REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 1108 OF 2001

FROM ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL CASE NO 2421 OF 2001 OF THE SP MAGISTRATE'S COURT AT KIBERA

LAWRENCE MUHANJI……...……..APPELLANT

VERSUS

REPUBLIC…….RESPONDENT

JUDGMENT

The appellant was convicted of the offence of indecent assault on a female c/s 144(1) of The Penal Code and sentenced to four years imprisonment, hard labour and to suffer four strokes of the cane.

Being aggrieved by the said conviction and sentence he lodged this appeal. The learned counsel for the appellant has taken the court through the record pointing out the shortcomings of the evidence adduced. The thrust of the submissions was that the said evidence was contradictory which cast doubt as to the identification of the appellant by pw1 and pw2.

The learned counsel for the appellant also submitted that the evidence of the complainant was not corroborated as required by section 124 of the Evidence Act. The doctor's evidence was not of any help in this regard as no physical injuries were noted, there was no clinical evidence of defilement and the infection noted could not be explained. Finally, the sentence was excessive and unjustified.

On the other hand, it was submitted on behalf of the Republic that there could not be any mistaken identity as the alleged offence took place in broad daylight. Pw2 saw what happened and therefore corroborated that of the complainant. The issue of medical evidence did not arise as the charge was that of indecent assault.

I have made an independent evaluation of the evidence on record. The appellant lived in the neighbourhood of the complainant. He was also known to the complainant and her brother pw2. The complainant and her brother escorted one of their neighbours to the appellant's house to be paid for drawing some water for him. The following is what she told the court:

> "Accused demanded that we dance for him we refused. He told us to leave and then enter his house one by one. We refused saying that he is the age of my grandfather. Then accused came and grabbed me as I and S1 and S2 went out. The accused grabbed me and threw me into his bed and locked the door behind him. S2 and S1 were outside the house. The accused then did something bad to me.He removed my under pant. He also removed his under pant. He then lay on top of me and had sex with me on his bed. He moved up and down on top of me and he placed his hand on my

mouth. I started screaming as did S2. The accused then rushed out of his house with his trouser unbuttoned. He stood like that outside his door way. Then he buttoned his trouser and then he shifted from his house the same day……"

As stated by pw1, pw2 S2 was with her. He also went to the appellant's house with pw1 and one S1. He told the court as follows:-

"We found accused completely naked. Accused stood and approached S1 to massage him. I hid at the door so I could see what was happening. I also heard the conversation. S1 ran out of accused's house. The accused grabbed Z intending to rape her. She (Z) screamed. We also screamed. A neighbour called M came and started screaming. Then accused pushed Z out of his house on hearing our screams……I saw accused grab Z. Accused was naked and was pulling .Z intending to undress her……I saw accused lie on top of Z on his bed but he never undressed her. I did not see accused undress Z… I did not know accused before this day incident."

The complainant was subsequently examined by a doctor who did not find any clinical evidence of defilement. She had no physical injuries. She had a whitish vaginal discharge which was a sign of infection which however could not be explained. The appellant was subsequently arrested and charged.

In his defence the appellant denied the offence and attributed his predicament on his differences with his landlady who was a friend of the complainant's mother. In his words"this case is a frame up concocted by the complainant's mother and her friend."

Pw1 was 11 years old while her brother was 13 years old at the time of the alleged offence. It is true that an accused person shall not be liable to be convicted on the evidence of a child of tender years unless such evidence is corroborated by other material evidence in support thereof implicating him.This is as provided for in section 124 of the Evidence Act Cap 80 Laws of Kenya. The wording of that section, with respect, does not make it mandatory that corroboration is a must. However, it is always desirable that corroboration be sought but the absence thereof does not mean that a conviction cannot be founded on the evidence of a child of tender years. If the court believes such evidence and warns itself of the danger of convicting notwithstanding that there is no corroboration, the conviction may never the less be sound.

Where two or more witnesses are present at the same place and time, one would expect that both would perceive the events of a particular occurance equally. I have earlier on in this judgment set out the extracts of the respective evidence of the complainant and her brother who said were together. It is not hard to see that the two do not agree on some crucial issues. Pw1 did not say the appellant was naked, when they first went to his house with S1; but that is the evidence of Pw2. Again she did not say that the appellant asked both S1 and her to massage him. However, this is what pw2 said.

Further to the foregoing pw1 said the appellant locked the door behind him. If that were the case, how did pw2 see what was happening inside while hiding at the door. Pw1 said the appellant removed her underpant; pw2 did not see all this, in fact he was emphatic he did not see the appellant undress pw1

Two crucial witnesses, M and S1 who were neighbours and who joined pw1 in screaming were not called as witnesses. NO reason was advanced for that omission.

The Doctors evidence was negative and did not help the prosecution case. The infection found on the complainant could not be explained.

The offence was no doubt serious but the evidence fell short of proving the same. There was a reasonable doubt. It should have been accorded to the appellant. I find the conviction was unsafe.

Accordingly, this appeal is allowed, conviction quashed and sentence set aside. The appellant shall be set free forthwith unless otherwise lawfully held.

Orders accordingly.

MBOGHOLI MSAGHA

JUDGE

18/12/2002