



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO.439 OF 2001

(Being an appeal from Original Conviction and Sentence in Criminal Case No.2032 of 2001 of the Chief Magistrate's Court at Mombasa – Ann Gungi RM)

KENNEDY OGOLLA APPELLANT

VERSUS

REPUBLIC RESPONDENT

J U D G M E N T

The appellant was charged convicted and sentenced for the offence of defilement of a girl aged 7 years contrary to Section 145(1) of the Penal Code. This appeal is against conviction and sentence.

The evidence on the side of prosecution is that the complainant was attending school and at lunch time (12.30 p.m.) was picked up by the appellant, taken to a house in the area and defiled. The complainant said that this was the third time the appellant had defiled her. The complainant's mother who is employed in the Ministry of Health goes to work and leave the child with a maid. The family resides at [particularswithheld] in Nyali. When the mother came home in the evening she had a talk with the complainant who said that someone had touched her private parts. She was crying. The mother looked at her private parts and saw that it was tender. She went to Police Station where she obtained a P3 form and thereafter she took the complainant to hospital. Upon examination 2 days later the Doctor found that she was defiled. She had pus cells and was tender and hymen was ruptured. He concluded she was defiled and classified injury as harm. The complainant was able to identify the appellant among other persons and after this the appellant was arrested and taken to court.

In his defence the appellant said he lives in Nyali and that he was a friend of C who was a relative of the complainant. He denied the offence and said that it was C who had planned the matter to destroy him.

On considering the facts laid before the court I find that the appellant knew and was known to the complainant. That is why the complainant was able to pick him up among others. The fact of defilement is confirmed by the medical evidence and I find it was the appellant who committed the offence.

On the grounds of appeal I find that there was sufficient evidence to convict. The mother looked at her child's private parts and realized she had been defiled therefore she was a principal witness. The medical evidence was by P3 form signed by Dr. Wadie of Coast General Hospital but produced on his behalf by a witness who knew his signature – a clinical officer at the hospital and who could have answered all questions on the subject. He was cross examined by appellant as to why the appellant was not examined and he answered that the appellant had already taken bath and therefore his examination would reveal nothing. In the circumstances the appellant was not prejudiced at all.

The other grounds as to contradictions I find them to be minor and do not cast any doubt on the prosecution case. There remains the issue of sentence. The trial magistrate is the right person to assess sentence because she is in a position to see the demeanor of witnesses and to consider mitigation. In this case although the appellant was first offender he had defiled the complainant three time before. He was offending his wife by seeking sex outside home. Although he had his own children he did not respect the right of children at all. This court considers the offence very serious. The maximum sentence is 14 years imprisonment. In the circumstances of this case I find sentence of 7 years lenient and I am not persuaded that I should interfere. I therefore uphold conviction and sentence.

The appeal is therefore dismissed.

Dated at Mombasa this 24th Day of July, 2002.

J. KHAMINWA

COMMISSIONER OF ASSIZE

Read in court in the present of Appellant and Ms. Kwena State Counsel.

J. KHAMINWA

COMMISSIONER OF ASSIZE