REPUBLIC OF KENYA

IN THE HIGH COURT FO KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 114 OF 2003

MKUTANI OLE MPAPAYAH …… APPELLANT

VERSUS

REPUBLIC …….. RESPONDENT

JUDGMENT

NKUTANI OLE MPAPAYAH (hereinafter referred to as the appellant) was charged in the Chief Magistrates Court at Kibera with defilement of a girl, contrary to Section 145(1) of the Penal Code. The particulars of the offence were stated in the charge sheet to be that on the 17th day of August 2002 at Olooseos Reserve in Kajiado District within Rift Valley Province the Appellant unlawfully had carnal knowledge of M N, a girl under the age of fourteen years. The prosecution called a total of 7 witnesses in support of the case. In his defence the appellant gave a sworn statement and called no witnesses. On evaluation the evidence, the Resident Magistrate found the appellant guilty as charged and duly convicted him. The appellant was subsequently sentenced to serve 7 years imprisonment. It is against this conviction and sentence that the appellant has lodged this appeal.

In his petition of appeal the appellant faults the trial court for convicting him on insufficient evidence. When the appeal came up for hearing the appellant was unrepresented. The state was represented by Miss Gateru, learned state counsel. In his oral submission in support of the appeal, the appellant stated that he did not defile the complainant, that he was not taken to the doctor for examination for the alleged crime and that the complainant was taken for examination 3 days after the incident.

In her response, the Learned State Counsel submitted that the prosecution proved its case against the appellant beyond reasonable doubt. That the complainant (PW1) gave a vivid account regarding the ordeal she underwent at the hands of the appellant. She was not shaken at all during cross examination by the appellant. She identified the appellant as the person who defiled her and who in any event was well known to her. The state counsel further submitted that the evidence of PW1 was corroborated in material particulars by the evidence of PW4. The evidence of PW1 was further corroborated by the

evidence of PW5, Dr. Zephania Kamau who examined her and found that the complainant had injuries to her private parts and indeed had a tear that had been repaired at Nairobi women hospital. The learned state counsel further submitted that penetration was proved when PW1 stated in her testimony that "……. The accused came and lay over me. He put in me the thing he uses to urinate. He put the thing in my thing that I urinate with……" On sentence counsel submitted that the sentence was lawful, neither harsh nor excessive. In sentencing the appellant to 7 imprisonment for such a serious offence, the trial magistrate was more than lenient to the appellant, the learned state counsel concluded her submissions. The appellant is entitled to expect from me a fresh reconsideration of the evidence, my own evaluation of that evidence and my own conclusions drawn from such evidence – See OKENO – VS – REPUBLIC (1972) EA 32 . I shall proceed to look at the recorded evidence.

The prosecution case was that the complainant who is a girl aged 9 years was staying with her auntie, D K (PW2) at a development center in Olooseos Reserve Kajiado District. The appellant was an employee of the center as a herdsman and milkman. The complaint would occasionally be sent by PW2 to the appellant to collect milk. On the 13th August 2002 the complainant was sent by her auntie (PW2) to the appellant to get milk. On reaching the appellant's house, the appellant locked her inside the house and defiled her. PW1 further testified that she felt a lot of pain and cried out but the appellant told her not to scream. He then gave her 20/= and warned her not to tell anybody what had transpired, otherwise he would beat her up. The complainant returned home looking sickly according to PW2 whereupon she was given medication.

The following day PW4 and PW6 who are also relatives of the complainant noticed that she was walking with difficulty. PW4 confronted the complainant who amid crying stated the appellant had defiled her. PW4, PW5 and PW3 then rushed the complainant to hospital where she was admitted for 3 days. They also reported the incident to the police. Accompanied by P.C. Kioko (PW7) they managed to arrest the appellant and upon completion of police investigations the appellant was charged with the offence.

It is common ground that the complainant was defiled. However, was she defiled by the appellant" The complainant was categorical that indeed it was the appellant who defiled her. The appellant denies having committed the act. There was no other witness to the incident. It therefore boils down to the word of the complainant against that of the appellant. The trial Magistrate opted to believe the story of the complainant. Her decision was based on the fact that she was impressed by the demeanor of the complainant. The trial Magistrate stated in her judgment "……..PW1 who gave a sworn statement looked to be a bright girl, stated clearly and without hesitation that it is the accused who had defiled her. She informed her aunt when she inquired and the police as well. There is no question as to identification as accused was well known to her, a fact that is without dispute ……". This court as a first appellate court cannot interfere with the finding of fact of the trial court regarding the demeanour of witness, unless it is shown that it is based on misapprehension of the evidence, or that the trial court acted on wrong principles in reaching the decision – SEE CHEMAGONG – VS – REPUBLIC (1984) KLR 611; KLARIE – VS – REPUBLIC (1984) KLR 7 39. I do not see such misdirection in the instant case.

It is appreciated that the complainant was a minor whose evidence required corroboration in material particulars. Was there such corroboration" I think so. There is evidence that when the complainant went back to her auntie's house she appeared sickly. In her own testimony the complainant stated "….. I did not tell anybody but I was given some medicine by my auntie because I said I was feeling unwell. I was still hurting at my private parts an d I even bled". On the same issue her auntie (PW2) testified thus "……. she went and came back later. I did not know anything had happened. She however stated looking sickly. I asked her what the problem was. She said she had a headache. I gave her me dicine……" There is no evidence on record that the complainant was sick or unwell before she was sent to the appellant by her auntie to collect milk. She only appeared unwell on coming back meaning therefore that something

must have happened. It has been held in several authorities that “in sexual offences the distressed condition of the complainant is capable of amounting to corroboration of the complainant’s evidence”. SEE ABASI KIBAZO – VS – UGANDA (1965) E.A 507. I would hold in the circumstances of this case that the sickly appearance of the complainant soon after coming from the house of the appellant provides the necessary corroboration of the complainant’s evidence. Further corroboration is also provided by PW4 who on 15th August 2002, two days after the incident noticed the complainant walking in a funny manner. She was apparently walking with her legs wide apart. When confronted, the complainant broke down, cried and informed this witness that she was defiled by the appellant. Finally there is the evidence of Dr. Zephania Kamau (PW5) who examined the complainant and filled the P3 form that was introduced in evidence as an exhibit. The examination revealed that the complainant had a hematoma around the vaginal area. She also had sustained a tear in the same area, which had been stitched at Nairobi Women Hospital. In the absence of any other explanation as to how the complainant sustained the injuries to her private parts, it is safe to conclude or draw the inference that she was defiled by the appellant as she stated in her testimony. The appellant in his oral submissions raised the issue that he was not taken to the doctor for examination in connection with the offence. From the record the appellant was arrested on 15th August 2002. The alleged offence was committed on 13th August 2002. The appellant could have cleaned himself and or taken such measures as to conceal the evidence. No useful purpose would have been served in the circumstances of this case by taking the appellant for medical examination in connection with the offence.

The appellant further submitted that the complainant was examined 3 days after the event. This is not true. The complainant was actually examined by the doctor on the second day after the incident. The doctor noted that the injuries inflicted on the Complainant’s private parts that were consistent with defilement.

On sentence, I note that the offence carries life imprisonment. The appellant was sentenced to a mere 7 years imprisonment. The offence is serious and rampant. The victim is a young girl and will suffer the effects of this incident for the remainder of his life. I do hold in the circumstances that the sentence imposed is neither harsh nor excessive. It was within the law.

Taking all the evidence adduced and the appellants defence into consideration, I am satisfied that the appellant was properly convicted. Accordingly I do dismiss this appeal and confirm the conviction and sentence imposed on the appellant.

Dated at Nairobi this ……. day of …….. 2004.

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M.S. A. MAKHANDIA

Ag. JUDGE