



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT KITALE.**

**APPELLATE SIDE.**

**CRIMINAL APPEAL NO. 62 OF 2003**

**ABRAHAM NDEYA AKUDINYANG ::: APPELLANT.**

**VERSUS**

**REPUBLIC ::: RESPONDENT.**

(Being an appeal against the Judgment of the RM'S court in criminal Case No.

235/2003 by H. Wandere (Mrs.) – RM delivered on 12th June, 2003 in Kapenguria)

**J U D G M E N T .**

Abraham Ndeya Akudinyang was charged, tried and convicted of the offence of indecent assault on a female contrary to section 145 (1) of the Penal Code and was sentenced to serve 7 years imprisonment with hard labour.

Being dissatisfied with both the conviction and the sentence he has now preferred this appeal whose grounds are mainly that the prosecution case was full of contradictions and that the case was not proven beyond reasonable doubt.

Briefly, at about on 30/1/2003 the complainant, (PW2) who was seven years old then, was requested by the mother to guide Akudinyang (hereinafter called the appellant) to a teacher's house, where the latter intended to sell vegetables. She escorted him and came back home alone after about 2 hours.

According to her, while on their way to their destination, the appellant had led her into the bush and defiled her and she reported the incident to her mother as soon as she returned home. She suffered pain that night, and in the morning started scratching her private parts. She was taken to Kapenguria District Hospital next the day, where the clinical officer (PW1) who attended to her noted that she had bruises all over her private parts, and that blood stains were visible. She had contracted a bacterial infection and suffered pains on the lower side of her abdomen.

It is not in dispute that the complainant had been defiled, but the issue that arises is, who had done so"

I have, as is expected of me, evaluated all the evidence on record, with a view to establishing

whether, a fact which this appellant disputes, the prosecution proved its case against him beyond reasonable doubts.

The complainant's mother (PW3) narrated how her daughter came back after the errand and how she complained that it had taken the girl long to return. She also testified that PW2 had explained that she had pains in her stomach and could not therefore walk fast enough. She didn't learn about the defilement until next morning when she went to enquire why the complainant was crying as she passed urine and it was only then that PW2 had informed her the 'person of yesterday' had done bad thing to her.

It is on record that at the time when PW1 attended to her 3 days after the incident, he assessed her injuries as four days old. That, in my humble opinion should have cast doubts in the mind of the learned trial Magistrate, especially in view of the fact that not only did the appellant state in his defence that he had quarreled with PW3 prior to the incident, about a shamba, but also because, PW1 didn't inform her mother of the incident until a day after. The fact that she kept mum about it even when the appellant came back to her home and took a meal with them at 1 pm on the same day should also have cast doubts.

I form the opinion that PW2 had already been defiled by a person whose identity remains undisclosed at least a day before 30/1/2003.

I find that the evidence of PW2 was full of contradictions in itself, and that it was also contradicted by PW3 who denied having had a meal with the appellant soon after the said incident.

Needless to say, it was imperative that the identity of the culprit be established positively. The complainant had informed the court that she saw her assailant for the first time during the incident, she didn't give out his name to her mother. She only described her assailant as that 'person of yesterday'. The fact that PW3 admitted that there were other men, within the homestead during that time as she had had a social get together (mgada) raises serious issues on who amongst her visitors would have defiled the complainant. It was necessary in the circumstances that an identification parade be conducted with a view to establishing whether the appellant was the person who had defiled the complainant. The complainant had identified the appellant in court but that cannot suffice, as it is now trite law, that dock identification is undesirable and should be discouraged at all costs.

The upshot of all this is that I find that the prosecution failed to prove its case beyond reasonable doubt and on that account this appeal should succeed. It is thus allowed, the conviction is quashed and sentence is set aside.

The appellant should be released forthwith, unless otherwise held in lawful custody.

Dated and delivered at Kitale on this 23rd day of March, 2004.

**JEANNE GACHECHE.**

**Judge.**

Delivered in the presence of:-



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