



No. 279/14

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 95 OF 2013

JOHN KITAU NYAMAIAPPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence in Sexual Offence Case No. 4 of 2013 by Hon. S.K. Mutai ,Ag. P.M on 9/5/13)

JUDGMENT

1. The appellant was charged with offences as follows;-

Count I -Attempted Defilement Contrary to **Section 9(1)** as read with section 9(2) of the sexual offences Act No. 3 of 2006.

Count II- Assault causing actual bodily Harm contrary to Section 251 of the Penal Code.

Count III - Malicious Damage to property contrary to section **339(1)** of the **Penal Code**.

2. He was tried, convicted on all counts and was sentenced as follows;

Count I -Ten (10) years imprisonment

Count II- Three (3) years imprisonment

Count III- Five (5) years imprisonment

Sentences were to run concurrently.

3. Being aggrieved by the conviction and sentence the appellant appealed on grounds thus;-

That the trial Magistrate erred in both fact and law by finding the appellant guilty notwithstanding the fact that there was mistaken identity; he failed to find that the case was not proved beyond reasonable doubt, due process was not adhered to when the appellant was arrested by the police; and that essential witnesses were not produced during the course of trial.

4. The appellant relied upon written submissions. The state opposed the appeal. Learned state Counsel, **Mrs Abuga** submitted that the evidence adduced established a case of indecent act therefore the court ought to have convicted the appellant on the alternative Count instead of the Main Count of attempted defilement. She called upon the court to set aside the conviction on the main count and enter a conviction on the alternative count. Further, she stated that the conviction on the second and third counts was proper. In respect of sentence she submitted that the sentence on count 2 was within the law. However in respect of count 3 she averred that it was excessive the appellant having been a first offender.
5. Briefly, facts of the case were that on the **24th February 2013**, at about 1.00 p.m., PW1, **K M** was grazing cattle with **PW2, K M** and **PW3, M M** when a person they identified as the appellant chased after them. She fell down. The person held her neck and tried to remove her clothes. She disengaged herself, tried to run but he caught up with her, tried to strangle her and also attempted to remove her pant. In the process the pant got torn. Children threw stones at him. The complainant informed her mother. She was taken to hospital for treatment. Thereafter the appellant was arrested and charged.
6. In his defence the appellant denied having encountered the complainant on the material date.
7. This being a first appellate court, I am duty bound to re-evaluate and reconsider evidence adduced in the lower court bearing in mind the fact that I neither saw nor heard witnesses who testified (**Okeno –vs- Republic (1972) E.A 32**).
8. In the main Count the appellant was said to have attempted to defile a child by intentionally attempting to cause his penis to penetrate the vagina of the complainant. Penetration has been defined as partial or complete insertion of the genital organ of a person in the genital organ of another person. (**see Section 2 of the Sexual Offences Act, 2006**).
9. This is a case where witnesses said the appellant assaulted the complainant. He tore her blouse and pant. There was however no suggestion that he reached out for his genital organ. There was no evidence that he tried to insert his genital organ into the complainant's organ. It was erroneous on the part of the Trial Magistrate to reach a finding that there was an attempted defilement.
10. In the alternative, the charge is committing an indecent act with a child. The child (PW1) said she was **13 years** old. Her mother **PW5, M M** and father **PW6, M M** were silent on her age but **PW4, Daniel Mulwa** the clinical officer who examined her estimated her age as **13 years**. The age of the complainant was proved beyond doubt.
11. According to the particulars of the offence, the appellant was alleged to have intentionally touched the vagina of the complainant. An indecent Act has been defined thus;

“(a) Any contact between the genital organs of a person, his or her breasts and buttocks with that of another person.

b) Exposure or display of any pornographic material to any person against his or her will, but does not include an act which causes penetration”.

12. No evidence was led to suggest that the appellant caused his genital organ to touch the genital organ of the complainant. Without existence of such evidence, there is absolutely nothing to prove that he committed an indecent act with a child as stated. Similarly the alternative charge cannot stand.
13. In the second count the appellant was charged with the offence of assault whereby he was said to have unlawfully assaulted the complainant. Evidence led established that the complainant sustained injuries. She had bruises on the neck region, back region, abdomen, buttocks, both hands and legs. The degree of injury sustained was assessed as harm.
14. PW1 said the assailant beat her up. He held her neck. He tried to strangle her. As a result she sustained the injuries on the neck, head and fingers. Her evidence was corroborated by that of PW2 and PW3 who were present. The injuries sustained were consistent with the manner of beating described by the complainant as having been occasioned by the assailant.
15. There is further evidence to prove that in the process of the assault the assailant tore the complainant's blouse and pant. The complainant was lawfully grazing animals when it happened. The action of the assailant which was contrary to the law and intentional was done willfully as the assailant should have been in control of his actions.

16. It is argued by the appellant that it was a case of mistaken identity since he was not at the scene of the incident. There is no doubt that the offence was committed in broad day light. However it was the evidence of PW1 that she did not know the appellant prior to the incident. However, she identified him in court.
17. PW2 testified that she saw the appellant who was drunk. He asked to be shown the way to his home. He proceeded to sit down. Then he chased after PW1 and later assaulted her. She also identified him in court as the complainant's assailant. On cross examination she said he was arrested the following day.
18. PW5 testified that he found PW2 and PW3 who told her that a man passed by and he asked to be shown the way. He then assaulted PW1. In her testimony she stated further thus:-

“ I found Kanini asleep and I woke her up. Kanini told me that the accused had got hold of her and beat her. She showed me a torn shirt. Kanini had a swollen head, had marks on the neck and she had no clothes. I called the accused's father who came and I told him what the accused had done. I went to the scene and found Kanini's shoes, pant and blouse which were torn. I found the accused had been caught and we brought him to Mutomo Police Station”

19. PW5 similarly identified the accused in court but she did not state how she came to know that he was her daughter's assailant. She did not say how she knew his father. On cross examination she said she believed her children because they had seen the appellant with **Nyamai**. None of the witnesses (children) mentioned **Nyamai**. The question to be answered is who was **Nyamai** and if he existed, could he have shed some light as to what indeed transpired?
20. PW5 could not tell how the appellant was arrested. There is however PW6, the complainant's father who stated thus:

“ .. my wife told me that K had been beaten by one man. I found K had marks on the neck. K told me that the accused had passed by as they were grazing. I went to where the accused was working. The following day I sent people to where the accused was and I was given 2 Police Officers. The people I sent brought the accused and we handed him to the Police. K and M confirmed that the accused beat K”

21. On cross examination he said he had never seen the accused before. The question to be answered is how he knew the appellant's place of work as he did not know him before. Another issue not answered is who identified the appellant prior to his arrest?
22. The Investigation Officer, PW8 believed the complainant and her witnesses and charged the appellant. On cross examination she said the appellant did not ask for an identification parade to be conducted.
23. This is a case where people who arrested the appellant were not called as witnesses. It is not stated how they formed the opinion to arrest the appellant without being identified by the assailant. Supposing they had been called as witnesses, what could have been the nature of their evidence?
24. If at all the prosecution called **Nyamai** and the people who arrested the appellant, would their evidence have been favourable to the State or would it have been adverse to it? (see ***Bukenya & Other versus Uganda (1972) E.A 549***).
25. To secure a conviction the prosecution was under a duty to prove that the appellant herein was the complainant's assailant. This is a case where the prosecution failed to prove that indeed the person who was arrested was the one who assaulted the complainant and damaged her property.
26. Having re-considered the evidence adduced, I find that it was a misdirection on the part of the trial court to reach the decision of convicting the appellant on all the counts. In the circumstances I do allow the appeal, quash the conviction and set aside the sentences imposed. The appellant shall be released forthwith unless otherwise lawfully held.

DATED, SIGNED and DELIVERED at MACHAKOS this 23RD day of MAY 2014.

L.N. MUTENDE

JUDGE