



**REPUBLIC OF KENYA.**  
**IN THE HIGH COURT OF KENYA**  
**AT KITALE.**  
**CRIMINAL APPEAL NO. 76 OF 2013.**

**P M M.....APPELLANT.**

**VERSUS**

**REPUBLIC.....RESPONDENT.**

*(Being an appeal from the original conviction and sentence of J.A. OWITI – AG. PM*

*in Criminal Case 960 of 2012 delivered on 17th May, 2013 at Kitale.)*

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

The appellant, **P MM**, appeared before the Principal Magistrate at Kitale charged with attempted defilement, contrary to section 9 (1) read with 9 (2) of the Sexual Offences Act, in that on the 31st March, 2012 in Trans Nzoia county, attempted to defile SM B, a child aged fourteen (14) years.

After trial, the appellant was convicted for the offence of Indecent Act contrary to section 11 (1) of the Sexual Offences Act and sentenced to ten (10) years imprisonment.

Being dissatisfied with the conviction and sentence, the appellant filed this appeal on the basis of the grounds contained in the petition of appeal dated 15th June, 2013, filed by the firm of **Okile & Co. Advocates**, which grounds were argued at the hearing of the appeal by Learned Counsel, **Mr. Kaosa**.

The state/respondent opposed the appeal through the Learned Prosecution Counsel, **M/s. Limo**.

In his submissions, the appellant contended that the prosecution evidence was full of contradictions which should have been construed for his benefit. That, the trial court failed to consider his defence. That, the complainant stated that she found him (appellant) sitted outside his house yet stated in cross-examination that he was inside the house. That, the complainant said that there was a lamp in the house yet she said that she identified him (appellant) by voice. That, the complainant's brother (PW2) did not say that he found the complainant under a bed yet the complainant stated that she hid under a bed. That, the complainant denied ever visiting him (appellant), yet the judgment of the court indicated otherwise. That, there was no evidence that PW2 heard him (appellant) telling the complainant that he would give her money yet the trial court found as much.

The appellant contended that the evidence by the investigations officer (PW5) was suspicious since he recorded statements from the witnesses and charged him yet the complainant said that her clothes were not removed nor was she defiled. That, the evidence by the investigating officer did not agree with the evidence of the rest of the witnesses.

The appellant therefore urge this court to allow the appeal.

In opposing the appeal, the learned Prosecution Counsel submitted that the evidence was sufficient to convict the appellant for indecent act. That, there was no contradictions in the prosecution evidence and if the same existed they did not go to the root of the case and were immaterial. That, the complainant was aged 14 years and her evidence could be relied upon in the absence of corroboration in terms of section 124 of the Evidence Act. That, the appellant lured the complainant into his house and started touching her.

The Learned Prosecution Counsel called for the dismissal of the appeal.

Having considered the rival submissions, the duty of this court is to re-consider the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

Briefly, the case for the prosecution was that the complainant, **SM B (PW1)**, aged 14 years and a primary school pupil was walking and passing by the home of the appellant when she saw him standing outside his house. He called and asked her to assist him in drawing water at a watering point at S. She complied but as she returned to the appellant's home with a 20 litre jerrycan full of water he followed her into the house and started touching her back and buttocks while remarking that he loved her. She spoke in a raised voice as he continued touching her. Her brother appeared at the scene and she hid under a bed while her brother went ahead to assault the appellant.

The brother, **AW (PW2)**, was informed that the complainant had shouted a distress call while in a nearby house. He went to that house and heard the voice of the complainant. He knocked the door and the appellant opened. He enquired from the appellant what he was doing with the complainant and he indicated that she had gone for her money from him. He (PW2) restrained the appellant from leaving the bedroom and found the complainant hiding under a bed. He (PW2) contacted his brother and father leading to the apprehension of the appellant and handing him over to the police.

**P W (PW3)**, the complainant's father proceeded to the appellant's house and found the appellant and others including A (PW2) and the complainant. He (PW3) then called the village elder to the scene.

**Dr. Jonathan (PW4)**, assessed the complainant's age and placed at fourteen (14) years while P.C. Caleb Yator (PW5), investigated the case and thereafter charged the appellant accordingly.

A clinical officer, **Kirwa Labat (PW6)**, examined the complainant and compiled the necessary P3 form indicating that there was no defilement. In his sworn statement after being placed on his defence, the appellant stated that he was a teacher for 37 years prior to joining the Red Cross of Kenya as a volunteer. He lived at M with his family and was at home when he heard a commotion outside his house and found the son of his landlord by name Kitosi assaulting his wife. He called upon the mother of Kitosi to assist him (appellant) to remove items from his house as he had been involved in a road accident. He was locking the door to his house when a brother to the complainant by name D arrived there and assaulted him. D was joined by a brother A (PW2) and both assaulted him. In the meantime, the complainant and other children were outside his house making noise. Other people appeared at the scene while he was being assaulted by D and A who forced the complainant into his house and alleged that he had intended to defile her. He was thereafter escorted to the police station to make a report against the said D and A.

The appellant denied that he sent the complainant to draw water for him and stated that it was the complainant's father who reported that the complainant had been found in his house. That, during interrogation at Matisi police post, the complainant denied that she was defiled nor that an attempt was made to defile her. That, his note book containing Ksh. 3,000/= was taken away by the complainant's brother A while police officers at Matisi police post declined to give him a P3 form.

After considering all the foregoing evidence, the learned trial magistrate concluded that the offence which was disclosed against the appellant was that of indecent act contrary to section 11 (1) of the Sexual

Offences Act as the evidence by the complainant did not reveal ingredients of attempted defilement.

This court agrees that the ingredients necessary for the offence of attempted defilement were not disclosed by the complainant nor any other witnesses and that what was disclosed was an indecent act which is defined as an unlawful intentional act which causes any contact between any part of the body of a person with the genital organs, breasts or buttocks of another.

Herein, the complainant stated that the appellant touched her body including the buttocks while saying that he loved her. She indicated that the appellant's action was against her wish and was intentional. However, the appellant denied the fact and implied that the complainant was forced into his house by her brothers D and Am so that he could be implicated with a sexual offence as a cover for their assaulting him.

Apparently, the appellant's conviction was based on the credibility of the evidence adduced against him by the complainant who was the key witness. What she stated was not corroborated by the other prosecution witness simply unlawful acts committed by the appellant against the complainant.

The complainant's father and brother (PW3 and PW2) respectively arrived at the scene after the alleged act.

Being alive to the provisions of section 124 of the Evidence Act, the learned trial magistrate, made finding that the complainant was a truthful witnesses and that her evidence was corroborated by PW2.

This court finds no good reason to interfere with the findings made by the learned trial magistrate based on credibility and must also hold that the appellant indeed committed an indecent act against the complainant on the material date and that his defence to the contrary was an afterthought. His conviction by the learned trial magistrate is herein upheld and the sentence confirmed in as much as it was lawful. The appeal is thus dismissed.

**[Delivered and signed this 19th day of March, 2014.]**

**J.R. KARANJA.**

**JUDGE.**