Case Number:	Criminal Appeal 209 of 2006
Date Delivered:	26 Jun 2008
Case Class:	Criminal
Court:	High Court at Kisii
Case Action:	Judgment
Judge:	Daniel Kiio Musinga
Citation:	OSCAR KESENDI RODEK v REPUBLIC [2008] eKLR
Advocates:	Mr. Kemo, Senior Principal State Counsel for the Republic. Appellant in person
Case Summary:	**Criminal practice and procedure-defilement**-appellant convicted of the offence and sentenced to 30 years imprisonment with hard labour-appeal against conviction and sentence-grounds of appeal that there was insufficient identification evidence-whether the evidence adduced was sufficient to secure a conviction-whether the sentence imposed against the appellant was harsh and excessive-whether the appeal had merit-Penal Code section 145 (1); Criminal Procedure Code section 382
Court Division:	-
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-

Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

Criminal Appeal 209 of 2006

OSCAR KESENDI RODEK …….. APPELLANT

VERSUS

REPUBLIC …….. RESPONDENT

(From original conviction and sentence in the Chief Magistrate's Court at Kisii Criminal Case No.576 of 2005 by S. M. S. Soita Esq., P.M)

JUDGMENT

The appellant was charged with defilement of a girl contrary to section 145(1) of the Penal Code. The particulars of the offence were that on the 16th day of April 2005, at township location within Kisii Central district, the appellant jointly with another not before court, had carnal knowledge of L. N., a girl aged 15 years.

After a full trial, the appellant was convicted and sentenced to 30 years' imprisonment with hard labour. The appellant was aggrieved by the said conviction and sentence and preferred an appeal to this court. He stated that there was no sufficient evidence pointing to his positive identification by the complainant.

The brief facts of the prosecution case were that on the material day at about 6 p.m. or thereabout L. N., the complainant herein, was sent to collect some money from one of their neighbours. On her way back to their home she met two men. One of them was known to her as Ogega. The men told her that they were doing community policing and nobody was supposed to be walking around at that particular time. They grabbed her, took her to the bush and defiled her in turns. They also forced her to take some vodka. After the ordeal they told her to go home. As it was already dark the complainant pleaded with her assailants to escort her to their home. Instead Ogega took her to his home and ordered his wife to serve the three of them with some food. Thereafter, Ogega escorted the appellant and returned to his house. He ordered his wife to sleep on the floor and he slept with the complainant on his bed. He further defiled her on the material night.

Early in the morning the complainant managed to sneak out of Ogega's house and ran to their home. She reported the matter to her parents who had been looking for her. The complainant's father, PW3, accompanied the complainant to Ogega's home but they did not find him. They decided to go and report the matter to the police. On their way to the police station, the complainant spotted the appellant. She said that he was the one who together with Ogega had defiled her.

The appellant was arrested and the complainant was taken to a hospital where she was examined. It was ascertained that she had been defiled and had been infected with a sexually transmitted disease.

In his defence, the appellant simply denied having committed the said offence. He said that on the material day he was selling water in a different place from where the alleged offence was committed.

From the foregoing evidence, there is no dispute that the complainant was defiled by two men on the 16th day of April 2005. She was able to recognize one of them as Ogega but she did not know the other one. She saw Ogega's accomplice twice, at the time of commission of the offence and secondly, when they went to Ogega's home where they had dinner. I believe that was sufficient time to enable the complainant positively identify the appellant. The complainant saw the appellant on the following morning when her mind was still fresh after the bad events of the previous night. When the appellant was medically examined he was found to be infected with the same sexually transmitted disease as the complainant. While it cannot be positively stated that he was the one who infected the complainant with the disease, that fact strengthened the complainant's evidence regarding her positive identification of the appellant. In my view therefore the appellant's conviction was safe.

The charge as framed and presented before the trial court was defective to the extent that it stated that the appellant jointly with another person had carnal knowledge of the complainant. In PAUL MWANGI MURUNGA VS. REPUBLIC Criminal appeal No.35 of 2006 at Nakuru (unreported), it was stated that the appellant, jointly with another not before court, had carnal knowledge of a certain girl. The Court of Appeal stated that two men cannot jointly at the same time have carnal knowledge of one woman. Each one of them commits the act individually and is followed by the next man. Each must be charged on a separate count. The court allowed the appeal and held that the charge as framed was incurably defective.

However, in this appeal no such ground regarding the charge was raised by the appellant. In any event I do not think that the said defect occasioned a failure of justice on the part of the appellant. Section 382 of the Criminal Procedure Code states as follows:

"382. Subject to the provisions herein-before

contained, no finding, sentence or order

passed by a court of competent jurisdiction

shall be reversed or altered on appeal or

revision on account of an error, omission

or irregularity in the complaint, summons,

warrant, charge, proclamation, order,

judgment or other proceedings before

or during the trial or in any inquiry or other

proceedings under this Code, unless the error,

omission or irregularity has occasioned a

failure of justice:

provided that in determining whether an error,

omission or irregularity has occasioned a failure

of justice the court shall have regard to the

question whether the objection could and should

have been raised at an earlier stage in the

proceedings."

My view of the error in the charge is that the same could have been raised before the trial court but it was not. The purpose of a charge is to notify an accused person about the accusation that has been brought against him so as to enable him prepare his defence accordingly. The appellant herein knew of the charge that he was facing and he tendered his defence to the same. I do not think that the error occasioned a miscarriage of justice in any way. Being so persuaded, I find no merit in the appellant's appeal against conviction.

Regarding his appeal against sentence, section 145(1) of the Penal Code, which has now been repealed, provided that any person who has unlawful carnal knowledge of a girl under the age of sixteen years is guilt of a felony and liable to imprisonment with hard labour for life. The appellant herein was sentenced to 30 years' imprisonment. It cannot therefore be said that the said sentence was harsh or excessive. In the circumstances, I dismiss the appeal against the sentence. All in all, the appeal herein is dismissed in its entirety.

DATED, SIGNED and DELIVERED at KISII this 26th day of June. 2008.

D. MUSINGA

JUDGE

Delivered in open court in the presence of:

Appellant

Mr. Kemo, Senior Principal State Counsel for the Republic.

D. MUSINGA

JUDGE.