



No. 173/2014

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 65 OF 2010

JACOB KASANGA SINGI..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

*(Being an appeal from the original conviction and sentence in Kitui Principal Magistrate's Court Criminal Case No. 116 of 2009 by*

*Hon. E. Juma Osoro - S.R.M. On 18/3/2010)*

J U D G M E N T

1. In an amended charge sheet presented to court on the 22nd September, 2009, the appellant was charged on the main count with the offence of defilement contrary to Section 8(1)(3) of the Sexual Offences Act, No. 3 of 2006. Particulars of the offence being that on the 24th day of January 2009 at around 3.00 p.m., at Zombe location in Kitui District of the Eastern Province, unlawfully penetrated **M W** a girl aged 13 years against the order of nature. In the alternative he was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. particulars of the offence being that on the 24th day of January 2009 at around 3.00 p.m. in Kitui District of the Eastern Province, he committed an act of indecency with **M W** a girl aged 13 years by touching her private parts namely vagina and buttocks.
2. He was tried, convicted and sentenced to 30 years imprisonment on the main count. Being aggrieved with the conviction and sentence he now appeals on the following grounds:

That the trial magistrate erred in law and fact by failing to consider that the charge before court was incurably defective; the evidence on record failed to prove the charge beyond doubt; that he rejected the defence without cogent reason and the sentence meted out was harsh.

3. The appellant relied on written submissions whereby he buttressed what was stated in the grounds of appeal. The learned state counsel **Mr. Mukofu** on the other hand argued that it was a case of recognition hence identification of the appellant was positive; the act of penetration was proved; the court observed that the complainant was truthful and the court rejected the alibi defence put up by the appellant.
4. This being the first appeal, I do remind myself of my duty as a court to revisit evidence adduced before the trial court, analyze it independently and draw my own conclusion bearing in mind the fact that I neither saw nor heard witnesses who testified before the lower court. **(See Okeno versus Republic (1972) EA 32).**
5. The case as presented by the prosecution was that on the 24th January 2009, PW1, **M W** the 13

years old complainant was cutting firewood when the appellant ambushed her, took her to a nearby home, undressed her and penetrated her genital organs, through the vagina and anus for a duration of one (1) hour. The appellant then left her at the place. PW3, **L K W** the mother to the complainant who left the appellant cutting trees within her home on her return encountered him along the way. She reached home to find only PW2, **M W**, her son who led her to the cave where he saw the accused take the complainant. On arrival she found the complainant lying on the ground stark naked bleeding from her private parts. She carried her to the house.

6. The following morning she took her to hospital having reported the matter to the assistant chief Zombe, **Jairus Nzaani**, PW5. At Kitui District hospital she was examined by PW6, **Manthi Njue** a clinical officer. Her clothes were blood stained. She had sustained a superficial vaginal tear and her hymen was absent. No spermatozoa were seen but there were a few pus cells seen following a high vaginal swab. The appellant was arrested and charged with the offences.
7. In his defence the appellant stated that on the material date he was at the market with his wife selling goats and they returned home late. The following day he was arrested. Thereafter he was taken to hospital for medical examination and later charged.
8. The appellant in claiming that the charge was defective stated that the charge was amended following an application made by the prosecution. The substituted charge was read to him and he denied. However, the amended charge was not availed to him. As correctly stated by the appellant, the defective charge was substituted by another on the 29th September 2009 which has no defects and forms part of the court record. The trial magistrate in convicting the appellant reached her findings based on the amended charge sheet read to the appellant on the 22nd September 2009. In the circumstances the conviction cannot be quashed on that ground.
9. The next issue to be determined is whether the case was proved to the required standard and whether the defence put up by the prosecution was taken into consideration. Evidence of penetration was proved. There was medical evidence showing as a result of the act done to the complainant she sustained a vaginal tear and her hymen was absent. This was evidence that she had been sexually assaulted. Her age is not in dispute. She was a 13 years old girl. The complainant in identifying the appellant as her assailant said the accused was a person she knew very well and when he carried her off on his shoulders she screamed. PW2, **M W** though a minor aged 5 years was taken through a preliminary inquiry (Voire dire examination) and found by the magistrate to be intelligent as he understood the nature of oath. He was duly sworn and after he testified he was cross examined and he answered questions appropriately.
10. It was the evidence of PW2 that when he attempted to rescue his sister the appellant threatened to hit him with a panga. He went home. When he saw the accused lying on the complainant he left going home. Thereafter he led their mother to the scene of the incident. This evidence corroborated that of the complainant that the person who assaulted her sexually was the appellant. In his defence the appellant said he was at the market selling goats with his wife. Thereafter he was examined by a clinical officer, six (6) days later and nothing of importance was noted. The evidence adduced by the prosecution as to who defiled the complainant was cogent. In reaching his decision the trial magistrate stated thus:

***“There is overwhelming evidence from the complainant, eye witness and medical evidence against the accused... I do find the alibi defence not established... I reject the defence as a made up story which did not shake the prosecution's case. The alibi defence is therefore dismissed.”***

11. On evaluation of the evidence adduced it is apparent that the trial magistrate carefully analyzed evidence on record, applied the relevant law and reached a correct finding. The sentence imposed was said to be harsh. In the case of **S-V- Malgas 2001 (1) SA CR 469 (SCA)** the Supreme Court held thus:

***“If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and needs of the society, so that an injustice would be done by imposing the***

***sentence, it is entitled to impose a lesser sentence.”***

12. The question to be answered is whether the sentence meted out was harsh in the circumstances. Section 8(3) of the Sexual Offences Act, 2006 provides for a minimum prescribed sentence of not less than 20 years. In sentencing the appellant the magistrate took into consideration the trauma suffered by the complainant. She could not leave the scene of the incident, a cave. She remained stark naked. She was robbed off her innocence. She went on to remark that the appellant required to be kept away from the society for purposes of protection of vulnerable girls. In the premises, I find no reason to interfere with the conviction and sentence meted out. I do confirm the same. The appeal is therefore dismissed.

**DATED, SIGNED and DELIVERED at MACHAKOS this 27<sup>TH</sup> day of JANUARY, 2014.**

**L.N. MUTENDE**

**JUDGE**