REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CRIMINAL APPEAL NO. 66 OF 2016

GEOFFREY MAINA NDUNGU …… APPELLANT

versus

REPUBLIC……..……....…… RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. T. W. CHERERE – CHIEF MAGISTRATE dated 23rd April, 2015 in Nanyuki Chief Magistrate's Court Criminal Case No. 379 of 2011)

JUDGMENT

1. The appellant **GEOFFREY MAINA NDUNGU** has appealed against his **conviction and sentence** for the **offence of causing indecent act contrary to section 6(a) of the Sexual Offences Act**. On conviction he was sentenced to serve **5 years** imprisonment.

2. The prosecution evidence was that on 6th March 2011 the appellant sent his child to go to the complainant's home and ask the complainant to go to the appellant's house for coaching in mathematics. The complainant who was then 14 years old went to the appellant's home where she found the appellant, his wife and children. The appellant finished coaching the complainant at 9.00 p.m. He escorted the complainant and on the way the complainant said that the appellant held her waist touched her breast and her vagina. The complainant said that they both struggled for one hour when the appellant attempted to defile her.

3. The complainant on reaching home after the incident found her mother asleep. She did not tell her mother what had happened. On the following day at school the complainant informed her class teacher Mrs Mwangi. Since the complainant did not elaborate in her testimony what she told her class teacher and because that class teacher was not called to testify at the trial, this court and the trial court cannot say what she told he class teacher.

4. The complainant had an encounter with the appellant at the church on Sunday 13th March 2011. She stated that because the appellant threatened her she again on 14th March 2011 talked to her class teacher. This time the class teacher took the complainant to the head teacher who in turn invited the chief to hear what the complainant was saying. The head teacher testified at the trial and stated that the complainant narrated how on 6th March 2011 the appellant had called her to his home for coaching in mathematics and how after the coaching he escorted her home and attempted to defile her.

5. The appellant in his own defence stated that he was an assistant chief. He denied coaching the complainant. He denied that the complainant was at his home on 6th March 2011. He also denied escorting the complainant while touching her or attempting to defile her.

6. He called two witnesses one of whom confirmed that on the night of 6th March 2011 from 6 p.m. to 10 p.m. he was in the company of the appellant. They both attended a social gathering up to 8 p.m. Thereafter they went on patrol up to 10.00p.m. After the patrol they escorted the appellant to his home.

7. The second witness was the appellant's wife. She denied that the complainant went to their home or that she was coached by the appellant in mathematics.

8. Although the appellant raised five grounds of appeal which faulted his conviction at the trial court on uncorroborated and contradictory evidence this appeal will be decided on two issues. The first issue is whether the prosecution's case failed because of failure to call vital witnesses. Secondly, whether the prosecution was able to displace the alibi defence raised by the appellant.

9. On the first issue it will be recalled that the complainant did not tell her mother or her siblings what she allege the appellant did to her. Indeed the mother confirmed before the trial court that she was summoned by the head teacher when the complainant was taken to speak to him. The evidence is however clear that the appellant told her class teacher the following day about the incident. That class teacher as rightly submitted by both the learned counsels Mr. Njuguna Kimani for the appellant and Mr. Tanui Senior Principal Prosecuting Counsel, was a vital witness in the case. It is to her that the first report was made by the complainant. Her evidence was vital to confirm the allegations made by the complainant. Although **Section 143** of the **Evidence Act Cap 80** provides that there is no particular number of witnesses which the prosecution need call to prove any fact the case law however and in particular the case of **BUKENYA VS UGANDA 1971 (EA) 549** shows that the prosecution is duty bound to make available witnesses necessary to establish the truth even if the evidence may be inconsistent with the prosecution's case. Failure to produce such witnesses such as in his case the class teacher may lead to adverse influence that such evidence would not have been favourable to the prosecution. The court is of the view that the prosecution failure to call the class teacher of the complainant was an attempt to suppress evidence which was unfavourable to the prosecution. This is much more so because there are contradictions between the complainant and her mother on the supposed day of the incident. The complainant in evidence in chief talked of the appellant touching her breast and vagina. On being cross examined the complainant talked of the appellant undressing himself and attempting to defile her. The trial court did not convict the appellant on the main count of attempted defilement because it did not believe that aspect of the complainant's evidence. On the basis of the above I find that the appellant's conviction was unsafe.

10. The appellant in his defence gave alibi evidence. He called evidence to show that on the material time and day he was not in the company of the complainant. Rather that he was in the company of others one of who testified. It is trite law that prosecution bears the burden of disapproving alibi evidence. see the case of **KARANJA VS REPUBLIC 1983 KLR.** The trial court and also this court as the first appellant court have a duty to test appellant defence of alibi. In this court's view the appellant's alibi evidence weighed together with the prosecution evidence which as this court has stated had inconsistencies show that the prosecution failed to meet the criminal burden of proof. The alibi evidence of the two defence witnesses is consistent and reliable.

11. In the end I find and I hold that for the reasons stated above the appellants conviction was unsafe and **I accordingly allow the appellant's appeal against conviction and sentence. The appellant's conviction is hereby quashed and his sentence is hereby set aside. I order Geoffrey Maina Ndungu to be set free unless he is otherwise lawfully held.**

DATED AND DELIVERED THIS 25TH DAY OF JANUARY 2017.

MARY KASANGO

JUDGE

CORAM

Before Justice Mary Kasango

Court Assistant: Njue

Appellant: Geoffrey Maina Ndungu ……

For Appellant: ……

For the State: ….....

Language: ……

COURT

Judgment delivered in open court.

MARY KASANGO

JUDGE