

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO.429 OF 2000

(From Original Conviction and Sentence in Criminal Case No.422 of 2000 of the Senior Resident Magistrate's Court at Voi – E. N. Maina, Ms – SRM)

JOSEPH KATUKA MWAMESO.....APPELLANT

=V E R S U S=

REPUBLIC.....RESPONDENT

JUDGMENT OF COURT

The Appellant was charged with the offence of defilement of a girl contrary to Section 145(1) of the Penal Code. He was convicted and sentenced to 7 years imprisonment. He appeals against both the conviction and the sentence.

The facts of the case are that the complainant, who gave evidence as PW.2, was at the material time a child of about 6½ years old. On the 2nd May, 2000, she visited her uncle a few miles away from home and there found her uncle at home together with the accused who was a herdsman and garden boy employed by her uncle. The complainant lured the child to his house where he had carnal knowledge of the child. It is claimed that he did so with the door of his house wide open. The complainant says that she did not know where her uncle went at the material time when the accused removed her and his pants and fixed his penis into the complainant's private parts. She claimed he did so while seated while the complainant was standing. The complainant further stated that she did not cry although she claimed that she felt pain. He then gave the complainant some ball gum and warned her not to tell her mother but when her mother came home in the evening she told her. The complainant was taken to the dispensary the next day after her mother, PW.1, noticed that she had bruises, and a discharge in her private parts. At the Health Centre, the child was at the earliest examined by PW.4, a nurse at Mwatate Health Centre. The Nurse did not notice any tears or bruises on the complainant genitalia. But he nevertheless decided to send the complainant to the laboratory for further analysis. The laboratory results were that there were pus cells and spermatozoa revealed. The nurse filled the medical notes and prescribed some medicines and then referred her to Wesu or Voi Hospital for the P3 to be filled. The latter was done on the 16.5.2000 when the child was examined by Dr. George Njogu of Wesu Hospital who noticed a slight bruise on the posterior aspect on the complainant labia minora and also noticed a white discharge. He classified the bruise as harm and filled a P3 form.

I have examined the grounds of appeal and the judgement of the Honourable trial Magistrate as well as the grounds upon which she based the conviction. I note that at the time she was examining the complainant for her fitness to give evidence she was conscious of the danger of convicting on evidence of a child of tender age without seeking other material and credible evidence on record. I have however examined her judgment with care but find nowhere in the said judgment where she warned herself of the danger of convicting on such evidence. I also noticed that she did not bother to look for corroboration of the complainant's evidence before convicting.

The trial Magistrate was of the opinion that the complainant's evidence was clear and cogent. She identified the Appellant without any problem. She knew him as her uncles herdsman. She described the act of defilement so vividly, according to the trial Magistrate, that she could not have imagined the story. Looking at the complainant's story however, I notice that she had claimed that when she had arrived at her uncle's house, the uncle was said to be present as well as the Appellant. It is not explained when and how the uncle disappeared from the scene. The complainant claimed that Appellant put her mdudu into

her private parts. Could “private parts” be referring to the complainant’s vagina or between her thighs? In such offences, penetration of the intruder’s penis must be proved either by express evidence of the complainant or by the medical evidence. Was this proved here clearly? Private parts of a woman may not necessarily mean inside a woman’s vagina. In this case the Appellant is alleged to have used his penis to penetrate into the complainant’s vagina. She was only 6½ years old. That is a very tender age. Such alleged penetration or sexual intercourse was bound to bruise the complainant to a serious degree. Tears could certainly occur. And yet the next day when she was examined at the earliest at the Kambi Ya Punda Health Center and was examined by a Nurse, she was found to have no tears and no bruises. The nurse did not even claim to see any traces of discharge or spermatozoa. But for unexplainable reasons and despite his finding he nevertheless decided to send the complainant for a laboratory test. I know from the evidence that the laboratory test found pus and spermatozoa, both of which the nurse never saw, even traces thereof. And even more strange, 13 days later, Dr. George Njogu could find that the complainant had a bruise on her labia minora despite the fact that such was not there 13 days earlier when nurse Wilfred Pola examined her. I, with respect, find that the evidence upon which the honourable trial Magistrate based the conviction was not reliable, lacked corroboration and was evidence of a single witness, who was a child of very tender age. It was not safe evidence. It was not as reliable and cogent as the learned Magistrate thought. While I sympathize with the complainant if she was really assaulted, I nevertheless cannot support the conviction upon the grounds aforementioned and upon the evidence on the record alone.

The upshot is that the case was not proved beyond a reasonable doubt.

The appeal must succeed. I quash the conviction and set aside the sentence.

The Appellant is hereby set at liberty forthwith unless lawfully held.

Dated and delivered at Mombasa on the 11th day of April, 2002.

D. A. ONYANCHA

J U D G E