



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 84 OF 2012

PATRICK NGALA MUTINDA APPELLANT

VERSUS

REPUBLIC

(Being an appeal from the conviction and sentence of Hon. B.M. Kimemia Principal Magistrate delivered on 11/04/2012 in Kitui Senior Principal Magistrate Sexual Offence Case No. 5 of 2011)

(Before Hon. B. Thurania Jaden J)

J U D G M E N T

1. The Appellant, **Patrick Ngala Mutinda** was charged with the offence of **attempted defilement** contrary to **section 9 (1) & (2)** of the **Sexual Offences Act No. 3 of 2006**.

The particulars of the offence were that on the 20th day of January 2011 at about 7.00 p.m. at **[particulars withheld], Kyangwithya Location in Kitui County** intentionally attempted to penetrate his penis into the vagina of **E M** a child aged 9 years.

2. In the alternative, the Appellant was charged with the offence of indecent act with a child contrary to **section 11 (1)** of the **Sexual Offences Act No. 3 of 2006**.

The particulars of the offence were that on the 20th day of January 2011 at about 7.00 p.m. at **[particulars withheld], Kyangwithya East Location in Kitui County** committed an act of indecency with **E M** a child aged 9 years by touching her private parts namely vagina, buttocks and breasts using his hands.

3. When the Appellant was arraigned in court, he pleaded not guilty. After a full trial, the Appellant was convicted for the offence of attempted defilement and sentenced to ten (10) years imprisonment.
4. The Appellant was aggrieved by both the conviction and sentence and appealed to this court. His grounds of appeal are that, first, the case was a nullity as the prosecution was conducted by an unqualified police prosecutor contrary to section **85 (2)** and **88** of the **Criminal Procedure Code**. Secondly, that the prosecution case was not proved beyond reasonable doubts.
5. The case for the prosecution as on 20/1/11 at about 7.00 p.m. the complainant PW1 **E M**, a nine year old girl was sent to the nearby shops to buy vegetables. When the complainant was at the corridor on the way to the shops, the Appellant who was a neighbour held her hand and mouth,

- opened his zip and lifted her up in an attempt to defile her. A neighbour, PW2 **P M** walked to the corridor but when she tried to open the door to get in, the door was pushed back. PW2 flashed her telephone set's torch unto the corridor and found the Appellant and the complainant there, with the complainant's dress lifted up to the waist.
6. When PW2 inquired what was going on, the Appellant started running away towards a nearby bar. PW2 gave chase and caught up with the Appellant and held him then called the complainant's father. The Appellant was arrested and taken to the chief. The matter was then reported to the police. The complainant was issued with a P3 form and referred to **Kitui Hospital** for examination. The Appellant was subsequently charged with the offence herein.
 7. In his defence, the Appellant states that he had gone to the bar when he met **Mukui** (PW2) holding a child by the hand. That **Mukui** (PW2) flashed the telephone's torch light on him and then started screaming. Members of public came to the scene. **Mukui** (PW2) then alleged that the Appellant wanted to defile the child. The child's father came and the matter was referred to the chief. The Appellant was then escorted to the police station and charged. The Appellant stated that the case was framed up on him and the child coached. The Appellant further stated that the previous month, **Mukui** (PW2) had accused him of having stepped on her crops while picking a mango and had threatened him.
 8. The complainant (PW1) testified after the court carried out a *voire dire*. The complainant gave unsworn evidence and was duly cross-examined. The complainant narrated to the court what transpired, stating that the Appellant removed her pants and wanted to have sex with her before PW2 walked in. The complainant knew the Appellant and identified him by his name "**Ngala**" and described him as somebody she used to see at the plot.
 9. The complainant's evidence was corroborated by that of PW2 who caught them in a compromising position. PW2 was a neighbour and knew both the Appellant and the complainant. PW2 described she came, how the door to the corridor was being blocked and when she flashed her phone's torch she found the Appellant and the complainant with the complainant's dress lifted up to the waist. It comes out clearly from both the evidence of the complainant (PW1) and her neighbour (PW2) that their evidence was that of recognition. There was light from PW2's phone's torch.
 10. The complainant's father's (PW3) evidence established that the time was about 7.00 p.m. and there was moonlight and it was not yet dark and from a distance of about ten (10) metres, he could see the neighbour (PW3) holding the Appellant. From the evidence of these witnesses from the scene, I am satisfied that there was sufficient light at the scene to enable them to see clearly. The scenario described by PW1 and PW2 leaves no doubt that the complainant was about to be defiled if there was no interruption from PW2. Why else would the Appellant hold the complainant and close her mouth then lift her dress and open his zip and block the entrance to the corridor? Like the trial magistrate who observed the complainant's demeanour, I have no reason to doubt the complainant's evidence that the Appellant wanted to have sexual intercourse with her.
 11. The Appellant termed this case as a frame up due to a grudge that PW2 (the neighbour) held against him. However, there are no reasons why the complainant and her father would plant this case on the Appellant.
 12. The evidence of DW2 **Rose Kalunda** is that she saw the Appellant enter the corridor and a few minutes later heard noise there and on going to check what was happening she found the Appellant there with PW1 and PW2. The evidence of DW2 confirms that the time of the incident was about 7.00 p.m. and that there was light and she could see the inside of the corridor. DW2's evidence also placed the Appellant at the scene of the offence. The evidence of DW2 did not exonerate the Appellant from the offence charged.
 13. **Section 82 (5)** of the **Criminal Procedure Code**, was amended by **Legal Notice No. 7 of 2007**. There is no longer any requirement that a case must be prosecuted by a police officer who is not below the rank of an Assistant Inspector of Police. **Section 88** of the **Criminal Procedure Code** is not applicable in the circumstances of this case as it was prosecuted by public prosecutors.
 14. Having evaluated the evidence of both the prosecution and the defence, I am satisfied that the conviction was based on sound evidence. The sentence is within the law. The appeal has no merits and is dismissed. The sentence meted out by the lower court is upheld.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 19th day of February 2014.

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B. THURANIRA JADEN

JUDGE