REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII

Criminal Appeal 247 of 2004

SAMSON NYANTORI KIBURE …….. APPELLANT

VERSUS

REPUBLIC ……..…….. RESPONDENT

JUDGMENT

The appellant SAMSON NYAITORI KIBURE was convicted for the offence of defilement of a girl contrary to S.145(1) Penal Code. Particulars were that on 6th June 2004 at Ihore Sub-location in Kuria District he unlawfully had carnal knowledge of BM, a girly under the age of 16 years.

Prosecution case was that on the material day the appellant ambushed the complainant, a girly of 14 years in a cassava plantation and defiled her for over one hour. She screamed and one Kamande and Ongenga Ombogo went to the scene. Accused ran away. The complainant went home and took a shower. Her mother returned home later but complainant did not tell her of the assault. That evening Onganga Ombogo went and reported the incident to complainant's mother. She checked her daughters private parts and she saw blood stains and sperms.

The complainant confirmed to her that she was defiled by the appellant.

The next day she reported to the chief then to Kehancha Police Station.

Complainant was taken to Kehancha Hospital where she was examined and treated. Appellant was arrested 3 months later as he had gone to Tanzania.

Appellant denied the offence.

The appellant had also been charged with the alternative charge of indecent assault but the trial magistrate did not make any comment on that.

Mr. Kemo the State counsel supported the conviction and the Sentence of Seventy years and hard labour imposed on the appellant and said the evidence was enough to support the conviction. Mr. Lebu for the appellant had submitted that there was no enough evidence and the medical evidence was contradictory.

I have considered the appeal and evaluated the evidence on record.

It is only the complainant (PW1) who testified to the fact that she was defiled. Indeed S.124 Evidence Act provides that evidence of a minor can be relied upon to conviction even if there is no other corroborating evidence.

However the trial magistrate in his evidence did not state whether he believed the evidence of the complainant or not. He only stated that he was satisfied that the appellant committed the offence.

As stated I have evaluated all evidence and I find it hard to believe the evidence of the complainant.

She never reported to her mother that the complainant had defiled her until one Onganga told her mother. In fact after the defilement she said she took a shower. It is clear that she was not going to talk about the event until somebody else reported. Her explanation that she feared her mother did not hold water unless she wanted to say she had agreed to have sex.

Onganga who reported to her mother about the defilement was himself never called to testify. I think this was one case where the evidence of the complainant needed to be corroborated before it could be relied on to convict. There was no corroborating evidence.

The evidence of the Clinical Officer was fatal to the prosecution case.

The Clinical Officer – PW4 did not say when he examined the complainant but he said the injuries were 3 months old. The P3 form though shows to have been issued on 8th June 2004 was filed on 29th September 2004 almost four months later yet PW4 stated that he observed a torn panty, swollen labia majora, a wound in the inner side of the vagina whitish discharge and pus cells. PW1 & 2 had said that complainant had gone to hospital a day after the attack. I don't think that those injuries, if indeed she sustained them would have lasted up to 29th September 2004 a period of about 4 months. The evidence of the Clinical Officer was very casual and cannot be believed. He did not even say when the complainant was treated.

There were no treatment notes. The P3 form was of no evidential value and the trial magistrate erred to rely on it to convict. The conviction was most unsafe and should not be left to stand.

As for the sentenced of 70 years imposed on the appellant it is clearly illegal. The same was handed by a Resident Magistrate.

S.7(2) (a) of C.P.C. clearly provides that a Resident Magistrate can impose a sentence of up to seven years imprisonment unless for offences of under S.278,308(1) and 322 Penal Code where they can impose any sentence authorized by the law. S.145(1) P.C. is not one of such offence and as such the Kehancha Resident Magistrate had no jurisdiction to impose as sentence of 70 years. That was illegal.

From the above therefore I find that the appeal is well merited and the same is allowed. I quash the conviction and set aside the sentence imposed.

Appellant be set at liberty forthwith unless otherwise lawfully held.

Dated 7th November 2006.

KABURU BAUNI

JUDGE

Delivered in presence of

cc. Mobisa Mr. Chirchir for State.

Appellant P.I.P