

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
APPELLATE SIDE
CRIMINAL APPEAL NO. 168 Of 2000

MWAKASI MWAKICHWA APPELLANT

V E R S U S

REPUBLIC OF KENYA RESPONDENT

J U D G E M E N T

The appellant was charged with the offence of defilement of a girl contrary to Section 145 (1) of the Penal Code. He was sentenced convicted and sentenced to serve imprisonment for a period of 5 years plus 2 strokes of the cane.

The girl who was defiled was aged 2 years. On 14.6.99 PW2, A.M.C was in the employment as a housegirl in charge of the complainant, the 2 year old girl. She was also looking after another younger child. At about 3 p.m. the child left the house and went outside. PW2 heard her cry and went out to see what was happening. PW2 heard the child crying in the accused house which was adjacent. PW2 went to accused's house and found her seated on a stool while the child was standing near him. She was crying loudly. PW2 carried the child to their house. Later the mother of child PW1 came home from work and found the child sleeping. She did not wake up the child. It was the following morning that the child woke up crying. She said she was feeling pain in her private parts. On examination by her mother she was found to have mucous on her private parts. The child shouted Fundi! Fundi! Indicating that Fundi hurt her. The PW1 took the child to hospital where she was examined and found to have reddish vaginal wall and hymen was not present. She was found to have whitish discharge. She was also found to have abnormal cells for a child of her age. The appellant complains that the complainant did not testify and that three days taken to discover the child's defilement was too long. That the child was found crying at his door step which is normal for a child to cry. That the medical report was read by another person not the maker and his medical report of appellant was not produced in court and he pleaded that he is a first offender. Upon perusing the record I notice that the Trial Magistrate considered the age of the complainant and decided that she was too young to give evidence. However, clear evidence was given by PW2, the housemaid who heard the child crying and when she went into the house of the appellant, not at the door step, she found the appellant and the child. The child was taken to her mothers house and she was later put to sleep. It was the morning of the following day that she was found to have discharge and not after 3 days. She was taken to hospital on the following day, third day where medical examination was carried out. On the issue of the production of medical report of the complainant it was admissible and read by a different doctor under the provisions of Section 77 Evidence Act. Although the document was produced by a doctor who can give expert evidence on the matter the appellant did not put any question to her in cross-examination. The appellant believes the mother of the child that she pressed for prosecution because of a grudge he had with her. There is no evidence to support such allegation.

In the circumstances I find the evidence against the appellant was straightforward and well corroborated. It leads directly to the appellant as the person who committed the offence.

I, therefore, see no reason to interfere with the conviction. Regarding the sentence, the maximum laid down by law is imprisonment for 14 years with hard labor together with corporal punishment. Here I find sentence of 5 years and 2 strokes of the cane not excessive or harsh and I do not see any reason to interfere with the trial magistrate's discretion in sentencing.

The appeal is therefore dismissed.

DATED this 31st day of October, 2001.

J. KHAMINWA

COMMISSIONER OF ASSIZE