REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 60 OF 2009

PATRICK NJOROGE NJENGA .....APPELLANT

-VERSUS-

REPUBLIC .....RESPONDENT

(From original conviction and sentence in criminal case Number 69 of 2008 in the Senior Principal Magistrate's Court at Limuru – M. A. Murage (SPM) on 27th July 2008)

JUDGMENT

1. This appeal arises from the conviction and subsequent sentencing of the appellant on a charge of sexual assault contrary to **Section 5(1)(a)(2)** of the **Sexual Offences Act No. 3** of **2006**. Brief particulars were that on the 24th day of June 2007 at ***[particulars withheld]*** village in Kiambu West District within the Central Province, the appellant intentionally sexually assaulted by penetrating his genital into the anus of H. W. K., a girl aged 14 years, (identity concealed on account of her age).

2. In the alternative he was charged with indecent act with a female contrary to **Section 11(1)** of the same Act. It had been alleged that on the same dates and place he unlawfully did an indecent act with a female by touching her private parts-buttocks of the said H. W. K.

3. Upon conviction on the main count the appellant was sentenced to 15 years imprisonment. He then filed this appeal on grounds that the evidence of **PW1** and **PW2** was fabricated; that the arresting officer did not testify; that the charges were not proved against him beyond reasonable doubt and that his defence was rejected for no reason.

4. Miss Njuguna, learned State Counsel opposed the appeal on behalf of the respondent, stating that the evidence of **PW1** and **PW2** was not fabricated. She submitted that **PW1** went to buy charcoal at about 7 p.m. from the appellant who was well known to her as a neighbour and charcoal vendor. That he attacked her and took her to a bush where he attempted without success to defile her. He then sodomised her.

5. Miss Njuguna submitted further that **PW3** the arresting officer did testify and that the appellant was arrested by the members of the public. She urged that the charges were proved beyond reasonable doubt because **PW1** explained what happened on the material date and positively identified the appellant. That **PW2** the mother and PW4 the medical doctor corroborated her evidence and further that his defence was considered and dismissed as an afterthought.

6. In a nutshell, the prosecution's case was that on 24th June 2007 **PW1** was on her way to buy charcoal when she met the appellant. He was pretending to urinate by the roadside. She knew him by name and as a resident of ***[particulars withheld]*** where she lived. When **PW1** was about to pass by the appellant covered her mouth from behind, lifted her and carried her into the forest. He removed her nickers and tried to rape her but failed. He turned her over to lie prostrate, and held her by the neck so that she could not scream. He then went ahead and sodomised her. When the ordeal was over **PW1** ran home and informed her mother what had befallen her. A report was made to Tigoni police and subsequently the appellant was arrested and charged.

7. The appellant gave sworn testimony and called one witness. He denied having met or sexually assaulted **PW1** and averred that it was her mother with whom he had a sexual relationship and with whom they had differed.

8. The undisputed facts of this case are that the appellant and **PW1** the complainant were known to each other before this incident and that he was a charcoal vendor. There was also no dispute that **PW1** was a 14 year old minor at the time of the offence and that she was sodomised. To this end the evidence of Dr. Gathuka George of Tigoni Hospital is pertinent. He told the court that he examined **PW1** on 26th June 2007 and noted that she had a fresh tear in her annual opening and tenderness on the anterior. She also had pain on passing stool and he concluded that she was sodomised.

9. The question for determination is therefore, whether it was the appellant who sodomised her or someone else did. Since **PW1** was alone when she was attacked, the case for the prosecution rests on her evidence as the sole identifying witness of her assailant. It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness, especially when it is shown that conditions favouring identification were difficult. See the decision in **Ogeto v Republic [2004] 2KLR** .

10. As stated earlier **PW1** and the appellant were known to each other before this incident. I however analysed the evidence of identification with great caution bearing in mind what was stated in the case of **Republic Vs. Turnbull & others (1976) 3 All ER 549**, that mistakes can be made even in cases of recognition and that an honest witness may none the less be mistaken.

11. The circumstances of identification in this case are first, that the attack occurred at about 7 p.m. as the minor went to buy charcoal. Second, that the minor knew her assailant and identified the appellant as that assailant. Third, that the sun had not completely set and she was therefore able to see and identify him well. In her own words she told the court as follows:

> "**I met accused. He pretended to be urinating. He is called Wakimwe. That is his nickname. He lives in *[particulars withheld].* I know his home. I passed him as I walked. He held my mouth from behind."**

She therefore knew him by name and also knew where he lived. She saw him as she approached and passed him by before he attacked her.

12. It is pertinent to note that the minor was in tears when she returned home and reported the incident to **PW2** her mother and gave the appellant's name. The two of them went to the appellant's gate that evening but found it locked. The appellant's father testified on his behalf and told the court that the appellant was away in Kamirithu on the fateful day and returned home at 11 p.m. with **PW1**'s mother and her friend. The appellant testified that he was with **PW1**'s mother from 6.30 p.m. to 1 a.m.

13. I am alive to the fact that this being a criminal case there is no burden on the appellant to explain himself. I have however considered his defence on the context of the rest of the evidence on record. If the appellant's evidence is to be believed, then **PW2** was not in her home at about 7 p.m. to send her daughter for charcoal, neither was she there to receive her tearful report an hour later.

14. The trial magistrate who had the opportunity to see the witnesses as they testified, made an observation of **PW1**'s demeanor in the following manner:

> "**The complainant aged 14 years per PW4's evidence appeared intelligent and gave a detailed account of what happened. I saw her demeanour and was satisfied that she told the truth. She previously knew accused and they spent some time with him during the incident."**

PW1 was therefore observed to be a truthful witness.

15. The trial magistrate also considered and dismissed as untrue the appellant's version of events and I note that the appellant never brought up the issue of the alleged romantic relationship between him and **PW2** when he cross-examined her or **PW1**. In my view, this version came late in the proceedings because it was contrived and was intended only to exculpate him from guilt.

16. As the first appellate court I have treated the evidence as a whole to that fresh and exhaustive scrutiny which the appellant is entitled to expect, as the court cannot affirm a conviction resting on evidence which, if duly reviewed, would be found to be so defective as to render the conviction manifestly unsafe. See **Pandya v Rep [1957] E.A. pg 336**.

17. From my own analysis I have come to the conclusion, that the prosecution's case against the appellant was proved beyond reasonable doubt, and that his defence did not go any length in denting it. The appeal is found to be without merit and is dismissed in its entirety.

SIGNED DATED and **DELIVERED** in open court this **29th day** of **September 2014.**

L. A. ACHODE

JUDGE