



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**CRIMINAL APPEAL NO. 19 OF 2015**

*(An appeal from the judgment of the Senior Resident Magistrate, Siakago in SPMCR. Case No. 523 of 2013 dated 16/3/2015)*

**DAVID NYAGA KIRINGA..... APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

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

1. This is an appeal against the judgment of Siakago Senior Resident Magistrate delivered on 16/3/2015. He was convicted of the offence of attempted defilement and sentenced to serve ten (10) years imprisonment.
2. The appellant raised a handful of grounds of appeal. Firstly, he claimed that the magistrate erred when he rejected his defence and violated Section 169(1) of the Criminal Procedure Code. Further that the magistrate erred in accepting the evidence of the same family members who framed up the appellant. The appellant alleged that the magistrate erred when he failed to inform him that it was his constitutional right to be assigned an advocate.
3. The appellant filed written submissions in which he submitted that the case was fabricated against him due to a grudge between him and the complainant's father. The magistrate erred in that he ignored the appellant's defence that he was framed by the complainant's family. He added that the evidence of prosecution witnesses was contradictory and uncorroborated and that vital witnesses were not called to testify. It was also claimed that the alibi ought to have been given more weight than the magistrate did.
4. The state counsel Ms. Nandwa opposed the appeal. She submitted that the evidence on the identification of the appellant was very sound. She stated that PW1 said that the offence took place in broad daylight and that PW2 saw the appellant going to their home where PW2 stayed with his sister and the complainant. When he followed the appellant and peeped through the window he saw the appellant in bed lying on top of the complainant. The appellant had already removed his trouser and undressed the complainant. The appellant noticed that there was someone peeping and dressed up.
5. The respondent argued that the ingredients of the offence were proved beyond any reasonable doubt for there was evidence that the appellant undressed the victim, removed his own trouser and lay on top of the complainant. Ms. Nandwa added that there is nothing wrong with the fact that three of the witnesses were members of the same family. What was important was that they were all independent in their testimonies while bearing in mind that the clinical officer, PW5 and the Assistant Chief PW4 were not members of the complainant's family.
6. On the ground that he was not informed of his constitutional right to be provided with an advocate, the state counsel cited the case of ***KARISA CHENGO & OTHERS VS REPUBLIC*** where it was held that parliament has not yet passed the necessary legislation to actualize the

rights under Article 50(2) of the Constitution which is a legal requirement. This right is yet to be realized and the magistrate needed not inform the appellant about it. This ground cannot therefore stand.

7. As was held by the Court of Appeal in *NJOROGE VS REPUBLIC* [1987] KLR 19 :-

*As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the case are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwala v R [1957] EA 570*

8. The prosecution's evidence may be briefly stated. PW1 identified the appellant in court stating that he knew him as their homes are near each other. She told the court that on the material day, she was playing with the appellants children and her own sister when she felt cold and decided to go for a sweater from the family's home. The appellant then followed her into the house. He found her seated on her bed and immediately closed her mouth and removed her skin tight wear and under pants before removing his own clothes. He then lay on her but rose up when her brother PW2 entered the house. The appellant gave her cash Sh.10 before he left.
9. PW2 testified that the complainant is his younger sibling and that on 29/6/2013 at about 6.00 p.m. he was playing football with his friends when he saw the appellant going to the home where he lives with the complainant. PW2 ran to the house to check what the appellant was up to. PW2 opened the curtain and found the appellant sleeping on his sister without his trouser but with his underwear on. When the appellant saw PW2 he rose up, wore his trouser and left.
10. It was PW3's testimony that on 30/6/2013 PW2 told him what had transpired the previous day regarding his daughter. He reported the matter to the sub area who arrested the appellant in his home assisted by members of the public. PW3 took his daughter for medical examination and treatment. He said that he has no grudge against the appellant who is his uncle. He produced a clinic card showing that the complainant was born on 24/12/1999.
11. PW4 a clinical officer testified that the complainant and the appellant were taken by the Assistant Chief to Ishiara Sub District hospital on 30/6/2013 for examination on allegations that the appellant had defiled the complainant. After examination he found was that the complainant had been sexually assaulted and had bacteria infection in the vaginal carnal. Upon examining the appellant he found bacteria infection in the genitalia which corresponded with that found in the complainant.
12. PW5 testified that he is the Area Assistant Chief and that he arrested the appellant upon receiving a report that he had raped PW1. He escorted the appellant to Ishiara police station.
13. The appellant in his defence denied the offence. He testified that he did not know why he was arrested. On the material day he said he was at Embu and went to his children's school the following day and arrived home at 9.00 p.m. He alleged that there was a grudge between him and the complainant's family which led to him being framed up.
14. The appellant faced a charge of attempted defilement contrary to Section 9 of the Sexual Offences Act which provides:-

*(1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.*

*(2) A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years.*

*(3) The provisions of section 8(5), (6), (7) and (8) shall apply mutatis mutandis to this section.*

15. In regard to "attempt", the relevant law is Section 388 of the Criminal Procedure Code which provides:-

(1) *When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfillment, and manifests his intention by some overt act, but does not fulfill his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.*

(2) *It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfillment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.*

(3) *It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence.*

16. In the case of **In FRANCIS MUTUKU NZANGI VS REPUBLIC NRB CA CRIM. APPEAL NO. 358 OF 2010 [2013] eKLR**, the court held that:-

*"Our understanding of this provisions is that if a person conceives an idea or plan to commit an offence and sets out to effectuate the intention by taking definite steps or puts in motion a chain of events or state of things calculated to attain that objective as manifested by some open and discernible act or acts but fails to achieve his objective, he will be guilty only of an attempt to commit the offence. The attempt is proved whether or not that person did all the acts necessary to perfect the offence and quite irrespective of what intervening act or change of heart may have aborted the fulfillment. It also matters not that circumstances did in fact exist, unbeknown to the person, that would have rendered his success impossible.*

17. The ingredients of the offence of attempted defilement were discussed in the following cases;

(a) As regards penetration, it was held in the case of **PIUS ARAP MAINA VS REPUBLIC [2013] eKLR** that the intention to penetrate a minor is a key ingredient in the offence of attempted defilement.

(b) **OMAR MOHAMED IBRAHIM VS REPUBLIC [2014] eKLR** the court held:-

*On the issue of age of the complainant, my reading of section 9 (1) and (2) of the Sexual Offences Act shows that age is not a factor for an offence under this section other than the requirement that the victim of the offence be a child. To my understanding the only requirement of age is that the victim be under eighteen years, this being the definition of a child under the Kenyan law.*

18. The appellant claimed that the magistrate rejected his defence thus violating Section 169(1) of the Criminal Procedure Code.

19. Section 169(1) provides:-

*Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.*

20. The appellant in his defence stated that on the material day which was a Friday, he was at Embu and that the following day, he went to his children's school and arrived home at 9.00 p.m. He also alleged that there was a grudge between him and the complainant's family which led to the appellant being framed in this case.

21. The magistrate in her judgment dismissed the alibi that the appellant was not at home when the offence was committed describing it as baseless and an afterthought.

22. The magistrate therefore considered the appellant's defence and dismissed it on grounds that it was

- not plausible. I have weighted the alibi in light of the overwhelming evidence of the prosecution and find that it does not shake the prosecution's evidence. I therefore agree with the trial magistrate that the alibi was not apparently reasonable or probable. It is not therefore correct to say that the defence was rejected without basis.
23. I find that the magistrate fully complied with the provisions of Section 169(1). The judgment contained the relevant issues, the determination of the said issues, it was also signed and dated as required by the law.
24. The appellant raised was the issue of alleged violation of his constitutional rights for failure to be informed of his right of legal representation. It is trite law that the rights of an accused under Article 50(2) of the constitution are yet to be actualized.
25. In the Court of Appeal case of **GEORGE GIKUNDI MUNYI VS REPUBLIC [2015] eKLR** it was held that under the current Constitution an accused person is entitled to legal representation at the State's expense during trial where substantial injustice would otherwise arise in the absence of such legal representation. However the Constitution does not set out what constitutes substantial injustice. The court further held that parliament has not passed the necessary legislation for the realization of an accused person's right to legal representation at the expense of the state as stipulated under Article 50 of the Constitution.
26. I am guided by the above decision that no constitutional rights were violated by the trial magistrate in this case.
27. It was claimed that three prosecution witnesses were from the same family. There is no law prohibiting members of the same family from giving evidence. Despite the fact that three of the 5 witnesses were members of the same family, the court found them credible.
28. Having carefully considered the prosecution case and in particular the evidence of PW1, PW2 and PW4, I find that there was overwhelming evidence that the appellant attempted to defile the complainant as charged. The appellant had removed his trouser, undressed the complainant and lay on top of her. The bacteria infection found by PW4 on both the complainant and the appellant confirm that the sexual organs of the two persons came into contact. The appellant had done all the necessary acts in preparation to defile the complainant. An overt act took place when the sexual organs of the two came into contact.
29. In conclusion, I find that the trial magistrate considered all the relevant issues in the trial, evaluated the evidence and reached the correct finding of guilt on the part of the appellant in regard to the offence of attempted defilement. The conviction was safe and the sentence of ten (10) years imprisonment was lawful.
30. The appeal is hereby dismissed. The conviction and sentence are hereby upheld.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 30TH DAY OF MARCH, 2016.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Appellant**

**Ms. Nandwa for respondent**