REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

APPELLATE SIDE

CRIMINAL APPEAL NO 580 OF 1983

'From Original Conviction(s) and. Sentence (s) in Criminal Case No 580 of 1983 of the Resident Magistrate's Court at Kibera M A Ang'awa (Miss)

STEPHEN EIERIA I^ISMIA...APPELLANT

Versus

REPUBLIC...………............RESPONDENT

CORAM: TODD, J.

O'KUBASU,J.

Appellant absent, not wishing to be present and unrepresented.

B Mbai (State Counsel) for Respondent.

JUDGMENT

The appellant Stephen Kieria Memia was charged on the 1st count with rape contrary to Section 140 of the Penal Code (cap 63) of one V. M d/o P without her consent during the night of January 7/8, 1985 at [particulars withheld] in the Kajiado District and in the alternative to indecent assault of the same girl contrary to Section 144(I) of the Penal Code and on a 2nd count of defilement of a girl Contrary to Section 145 (I) of the Penal Code being S.M, a girl under the age of 14 years at the same place and during the same night and in the alternative indecent assault of the same girl, contrary to Section 144(I) of the Penal Code.

After trial the appellant was convicted on the two alternative charges. The learned trial magistrate in his judgment said:

"The Government Chemist here should have been made use of. For this reason I find that the prosecution has failed to prove first and second count to this offence……"

The appeal record has not been easy to read or understand, however the prosecution case was that the appellant came to the house where the two complainants were living, pretending to be a policeman investigating some case of assault.

After threatening the inmates of the house, he took the two girls away, V.M being some 15 years

of age and S.M, being 12 years of age. Both girls were affirmed, apparently after the trial magistrate had satisfied herself as to the ages of the two girls and that they were Catholics attending school. He does not however appear to have considered whether or not they understood the meaning of an oath or affirmation, but we find from their educational standard that they do.The appellant took them to an empty shop where there he opened the door and where there he tore up some boxes and told the girls to lie down and then told them to remove their pants. He slapped them and took out a knife and threatened them with injury. He then lay on and had sexual intercourse with S.M and then he lay on and had sexual intercourse with V.M twice with V.M and' three times with S.M during the night. In the morning he let them go and handed back to V.M the identity card of Mzee which he had taken the evening before. The 2 girls were medically examined and when Dr Philip Kipaga Githere came to give evidence he said:-

"A girl called V.M was sent by the police Loitokitok to the hospital in order that that would examine her. It was seen that she was defiled. When I examined her - the clothes were not torn, and she appeared normal. Her age was approximately 15 years. There were no injuries in her private parts but there was a little discharge. I took a specimen from her vagina smear. The results showed there was some spermatazoa and some bacteria. I then signed this P3. I wish to produce it to the court as an exhibit and it is in the file. The witness continued:

On January 10, 1983 I examined S.M. She too is said to have been raped. The clothes were not torn and she had no injuries. Her age is approximately 12 years old. There were no injuries on her private parts. There was a small discharge but it was nothing bad. I took a vaginal swab and the results showed some spermatazoa and bacteria. I signed the P3 form and wish to produce this as an exhibit before court. Girls had sex intercourse. I gave the police the vaginal swabs, whose results they gave to me.

It does not appear that the appellant was afforded an opportunity to crossexamine the doctor, but we did not find that this omission has occasioned any failure of justice to the appellant vide Section 382Criminal Procedure Code (cap 75).

The appellant in his statutory statement to the court said:

My name is Stephen Kiarie. On January 14. 1983 I had gone to the Tanzania Hospital as it was near. On returning I was then arrested and jailed with the Tanzania police. I was told I had to be repatriated as I had crossed without going through the entry. I was called for, the police, from Kenya. It was ought (must be caught) here. I was assaulted at the police. I was placed my ginger to the form that they said I slept with the girls by force. I was brought to court. That is all.

The appellant's defence was a denial of the stories told by the two girls.

The trial magistrate in his judgment said, inter alia:

In considering the evidence by the prosecution witnesses I find that the accused identity has been ascertained beyond any reasonable doubt that he is the one and same person who visited the witnesses homestead and left with PW 1 and PW 2 at night. The children were left with the accused according to PW 3, and PW 4 saw them leave together. All of them were frightened as the accused claimed to be a police officer and as such did not want to disobey him. It is also clear that the accused was also clearly recognised that same night by PW 5.The two complainants were then raped by the accused – in most beastly act.

The appellant's defence when he said in his judgment:

The accused has pleaded innocent in that he recalls as far as January 14, 1983 when he was in Tanzania and not Kenya.How he was arrested for illegal entry into Tanzania and was repatriated back.

The trial magistrate did not believe that the appellant was innocent of the offences charged.

The trial magistrate found that the prosecution had proved the case against the appellant beyond any reasonable doubt and as such found the appellant guilty as charged on the two alternative counts and convicted him accordingly on indecent assault contrary to section 144(I) of the Penal Code.

Making our own assessment of the evidence and believing the evidence of the prosecution witnesses and finding that there is sufficient corroborative evidence of the two stories that they were seen being taken away by the appellant on the night in question end disbelieving the appellants defence. We have no doubt that the appellant did in fact at least indecently assaulted the two complainants as testified to by them and so the appeal of the appellant against the convictions entered on the two counts of indecent assault are dismissed and we do not find the sentence imposed is manifestly excessive. But there cannot be one sentence for the two counts as imposed by the trial magistrate and so we alter the same to a sentence of 5 years on each count to run concurrently together with 5 strokes of corporal punishment on each count. To this extent the sentence is varied.

Dated and delivered at Nairobi by Todd, J. this 14th day of December, 1985.

J B S TODD

JUDGE

E O'KUBASU

JUDGE

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