



(Appeal arising from Judgment of the Senior Resident Magistrate's Court at Vihiga in Criminal Case No. 1582 of 2005 [T. N. BOSIBORI, SRM])

JOSEPH LOLO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, **JOSEPH LOLO** was charged with the offence of defilement of a girl under the age of sixteen years Contrary to Section 145 (1) of the Penal Code.

The particulars of the offence are that on the 20th day of November, 2005 at in Vihiga District within the Western Province, had unlawful carnal knowledge of SV, a girl under the age of sixteen.

The appellant pleaded not guilty before the lower court. After a full trial, the appellant was found guilty and convicted. He was sentenced to serve twenty years imprisonment. The appellant was aggrieved by the conviction and sentence and appealed to this court.

In his Petition of appeal, the appellant's main grounds of appeal are as follows:-

- The weight of the evidence on record did not meet the required standard in law.
- There was no evidence linking the appellant with the act of having had carnal knowledge of the complainant.
- Reliance on hearsay evidence.
- Absence of evidence of crucial witnesses.
- Reliance on inconsistent prosecution evidence that did not meet the legal threshold.
- Trial magistrate misapprehended the law and facts.
- Failure by the trial magistrate to evaluate the evidence of the appellant correctly in the light of the circumstances of the alleged offence.
- Trial magistrate paid homage to extrinsic factors in convicting the appellant.
- The offence was not entirely supported by the evidence on record.

This court heard oral submissions by Mr. Ouma for the appellant. The said submissions essentially expound on the grounds of appeal.

Mr. Limo, the State Counsel relied on the evidence on record.

This being a first appeal, it is the duty of this court to re-consider the evidence and draw its own conclusions. (see OKENO V R. [1972] EA 32).

The facts of the prosecution case were that on 20.11.2005 at about 1.00 p.m., PW1, SV, a 14 year old girl was at home. The appellant went and bought a chicken from the complainant's mother, PW2, AL. The appellant gave the chicken to the complainant to carry to his house within the same neighbourhood. The complainant found the door to the house of the appellant closed. The complainant went with the chicken to the river where her cousin was washing clothes. The appellant followed the complainant to the river and told her that his customs did not allow the chicken to be taken to the river. The appellant told the complainant to take the chicken to his house. When they reached the house, the appellant opened the door. The complainant entered the house. When the complainant reached where the table was the appellant grabbed her and took her to the bedroom. The complainant screamed but she was ordered to keep quiet. The appellant held the complainant by the hands and legs and placed her on the bed. The appellant pulled the complainant's skirt upwards. The complainant had no underpants. The appellant did what the complainant described as bad manners to her. The complainant felt pain in the vagina.

The appellant's wife who was the aunt to the complainant walked in and found them in the house. The appellant's wife reported the incident to the complainant's mother. The complainant's mother rushed to the scene. She found the appellant wearing a trouser with no shirt. The complainant's mother checked the complainant's sexual organs and found what she called "male ejaculations" there. The matter was reported to the village elder and to Vihiga Police Station. The complainant was taken to Vihiga District Hospital where she was examined by PW5, DR. SOLOMON KAMAU. The doctor confirmed that the complainant had been defiled. The appellant was subsequently charged.

In his defence, the appellant gave sworn evidence. He stated that he lived in Vihiga and at the worked at the Municipal Council as an askari. That he was married to Rebecca who had one child and they lived in Rebecca's brother's house in Vihiga.

The appellant stated that he had separated with his wife and had moved out for a period of about 1½ months after they differed over his excessive drinking.

That on the material day his estranged wife summoned him back home. When the appellant arrived at the house he did not find the wife in and waited for her as per her instructions. When his wife came, she went straight to the bedroom and asked him if he had found any children in the house. The wife started quarrelling with him accusing him of excessive drinking and told him she aborted his children because he was a Turkana and had another family in Lodwar. The quarrel attracted the extended family to the house.

The appellant denied having defiled the complainant and stated that he did not see her on the material date. According to the appellant, he treated the wife's brother's children as if they were his own brother's children and he was shocked by the allegations.

At about 10.00 p.m. on the material day, appellant was called to the Police Station. He was arrested and brought to court. He was taken to hospital for examination. The appellant further stated that his wife sought his forgiveness but that was like crying over spilt milk because she had framed him up. The appellant stated that he was not intending to take land from his wife's family.

Having re-evaluated the evidence adduced before the trial magistrate's court, I find that the complainant (PW1) gave sworn evidence and was cross-examined. The complainant narrated to the lower court how the appellant did "bad manners" to her after a placing her on the bed and pulling up her skirt. According to the complainant, she wore no underpants and she felt pain in her vagina. Although the complainant was not pressed to expound on what she exactly meant by bad manners, the evidence of her mother, PW2, AL and that of PW5, Dr. Solomon Kamau sheds more light on the matter. The mother gave evidence that corroborated the complainant's regarding the chicken and the complainant having gone to the house of the appellant. According to the mother, she was informed by the wife of the appellant that she had

found the appellant having sex with the complainant. The mother rushed to the house of the appellant and found him in without any shirt on and she examined her child and found signs of sexual intercourse.

The doctor's evidence is that he found that the complainant had bruises around the vagina and the hymen was broken. There was therefore no doubt that the complainant was defiled. The complainant identified the appellant as the culprit. The complainant who was 14 years old according to the doctor's entry in the P3 form. The complainant knew the appellant well. The offence took place in broad daylight. The mother rushed to the scene and found the appellant there. The appellant's wife Rebecca passed away according to the evidence of the complainant's mother (PW2) and the evidence of the Investigating Officer, PW4, **P.C. PHILIP CHIKOLI**. Rebecca could therefore not be called as a witness. One PM, a brother to the complainant (PW1) called her and asked her what she was doing in the house of the appellant. PM was not a crucial witness as the complainant's evidence is that the said brother called her after the event. The said brother's evidence would not have made any difference in this case.

The trial magistrate believed the evidence of the complainant and found that there could be no mistaken identify. After re-evaluating the complainant's evidence, I arrive at the same conclusion.

The proviso to Section 124 of the Evidence Act stipulates as follows;

“provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

The defence has raised issues with the evidence on record, stating that the same has inconsistencies and contradictions. I have found no material inconsistencies and contradictions in the evidence by the prosecution witnesses. The exact position where the complainant and the appellant were standing when the appellant's wife burst in and whether the appellant was married to Rebecca or not or who was the complainant's aunt are of no material consequence to the offence charged.

The evidence of the village elder, (PW3) JOSEPH BWOSE and that of the Police Officer confirmed that a report o the defilement was made to them on the material day.

I have re-evaluated the appellant's evidence. The defence that the appellant was framed up is not plausible in view of the strong evidence adduced by the prosecution witnesses. There is no doubt that the complainant was defiled. If the appellant's wife could frame him up, there are no reasons why the complainant and the mother would also frame him up.

The trial magistrate convicted the accused on sound evidence. The appeal has no merits and is dismissed. The conviction and sentence is upheld.

Delivered, dated and signed at Kakamega this 11th day of July, 2012

B. THURANIRA JADEN

J U D G E