REPUBLIC OF KENYA

Ngare v Republic

Court of Appeal, at Nakuru September 27, 1985

Hancox, Nyarangi JJA & Platt Ag JA

Criminal Appeal No 32 of 1985

(Appeal from the High Court at Nakuru, Masime J)

September 27, 1985, Hancox, Nyarangi JJA & Platt Ag JA delivered the following Judgment.

WG, then aged 14 years according to Dr Maina (PW 1) and in standard V, on March 12, 1982 at about 8.00 pm left her house to carry food to her grandfather in a house nearby. On her way back, she met the appellant and another man near the toilet. The other man who she knew, pulled her, held her mouth and then the appellant who she knew as a neighbour, emerged. Both men carried her to a "shamba" some distance from her house. He mouth was held during the journey to the shamba. The appellant had sexual intercourse with her after the other man had removed her knickers and held her legs. After the appellant, the other man had his turn. After they let go of her, she screamed and her father came. She told her father what had happened to her. She gave the names of the appellant and the other man David Munyi. She was taken to hospital. He father's evidence was this that after the complainant's mother became anxious about WG he got out of his house carrying a torch, to check. Missing her, he went round only to hear her screams from a distance. He rushed and she reported to him,

> ***"how Nderitu and Munyi …had forcibly held her and played sex with her".***

He knew Nderitu and David Munyi and so he pointed them out to police officers who arrested them and had the appellant and David Munyi jointly charged with defilement of a girl contrary to section 145 of the Penal Code. The doctor examined WG on March 15, 1982, assessed her age to be 14 years, and found she had on a blood stained dress and ruptured hymen. The doctor told the magistrate:

> ***"we took a smear and found dead sperms and tricho monasuaginalis – all evidence of V D and sexual intercourse, two or three days before…***"

The appellant's reaction to all that was by way of an unsworn statement in Kikuyu whose English translation is:

> "***On March 18, 1982, police came and arrested me. The complainant's father is my enemy. I never slept with the girl. That is all". The appellant cross-examined the complainant's father who replied: "I was only desirous of knowing where my daughter was. I hadn't seen you around my house. I didn't know if anyone else heard her scream. I know you for long. You come often to our house."***

The magistrate held that there had been recent sexual intercourse and that WG had told the truth. The judge, in a one sentence judgment which took no or little account of section 169 of the Criminal Procedure Code, can be said to decide that WG was a credible witness whose evidence persuaded him to find no merit in the appeal, to him, of the appellant.

The concurrent finding that a man or men had had sexual intercourse with WG was based on worthy evidence.

The appellant argued in his main and supplementary petition to us that he was not medically examined to VD. However, as he was not alone, even a positive result that he had no VD could not, in the face of the

clear evidence of WG who knew him before the incident, exonerate the appellate. Eria Ngobi v Republic (1953) 20 EACA 154 concerned a man and a girl who had been with the man the day she was assaulted, who was found to be suffering from a new infection of gonorrhoea and the accused man was found to be suffering from an old infection of the same complaint. There, it was held that there was sufficient corroboration of the girl's evidence to make it safe to convict. In this case it would not have affected the charge one way or the other on the balance of probabilities, even if the appellant was found to be suffering or not to be suffering from VD.

The complainant was not under the age of fourteen years at the time the appellant unlawfully and carnally knew her. It is however crystal clear form the evidence that the appellant committed the offence of indecent assault contrary to section 144 (1) of the Penal Code. In pursuance of section 186 of the Criminal Procedure Code and section 3 (2) of The Appellate Jurisdiction Act, cap 9 the appellate is convicted of the offence under section 144 (1) of the Penal Code.

The appellant committed a grave offence to a young girl. His conduct was low and ignoble and he deserves punishment. A sentence of 5 years' imprisonment from May 28, 1982 with hard labour plus 12 strokes corporal punishment is just about right.

The appeal is otherwise dismissed. That is the order of this court.