



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CRIMINAL APPEAL NO. 336 OF 2013

JOSEPH KIMANZI APPELLANT

VERSUS

REPUBLIC

(Being an appeal from the conviction and sentence of Hon. Sandra Ogot Resident Magistrate delivered on 20/12/2013 in Mutomo Senior Resident Magistrate Sexual Offence Case No. 28 of 2013)

(Before Hon. B. Thurairaja Jaden J)

J U D G M E N T

1. The Appellant, **Joseph Kimanzi**, was convicted and sentenced on three counts. However, his appeal is limited to one count only.
2. The appeal is on the offence of **attempted defilement** contrary to section 9 (1) as read with section 9 (2) of Sexual offences Act No. 3 of 2006.

The particulars being that “on 6th day of September 2013 at about 2.00 p.m in Mutomo District within Kitui County intentionally and unlawfully attempted to cause his penis to penetrate the vagina of **N K** a child aged 9 years”.

3. In the alternative, the Appellant was charged with the offence of committing an indecent act with a child.

The particulars of the offence were that “on the 6th day of September 2013 at 2.00pm in **Mutomo** District within **Kitui** County, intentionally touched the buttocks of **NK** a child of aged 9 years with his penis”.

4. The Appellant pleaded guilty to the offence. The case proceeded in a full trial.
5. The prosecution case was that on 4/4/2013 at about 2.00p.m, the complainant, Pw1 **N K**, a **nine (9) year** old standard 3 pupil was on her home from school with other children. They came across the Appellant who chased them to a nearby farm. The Appellant then turned back and the children went home. The complainant who was now reluctant to go to school reported the incident to the mother.
6. On 6/9/2013 at about 2.00 p.m the complainant was alone on the way home from school when she was once again chased by the Appellant. The Appellant caught up with the complainant and fell her down on the road. The complainant was hurt on the face and made noise. The Appellant started removing the complainant’s pants. However, there was interruption by a herdsman and his

animals that were grazing nearby. The Appellant ran away.

7. The complainant went home and once again made a report to her mother, **Pw3 V K**. The mother observed that the complainant looked stressed, dusty and dirty. The following day the mother went to the complainant's school and reported the matter. The complainant and her mother were referred to the police station. They found the Appellant had been arrested for another offence and was already at the police station. The complainant identified the Appellant as the assailant. After investigations the Appellant was charged with the offence herein.
8. In his defence, the Appellant stated that on the material day he was at home throughout the day. He was arrested by people who questioned him and told him to agree to the charge. He refused and he was taken to the police station and the matter ended up in court. The Appellant further stated that there were attempts made to resolve this matter at home but he declined as the matter was already in court.
9. At the conclusion of the case, the Appellant was convicted for the offence of attempted defilement and sentenced to ten (10) years imprisonment. The Appellant was aggrieved by both the conviction and sentence and he appealed to this court on grounds that can be summarized as follows:
 0. *That the prosecution failed to call crucial witnesses.*
 0. *That the evidence rendered by the prosecution witnesses was full of contradictions and inconsistencies.*
 0. *That the complainants evidence lacked corroboration.*
 0. *That no identification parade was carried out.*
 0. *That there was no forensic evidence or any photographs taken at the scene of crime.*
 0. *That the defence case was not considered.*
10. During the hearing of the appeal, the Appellant relied on written submissions. The submissions essentially reiterated the grounds of appeal.
11. The appeal was opposed by the state. The learned counsel for the state submitted on the sufficiency of the prosecution evidence.
12. This being the first appeal, I am duty bound to re-evaluate the evidence and the record afresh and come to my own conclusions and inferences— See **Okeno –vs- Republic (1972) EA 32**.
13. The complainant (pw1) gave sworn evidence after the trial court conducted a *voir dire* and was satisfied that she understood the meaning of oath. She narrated to the court how she was chased and her panties removed. The complainant's evidence was corroborated by that of the herdsman, **Pw4, Martin Munyao**. Pw4's evidence was that he was herding cows at the material time when he heard the complainant's cries. Pw4 saw the complainant looked dirty and had soiled clothes. Pw4 however did not see the assailant at the scene.
14. The **complainant's mother (pw3)** gave evidence which reflects consistency on what the complainant told her on the material day and the evidence adduced by the complainant in court. It is clear from the mother's evidence that the complainant knew her attacker as a neighbour and described the clothes he wore and later identified him at the police station. The mother gave the complainant's age as nine years.
15. The clinical officer, pw12 **Daniel Mulwa** gave medical evidence that confirmed the complainant's age as nine (9) years at the material time. The evidence of the clinical officer also corroborated the complainant's evidence that she was injured on the face when she was felled down.
16. The above evidence leaves no doubt that the complainant was felled down and her pants removed. If there was no interruption from the herdsman, there could have been further activity. The act of being felled down and panties removed points at an attempt to defile.
17. It is clear from the evidence on record that the complainant's mother's evidence that the complainant informed her that she knew the attacker as a neighbour and a person who used to go to her school. The complainant also described the clothes that the Appellant wore at the material time as a stripped shirt and a pair of black trousers. The complainant's mother (pw3) identified the

Appellant in court.

18. The complainant's school's head teacher, **PW5 J N** gave evidence that confirmed that the complainant was a standard 3 pupil and that the incident was reported to him by the complainant's mother. It is clear from the said head teacher's evidence that the complainant described the assailant as somebody who she knew physically and used to see at the school kiosk. The evidence of the head teacher further corroborated the complainant's report to her mother that the assailant was once a student at her school. The head teacher further corroborated the evidence that the complainant also described what the assailant wore and that the complainant identified the Appellant at the police station as the said assailant.
19. The investigating officer, **PW1 PC Grace Gichoki** gave evidence that confirmed that the report was made at the police station and investigations carried out. The investigating officer produced as exhibits a stripped T-shirt and a pair of jeans as the clothes the appellant wore on the material day. The clothes the Appellant was arrested wearing match the complainant's description of what the Appellant wore at the material time.
20. The defence evidence dwells on the question of arrest. However, there are no reasons that emerge from the record why the complainant and the other witnesses would frame up the Appellant with this case. The offence took place in broad day light. The complainant's evidence is that of recognition. The complainant's evidence is corroborated by the evidence of arrest in a similar fact evidence relating to a case of another school girl on the same afternoon.
21. The Trial Magistrate who had the benefit of seeing the witnesses testify and observed their demeanor believed the complainant. The proviso to **section 124** of the **Evidence Act Cap 80 Laws of Kenya stipulates as follows:-**

“Provided that where in a Criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

22. The above provision of the law also answers the questions raised by the Appellant regarding corroboration, the lack of forensic evidence and the lack of any photographs from the scene.
23. On the failure to conduct an identification parade, it is noted that the complainant's evidence is that she knew the Appellant. Carrying out identification parade would therefore not have served any useful purpose.
24. On the issue that the prosecution failed to call crucial witnesses, the answer is found in the following dicta from the case of **Bukenya & Others –vs- Uganda (1972) EA 549, at page 550** where the Court of Appeal for East Africa stated:-

“It is well established that the Director has a discretion to decide who are the material witnesses and whom to call, but this needs to be qualified in three ways. Firstly, there is a duty on the Director to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. Secondly, the court itself has not merely the right, but also the duty to call any person whose evidence appears essential to the just decision of the case. Thirdly, while the director is not required to call a superfluity of witnesses; if the calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution.”

25. Starting re-evaluated the evidence on record, I am satisfied that the Appellants conviction is based on sound evidence. The sentence is within the law. The appeal has no merits and is dismissed.

B. THURANIRA JADEN

JUDGE

Dated and delivered at Kitui this 29th day of January 2015.

B. THURANIRA JADEN

JUDGE