

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
CRIMINAL CASE NO. 91 OF 2002

(Being an appeal against Sentence in Criminal Case No. 571 of 2000 by the Resident Magistrate's Court at Kilifi – C.O. Obulutsa)

N.C.S..... **APPELLANT**

- VERSUS -

REPUBLIC RESPONDENT

J U D G E M E N T

The Appellant was charged and convicted for the offence of Defilement of girl Contrary to Section 145 (1) of the Penal Code. He was subsequently sentenced to serve 7 years imprisonment and to receive 6 strokes of the cane together with hard labour. He has now preferred an appeal against sentence alone and says he is remorseful and has learned his lesson. The State opposed the Appeal saying the offence was beastly and should be treated with the seriousness it deserves and especially so, now that AIDS is an epidemic in our society.

The evidence against the appellant as it appears on record is that on 23.4.02 at around 6.30 p.m. the complainant a 13 year old girl had been sent by her mother to buy flour from the shops. On her way back the appellant whom she knew and addressed him by his name, grabbed her and carried her into the bushes and had sex with her despite her screaming. Her screams attracted her aunt who on arriving at the scene found when appellant had finished his business and he ran away. Together they went to report to the Chief who referred them to the police. The next morning they reported to the Police and she was issued with a P3 form and was treated at the Kilifi District Hospital. The Clinical Officer, Anthony Kitsao on examining her found her hymen was freshly perforated, was bleeding and injuries were within 24 hours.

The Complainant's aunt PW3, confirmed having heard someone calling for help and she decided to check only to find a girl she identified as the complainant who informed her she had been abducted by Nyambu, who was hiding in the maize plantation.

She noted the girl was bleeding from her private parts. Together with the Complainant's mother, they went to the house of Nyambu whom P3 says is her grandson but he was not home and she identified him as the accused. Her mother who testified as PW4, said she got worried when the complainant took long to return home and decided to go and look for her only to find her by the road side in the company of PW3 crying, and she told her that she had been defiled by Nyambu. This shocked PW4 and she screamed for help attracting her husband and relatives and they went looking for the accused at his home but he was not there. The next day she went back to the scene and recovered 2 pairs of pants one belonging to complainant and other supposedly to the accused. She said she had no grudge against accused.

I have analyzed the evidence and weighed it against the sentence and agree with the State Counsel that the attack on the complainant was beastly and the trauma she has suffered may remain for life. I have also considered the mitigating factors which I consider an after-thought as before Sentencing, he continued to deny the offence. He now thinks of the inconvenience visited upon him by the Imprisonment Term. However, the Court is alive to the lifetime effect such a crime has on the victim. In the circumstances, I find no special reasons to warrant interference with the sentence and consequently the Appeal is dismissed.

Dated and Delivered at Malindi this

day of July, 2003.

P.M. TUTUI

COMMISSIONER OF ASSIZE