



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO.83 OF 2002

Being an appeal from Original Conviction and Sentence in Criminal Case No.395 of 2001 of the Resident Magistrate's Court at Mombasa –R. Ndubi, RM)

ALI RAJAB ALI APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The appellant is convicted and sentenced for an offence contrary to Section 145(2) of the Penal Code in that he attempted to defile a girl aged under 14 years.

The complainant Kaveka PW.1 was on 28.1.2001 sleeping at her grandfather's house in a room with other children. At about 4.00 a.m. she felt the lock being broken. She woke up and there was light in the room. She felt somebody on her body touching her private parts. She screamed and the person ran away. He was chased by her grandfather who was sleeping next room.. She produced the clothing item that was cut on the front part. She said it was cut by appellant.

Further evidence was given by PW.2 who said he was sleeping in his house and at 4.00 a.m. he heard his children screaming. He woke up and went to see what was causing the children to scream. He met and recognized the appellant in the verandah of the house. On cross examination by appellant he said the appellant was his neighbour and he had known him for 10 years. The PW.2 had followed the appellant to his house at 7.30 a.m. that morning. Later that day at 3.45 p.m. the appellant was taken to police station.

In his defence the appellant said that he stays at Utage and he sells firewood. He said on 28.1.2001 he had traveled. He said on the in following day went to his place of work (selling firewood) He was followed by a village elder and Matano PW.2, and that he was hit by Matano in the face and that he went to police station at 1.30 p.m. and he was placed in cells. He said also that he had married the sister of Matano (PW.,2) who died leaving a child behind and Matano came for the child saying no dowry had been paid. He concludes that that is the reason why he was now charged with this offence.

What is to be observed from his own statement is that he knew the family of the complainant very well. Although he says he was injured by PW.2 he did not make any complaint when he says he went to the police station at 1.30 p.m. He does not say why he went to the police station at that time. But there is evidence that he went to police on 28.1.2001 when he was booked and taken to court on 31.1.2002. So his statement is unreliable and untrue.

Evidence of PW.3 Lee Lelemima, P.C., said the appellant was taken to police station by complainant and her grandfather. Then his defence shows that the PW.2 knew him well, and knew his home and therefore when the PW.2 says he recognized the appellant he was speaking the truth. There was light in the house. The appellant also knew the house well.

After considering the above and on perusing the ground of appeal I find that there was sufficient evidence to prove the case beyond reasonable doubt and that the evidence was corroborated sufficiently and that although the occurrence was at night the evidence of recognition was very strong. There was light in the house. The evidence of arrest is to be found in the charge sheet as 28.1.2001. This is the date recorded in the OB as the date the appellant was arrested. There is no credible evidence to prove otherwise.

On the issue of marital allegations, these are mere allegations. They are not made on oath. In his cross examination of the PW.2 the appellant never suggested that there were any marital disputes existing and his statements are mere allegations. In the circumstances I find the ground of appeal without merit.

On the issue of sentence the maximum is imprisonment for 5 years with hard labour with or without corporal punishment. I find the sentence imposed by trial magistrate reasonable and I see no cause to interfere. The appeal is therefore dismissed.

Dated at Mombasa this 31st Day of July 2002.

J. KHAMINWA

COMMISSIONER OF ASSIZE

Read in presence of Ms. Mwaniki State Counsel and Appellant.

J. KHAMINWA

COMMISSIONER OF ASSIZE