



IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO.55 OF 2001

**(From original conviction and sentence in Criminal
Case No.2307/2000 of the Senior Principal Magistrate's
Court at NAIVASHA - B. F. ODHIAMBO(S.R.M.)**

S.N.L.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The appellant appeals against conviction and sentence imposed upon him by SPM's Court Naivasha. He was charged of DEFILEMENT OF A GIRL contrary to Section 145(1) of the Penal Code. He also faced an alternative count of INDECENT ASSAULT OF A FEMALE contrary to Section 144(1) of the Penal Code.

The brief facts of the case was that the Complainant, a child of 12 years, was washing her sibling at home when the Appellant, known to her as her mother's husband came. It was 8 p.m. That the Appellant locked the door, felled her to the bed, put a stick in her mouth and covered it. He then removed her pant, after removing his trousers and inserted his male member into her private parts. That half an hour later, her mother, PW2 came home. She noted blood in the house and on inquiring who was bleeding, the Appellant left the house and fled. She told her mother what had happened.

PW2 confirmed the evidence. She also told the court that she looked at the Complainant's private parts and saw the bleeding. She then took her for treatment and reported to the Police.

A Doctor did give evidence and confirmed that on examining Complainant, he was satisfied that she had been defiled and at the time may have been infected with a venereal disease.

The Appellant denied the offence in his defence in very few words.

The Appellant urges this court to allow his appeal on grounds the Complainant took 2 days to report the incident and that the Doctor took long to go to court to testify. He was also not examined by the Doctor.

The Learned Counsel for the State opposed the appeal submitting that the Appellant was known to the Complainant before as her step-father and also because the Complainant's mother PW2 found the

Appellant still at home after committing the offence. That the Doctor, PW4 also confirmed that the Complainant had been defiled. He also urged the court to find sentence was not harsh or excessive.

On the Main Count of Defilement contrary to Section 145(1) of the Penal Code the particulars of the said charge were totally defective. The charge did not allege in its particulars that the carnal knowledge against the Complainant, which the Appellant committed was unlawful. Under Section 145(1) of the Penal Code provides:-

“Any person who unlawfully and carnally knows any girl under the age of 14 years is guilty of a felony and is liable to imprisonment with hard labour for 14 years together with corporal punishment.”

It is very clear therefore that for a charge of defilement, the particulars must allege that the act of carnal knowledge was unlawful.

The particulars of the offence of defilement upon which the Appellant was convicted was defective and unknown to law. The charge did not disclose an offence and the Appellant was wrongly convicted on it.

The alternative charge of indecent assault, however still remains on the record. The evidence on record and the finding of the lower court was that the Appellant pulled the Complainant to the bed, after removing his trousers, removed her pant and inserted his organ into the Complainant's genitals causing her to bleed. The complainant's mother found her bleeding and the Appellant still in the house. These facts supported a charge of defilement but as I have stated, it was incurably defective. These facts also support the alternative charge of indecent assault. The facts which the court accepted shows that the Appellant after stripping of his trousers and the Complainant's pant inserted his member into her private parts. The Complainant's mother confirmed that she was bleeding from her private parts therefore confirming that in the very least, the Appellant had come into contact with the Complainant's private part. The evidence of bleeding seen by the Complainant's mother confirms this as did the Doctor's finding that the Complainant had been defiled.

I am satisfied that that evidence before court supported the alternative count.

Accordingly, On a technicality I set aside the conviction for defilement contrary to Section 145(1) of the Penal Code and substitute it with a conviction under Section 144(1) of the Penal Code. I also set aside the sentence of 7 years imprisonment and substitute it with that of five years imprisonment. I also enhance the strokes of the cane from 1 stroke to 3 strokes of the cane. The sentence to hard labour is set aside.

Orders accordingly.

Dated and delivered at Nakuru this 18th day of March, 2003.

JESSIE LESIIT

JUDGE