REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA
APPELLATE SIDE
CRIMINAL APPEAL NO.136 of 2001

(From Original Conviction and Sentence in Criminal Case No.1000 of 2000 of the Senior Resident Magistrate's Court at Voi – E.N. Maina, Ms. – SRM)

DEMETRAS MWASI……………………………………………APPELLANT

V E R S U S

REPUBLIC…………………………………………………….RESPONDENT

JUDGMENT OF COURT

The Appellant was charged with the offence of Attempted Defilement of an Imbecile contrary to Section 146 of the Penal Code. He was also charged in 2nd Count with Unlawfully and Indcently Assaulting the same girl, D.M.P, by touching her private parts. The trial Magistrate, after considering the evidence which was given before her, convicted the appellant of the offence of attempted defilement of an imbecile and sentenced him to 5 years imprisonment with hard labour. The appellant appeals against both conviction and sentence.

The facts of the case are that sometimes between 24th October, 2000 and 30th October, 2000, the appellant who is a grandfather of the complainant, tried to have or infact had carnal knowledge of her. This occurred [particulars withheld]. It is not clear whether the appellant had succeeded or not. The complainant, however, appears to have screamed either before the appellant succeeded or after. An Administrative Police Officer heard her screams and came to rescue her. The AP did not find the appellant who had either run away or was hiding nearby. But according to the complainant's evidence, she immediately informed him that the appellant had wanted to do had things with her and had ran away. Nevertheless, the complainant proceeded to her school where she stayed until evening when she returned home where she lived with PW.1. She the next day on 25.10.2000 narrated the incident to PW.3 in the presence of the appellant who denied the accusation. The next day, which should be on 26.10.2000, PW.1, who until then was away, came back (as per the story of PW.3). Sh reported the incident to the Wundanyi Police Station. PW.1 however stated in her evidence that she received the report of the appellant's attack on complainant while she was at Nairobi on 30.10.2000. This contradicts PW.3's story that the attack took place probably on the previous day of 25.10.2000 which should be on 24.10.2000. According to PW.1's evidence, PW.1 came back home from Nairobi after two days, and having confirmed the details of the attack from the complainant, proceeded to report the matter to Wundanyi Police Station.

She then took the complainant to Wesu Hospital for Medical Examination with a P3 she had been given (presumably) at the Wundanyi Police Station. She returned the P3 to Wundanyi Police Station the next day. Thereafter the appellant was arrested. She does not in her evidence, say when she reported to Wundanyi Police. She does not also say when appellant was arrested. But according to PW.3, PW.1 came from Nairobi a day after 25.10.2000 and reported to Wundanyi Police Station the next day after she arrived. This puts the arrival on 26.10.2000, which totally contradicts PW.1's date of arrival from Nairobi which was two days after 30.10.2000. These contradictions are clarified by PW.4 Pc. Joseph Mwenza who states in his evidence that on 3.11.2000 she received a report from complainant and PW.1 that they had reported the incident to the Police Station on 2.11.2000.

From PW.4's evidence, Appellant was arrested on 7.11.2000. There is ample evidence on the record

that the complainant is an imbecile. It is also clear that she did not remember the date of the attack. It is not clear whether she reported the matter to PW.3 on the next day or several days after. According to PW.1, the appellant actually succeeded in having carnal knowledge of the complainant. She must have reported so to PW.1 or PW.1 was lying to court as to what the complainant had to her. The investigations in this case (if there was any at all) was, sadly, terribly wanting. It is clear that the Police Officers who received the first reports from the complainant and PW.1 never recorded it. Otherwise PW.4 would not be reminded of it by PW.1 when they returned the P3 on 3.11.2000.

It is not understandable also why PW.4 after knowing that the O.B. was not opened did not himself open it and proceed to investigate and record relevant statements from the APs who had intervened and rescued the complainant. Nor did he record the statement of the Police Officer who had first received the complainant’s report at the Police Station and the doctor who had examined the complainant at Wesu Hospital. The result of all these omissions is that the court did not have the advantage of hearing the said persons’ evidence. Despite this serious omissions, the trial Magistrate found that the appellant had a case to answer. The appellant decided to say nothing in his defence and the trial Magistrate proceeded to convict on the evidence from PW.1, PW.2, PW.3 and PW.4. The counsel for the appellant Mr. Odiaga stated that the trial Magistrate convicted the appellant on evidence which was inadequate. He argued that there should have been no case to answer finding from the trial Magistrate, and that at the end of the full hearing, the burden of proof which always lay on the prosecution, was not discharged. The State Counsel, Miss Kwena, could not support the conviction and therefore had no reason to address this court on sentence. I have perused the evidence upon which the trial Magistrate grounded her judgment. The investigation of the case by Police was totally inadequate or non-existent.

The Police Officers who handled this matter failed to look for the necessary and/or relevant evidence. The Prosecutor should have returned the Police File back to the Station where it originated and demanded further statements of the other witnesses who had not been called or summoned to record their evidence as pointed out hereinbefore. It was not logical on the part of the Prosecutor to start prosecuting the case when he clearly knew or ought to have known that he will not come near proving it. The attitude manifested by the specific Police Officers who handled this case from the beginning until the end including the Prosecutor is deplorable and is to be openly discouraged.

This court agrees with the sentiments expressed by both counsel. Evidence of the AP who rescued the complainant during the attack was relevant and important for the corroboration of the complainant’s case. So should have been the evidence of the doctor who examined the complainant, although the same may not have proved much since it was obtained several days after the attack. The testimonies of PW.1, PW.2, PW.3 and PW.4 contradict each other and one another in several material particulars i.e. the date of the attack and whether the appellant succeeded to have carnal knowledge of the complainant or not. The complainant was about 14 years and not necessarily a child of tender years. However, she was provn to be an imbecile.

Her thinking as demonstrated in her testimony in the court below, confirmed that she is like a child of tender years. Her evidence would therefore of necessity require corroboration. There was no such corroboration.

It is amazing how the learned trial Magistrate arrived at the decision that the case had been proved beyond a reasonable doubt with all the short falls and contradictions aforementioned. She nevertheless reached those unsupportable conclusions.

This court cannot support her judgment in respect of both the conviction and sentence. I therefore quash the conviction and set aside the sentence.

The appellant is forthwith ordered released unless lawfully held.

Dated and Delivered at Mombasa this 27th day of November, 2001.

D.A. ONYANCHA

J U D G E