



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL APPLICATION NO. 587 OF 2001
(In the matter of an intended appeal)

THOMAS OLUOCH OKUMUAPPLICANT

VERSUS

REPUBLICRESPONDENT

(Intended appeal from conviction(s) and sentence(s) of the Senior
Principal Magistrate's Court at Kibera in Criminal Case No. 4529 of
2000)

RULING

THOMAS OLUOCH OKUMU (referred to this ruling as “the applicant”) was convicted by the Senior Resident Magistrate in Kibera Court in Criminal Case No. 4529 of 2000 on the 16th July 2001 for the offence of Defilement of a girl under the age of fourteen years contrary to Section 145(1) of the Penal Code and sentenced to serve five years imprisonment. Particulars of this offence were that on the 15th May 2000 at [particulars withheld], Nairobi, he had carnal knowledge of A.M (referred to as “the complainant”) a girl aged six years.

Being dissatisfied with both the Conviction and Sentence the applicant filed an appeal, being Criminal Appeal No. 869 of 2001, on the 15th August, 2001. This appeal has not yet been admitted to hearing. However, the applicant has now filed this notice of motion under Section 357 of the Criminal Procedure Code and in seeking to be admitted into bail pending the hearing and determination of this appeal.

It is now established law that an appellant may be admitted into bail pending appeal where he has sufficiently demonstrated that his intended appeal has overwhelming chances of succeeding. It is the applicant's submission, through his advocate Mr. Wanyama, that he has so demonstrated.

Defilement is a sexual offence, defined in Section 145(1) of the Penal Code as follows:- “S. 145(1). Any person who unlawful and carnally knows any girl under the age of fourteen years is guilty of a felony and is liable to imprisonment, with hard labour, for fourteen years, together with corporal punishment.”

The offence of defilement, like Rape contrary to Section 140 of the Penal Code, is a sexual offence committed against women by men. The underlying legal principle about these sexual offences is that the sexual act is committed against the will or consent of the woman victim. In the case of defilement it is committed against a girl under the age of fourteen years who is deemed to be incapable of consenting to the sexual act by reason of her age. There is another related sexual offence of defilement of female idiots or female imbeciles contrary to Section 146 of the Penal Code which is committed against an idiot or an imbecile who are deemed incapable of consenting to the sexual act by reason of their mental incapacities.

The words “carnal knowledge” appearing in Section 145(1) of the Penal Code mean nothing more than sexual intercourse, which is the sexual union of man and woman and is consummated when a woman's

vagina is penetrated to whatever degree or extent by a man's penis, whether or not ejaculation of spermatozoa into the woman's vagina and vulva occurs. I will only add, for good measure, that a woman's vagina is the biological opening of the woman's sexual and reproduction organ leading to the vulva, which in turn is a fleshly channel lying between the vagina and the uterus.

It must indeed follow that, when the prosecution charged the applicant with the offence of Defilement under Section 145(1) of the Penal Code it accused him of having a sexual union with the complainant. The law therefore placed a burden on the prosecution, to prove beyond reasonable doubt, that the applicant's penis penetrated the complainant's vagina to some degree and extent.

It is precisely because of this legal duty that the prosecution took the complainant to Dr. Zephania Kamau (PW 3) for medical examination, which was duly performed by him. It is Dr. Kamau's evidence that the complainant was a girl aged six years (under fourteen years) and her vagina and vulva had been bruised and her hymen.

This medical evidence only proved that the complainant's said sexual organs had been penetrated and injured. The prosecution had still to prove that the penetration occurred during a sexual union between the applicant and the complainant, involving their respective sexual organs. Realising this, the prosecution placed the complainant on the witness box to explain to the trial Magistrate the events leading up to that sexual act.

The complainant dutifully gave sworn evidence but she gave two contradictory accounts of what had transpired between her and the applicant. The first account is contained in her evidence-in-chief in which she explained that the applicant had pushed his finger into her and had only placed his penis on her vagina. At no time did she say that the penis had been pushed into her vagina. Assuming that this is what took place between them, then there was no sexual union between the complainant and the applicant. The act committed by the applicant amounted to an act of indecent assault, constituted when the applicant touched her private parts and inserted his finger into her vagina. I would regard such an act very indecent, offensive and shameful done to a girl, leading to the rupture of her Hymen. But however deplorable and dirty that act was, it did not amount to a sexual union between them.

The second account given by the complainant while under cross examination is that the applicant had in fact pushed his penis into her vagina. Assuming that this is what happened, then there was a sexual union between them and the offence of defilement of a girl under the age of fourteen years disclosed.

In my considered view, however, both these accounts cannot be correct at the same time. A doubt was thus created by the complainant's own testimony in court, which doubt ought to have been given to the applicant. Unfortunately the trial Magistrate believed the second account without giving sufficient reasons. In my view the trial Magistrate was duly bound to reject both accounts as untenable. The conviction of the applicant based on that evidence was therefore unsafe.

I do not propose to deal with the other legal issues of lack of corroboration of the complainant's evidence and unreliable identification as they are of no consequence to this application.

In agreement with both Mr. Wanyama and Mr. Mungai, the State Counsel, I find that that the applicant's intended appeal against his conviction for defilement has overwhelming chances of success. I accordingly allow this application and do hereby admit him to bail under Section 357 of the Criminal Procedure Code.

I direct that the applicant shall now execute a personal bond of Shs.100,000/= with one surety of a similar amount.

It is so ordered.

Dated and delivered this 24th August, 2001.

A.G.A. ETYANG

JUDGE