REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 130 OF 2009

MUTHINI KIVUVA THOKA …..... APPELLANT

VERSUS

REPUBLIC ….....…..... RESPONDENT

(*Being an appeal from the original conviction and sentence in Makueni Principal Magistrate's Court Criminal Case No. 561 of 2008 by*

Hon. F.M. Nyakundi - P.M. on 30/6/2009)

J U D G M E N T

1. The appellant was charged with the offence of attempted defilement contrary to Section 9(1) of the Sexual Offences Act, No. 3 of 2006. Particulars thereof being that on the 23rd day of December 2008 at ***[particulars withheld]*** village, Kilala location in Makueni District within Eastern Province, attempted to have carnal knowledge of **S N M** a girl between the age of twelve and fifteen years. In the alternative he faced the charge of committing an Indecent Act with a child contrary to section 11(1) of the Sexual Offences Act, No. 3 of 2006. Particulars thereof being that on the 23rd day of December 2008 at ***[particulars withheld]*** village, Kilala location in Makueni District within Eastern Province, unlawfully and indecently assaulted **S N M** by touching her private parts. A girl between the age of twelve and fifteen years.
2. He was tried, convicted on the main count and sentenced to (10) years imprisonment.
3. Being dissatisfied with the conviction and sentence he now appeals on the following grounds:

1. **That the learned trial magistrate erred both in law and fact when she convicted the appellant on uncorroborated evidence.**
2. **That the learned trial magistrate erred both in law and fact when she admitted the medical evidence produced by person other than the maker without explaining to the Appellant his rights under the circumstances.**
3. **That the learned trial magistrate erred both in law and fact when she admitted medical documents before identification by the complainant.**
4. **That the learned trial magistrate erred both in law and fact when she admitted pieces of clothes produced as exhibits after the investigating officer had testified and which exhibits were not in the custody of the investigating officer.**
5. **That the learned trial magistrate erred both in law and fact when she convicted the appellant on invalid charges in view of the delay in charging the appellant after arrest and incarceration.**
6. **That the learned trial magistrate erred in law and fact when she dismissed the appellant's defence.**
7. **That the learned trial magistrate erred in law and fact when she sentenced the appellant to**

serve a manifestly excessive sentence.

4. Briefly, the prosecution's case was that on the 23rd December 2008, PW3, **S N M "the complainant,"** aged 14 years old was sent by PW4, **L M M** her grandmother to purchase some tea for visitors. On her way back she encountered the appellant, their neighbour's employee. The appellant called her to go to where he was but she declined. The footpath she was using was narrow. He grabbed her neck and led her to a house under construction on the farm where he worked. He started removing her skirt, an act that prompted her to scream. He threatened her and tore her pant. In the meantime her grandmother who was notified of the incident by the complainant's sister went to the scene of the incident and peeping through the window saw the appellant and complainant struggling. Neighbours answered the alarm raised by the complainant. They apprehended the appellant and took him to the police station.
5. The complainant was taken to hospital, examined and found to have a swollen and tender neck. The degree of injuries sustained was assessed as harm. Hence the charges preferred.
6. In his defence the appellant denied having committed the offence. He testified that when the complainant passed by he asked her if she wanted to see how the ceiling in the house had been fixed. They entered the house. When her grandmother arrived she found the two (2) of them standing. PW4 then assaulted him and screamed. People gathered, locked him up and called the police. They arrested him.
7. Both counsels for the appellant and the state agreed to canvass the appeal by way of written submissions.
8. This being the first appeal, it is my duty as a court to subject evidence adduced in the lower court to a fresh review and scrutiny and come up with my own independent conclusion bearing in mind that I neither saw nor heard witnesses who testified. ***(See Okeno versus Republic (1972) EA 32).***
9. An issue was raised regarding admission of medical evidence by a person who was not the author of the same. PW1 who produced the P3 form ***(Medical Examination Report)*** did so on behalf of his colleague, one **Eric Katiamai** who examined the complainant and thereafter filled it. The medical report was indeed made by a medical practitioner. It bears a stamp impression establishing that fact. It is a document acceptable to the court as evidence. Procedurally a basis must be laid for such a document to be produced in evidence. It is a requirement for an accused person to be informed of his rights in order to raise concerns, if any, regarding production of the same. The lower record does not seem to have followed the procedure. The question to be posed would therefore be if the appellant was prejudiced in the circumstance?
10. In his testimony PW1 started off by laying the basis upon which he was producing the document. The clinical officer, the maker of the document had filled the P3 form while discharging his professional duty at Makueni District Hospital. He had been transferred. He was no longer working at the medical facility. He was conversant with his handwriting and signature. Therefore, he was capable of reading and comprehending what he had written. It was upon that basis that the P3 form was produced in evidence. The appellant did not object to the document being produced. He had no questions for the witnesses. When put on his defence he made no comment on it. This clearly means that the appellant was not prejudiced. The omission alluded to is therefore not fatal to the prosecution's case. Admission of the document prior to identification by the complainant was not irregular because this was a medical document that could only be produced by a medical practitioner in his capacity as an expert witness.
11. The appellant questioned the chain of custody of exhibits later produced in evidence. The investigating officer gave evidence but did not produce exhibits (Black torn pant and a black biker) at the first instance. She was recalled after PW3 and PW4 testified, identified them, that is when the clothes were produced in evidence. In her testimony the investigation officer said on receiving the report she asked to be given the exhibits which she kept. This meant that the exhibits were in her custody prior to being produced in evidence. Her evidence was not challenged. The integrity of the exhibits could therefore not be challenged.
12. On the issue of uncorroborated evidence, it was submitted that pursuant to **Section 124 of the Evidence Act,** a child of tender years' evidence ought to have been corroborated by material evidence before it forms a basis for conviction. The complainant herein was a child aged 14 years. Her age was not in dispute. **Section 2 of the Children's Act, 2001** defines a child of

tender years as a child under the age of ten (10) years. The complainant was, therefore, not a child of tender years as suggested. Secondly, pursuant to the priviso to **Section 124 of the Evidence Act**, Victim children's evidence in respect of Sexual Offences do not need corroboration if the court is satisfied of the truth of the complainant's evidence.

13. In this case though there was no evidence to corroborate the fact of the attempt, PW4 found the appellant struggling with the complainant, the complainant's pant was already torn. The explanation given was that the appellant struggled to push it aside hence it got torn in the process. That notwithstanding, circumstantial evidence (in the case of compromising situation that the appellant was found in) is corroborative evidence as stated in the case of **Ongweya versus Republic (1964) EA 12** where it was held that the commission of a sexual offence can be properly corroborated with circumstantial evidence. In the circumstances there was no miscarriage of justice occasioned.
14. The appellant's constitutional rights are said to have been violated by the delay in charging him. Indeed he was apprehended on 23.12.2008 and arraigned in court on the 29.12.2008. The appellant relied on the case of **Elizabeth Akinyi Odoyo** and **Another versus Republic - Criminal Appeal No. 161 and 162 of 2006** where the appellant was released upon the charges being declared a nullity due to extra judicial incarceration. This authority was overruled by the Court of Appeal in the decision of **Julius Kamau Mbugua versus Republic – Criminal Appeal No. 50 of 2008** where it held that such a breach gives rise to civil remedies unless it is shown that the effect on the criminal trial resulting to a prejudice to the appellant. Extra-judicial incarceration has no relation to the criminal trial process and that each of the process must be dealt with separately. In the circumstances, there was no misdirection on the part of the magistrate.
15. In her considered judgment the trial magistrate took into account the defence put up by the appellant. She also considered evidence adduced by his witnesses and acted by dismissing it having found that it was not convincing.
16. On sentence the minimum prescribed sentence for the offence is 10 years imprisonment. No injustice was done in the circumstances.
17. From the foregoing, there is absolutely no reason to interfere with the findings of the lower court. I uphold the conviction and sentence meted out by the magistrate. Consequently, the appeal is dismissed.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **17TH** day of **FEBRUARY, 2014.**

L.N. MUTENDE

JUDGE