

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Criminal Appeal 7 of 2005

GREGORY NJOROGE KIRERI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was charged with defilement of an imbecile contrary to Section 146 of the Penal Code. The particulars of the offence were that on the 5th day of February, 2004 at [particulars withheld] Farm of Nakuru District he had carnal knowledge of LWM, a girl under the age of 14 years, knowing her to be an imbecile. After a full trial, he was convicted of the said charge and sentenced to ten years imprisonment. He was aggrieved by the said conviction and sentence and preferred an appeal before this court. He raised three grounds of appeal. In the first one, he stated that the learned trial magistrate erred in law and fact by convicting him on hearsay evidence. In the second ground, he stated that the learned trial magistrate failed to consider that the charge was influenced by a grudge that existed between him and some key prosecution witnesses. Lastly, he argued that his defence was not properly weighed against the prosecution evidence.

The prosecution case was that LWM, a 9 year old girl and who was mentally unstable was defiled by the appellant. Her mother, MM (PW1) testified that on the material day, she returned to her home at about 5.30 p.m., having left her nine year old child under the care of SK, PW2. She was told by PW2 that the appellant had defiled the child. PW1 checked her child's private parts and realised that they had bloodstains. The matter was reported to the police and thereafter the child was taken to a hospital. PW2 had seen the appellant showing some children his private parts. PW2 was told by her son, SK (PW4), that he witnessed the appellant defiling the child. PW3, GW, also testified that she caught the appellant red handed as he defiled the minor. A Clinical Officer, David Mbugua (PW5) produced a medical report (P3 Form) in confirmation of the same.

In his defence, the appellant denied having committed the offence and alleged that he had been framed by PW1, PW2, PW3 and PW4. He did not give any reason for so stating. The appellant filed written submissions in support of his appeal. He wondered why LWM was not called as a prosecution witness since she was the one who had allegedly been defiled. For that omission, he submitted, the prosecution had failed to discharge its burden of proof against him and he was therefore wrongly convicted.

Mr. Mugambi learned counsel urged the court to dismiss the appeal as there was overwhelming evidence that the appellant had defiled the child. He submitted that there were eye witnesses who saw the appellant committing the offence. Thereafter the appellant was arrested by members of the public and handed over to the police. I have considered the grounds of appeal and the submissions that were made. I do not find any merit in the first ground of appeal. Although LWM was not called as a prosecution witness, it cannot be said that the appellant was convicted on hearsay evidence. P.W.3 was an eye witness. She saw the appellant lying on the complainant and she screamed. They were off the road and the appellant had left his vehicle on the road. P.W.3 even spoke to the appellant. That evidence was not challenged.

There was also no evidence that there existed any grudge between the appellant and any of the witnesses who testified before the trial court. P.W.3 stated in her examination in chief that there was no grudge between her and the appellant. The appellant did not suggest to her and indeed to any of the witnesses that they had any grudge against him. There was also no evidence that he had been framed. The trial magistrate was therefore right in dismissing his evidence.

I find that there was overwhelming evidence against the appellant. His conviction was proper. The sentence that was pronounced against him by the learned trial magistrate cannot be said to be excessive. I see no reason for disturbing the conviction and sentence and consequently the appeal is dismissed in its entirety.

DATED, SIGNED and DELIVERED at NAKURU this 15th day of December, 2006.

D. K. MUSINGA

JUDGE