PW 3 also complained to her aunt. PW 4 said that the appellant tried to apply the same 'treatment' on her but she objected. The matter was reported to police in November and the appellant was called from Mombasa and arrested.

The appellant does accept having been asked to go to the complainants' home to administer some treatment 'witchcraft' and that he was paid 8,000/= leaving a balance.

He was framed with this charge so that PW 4 could not pay him for the services rendered or because the witchcraft did not work.

There is no doubt that the appellant indeed visited the complainants' home on the night of 31/7/02 in company of the complainants, PW 4 and others. The appellant does not deny that he administered treatment to them as PW 2 and 3 alleged i.e. asking them to take off their clothes.

For an offence of rape or to be proved, there has to be penetration and lack of consent on the part of the victim. As for defilement, one only needs to prove penetration but not consent.

PW 2 and 3 explained to the court why they did not report the incident immediately because they believed it was part of the treatment but they felt ashamed and uncomfortable about it until PW 2 communicated to her mother through a letter. The two girls explained in detail what happened to them. The lower court believed them.

Because of the lapse in time there was no evidence of penetration save for PW 2 and 3's word. However, they were found with pus cells which was evidence of some infection confirming that they took part in some sexual activity. The question is whether it is the appellant who was involved with the girls sexually.

Appellant contends that the charge was not proved because he was not taken for medical examination. There is no requirement that he should have been examined. The court can still find on guilty if satisfied on the evidence on record that there has been a rape or defilement.

The lower court considered in detail what amounts to indecent assault. PW 2 and 3 described what the appellant did to them, touched their private parts and even penetrated them. There was evidence of pus cells in both complainants. I do agree with the finding of the lower court that the appellant indecently assaulted the two complainants and that is why he took off very early the next day after the said incident. PW 2's evidence was corroborated by that of PW 1, 3 and 4 and the magistrate in my view reached the correct finding.

The lower court did not consider the appellant's defence which is that he was framed since they did not pay him. It is inconceivable that these young girls would frame the appellant and expose themselves to such shame and ridicule because of money. The deal was between PW 4 and the appellant not the girls. Besides the evidence is that the appellant was in Mombasa. He had not asked for the balance. It is PW 4 who had him come to Nairobi and was arrested. The defence has no basis and is dismissed as untruth.

This court after evaluating the evidence on record finds that the appellant's conviction on both alternative charges is sound and safe. The sentence too is fair considering the circumstances under which the offence was committed, a higher sentence was deserved.

The appellant used tricks to have carnal knowledge of these young girls and destroyed their innocence and violated them which is irreversible. The sentence is fair. The court, therefore, dismisses the appeal on conviction and as for the sentence, Corporal punishment has been done away with. Sentence of 6 (six) strokes of the cane is hereby set aside but custodial sentence and hard labour are confirmed.

Dated at Machakos this 9th day of December 2004

R.V. WENDOH

JUDGE