



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT EMBU**  
**CRIMINAL APPEAL NO. 38 OF 2014**  
**NAZARIO NYAGA KANYORI.....APPELLANT**  
**VERSUS**  
**REPUBLIC.....RESPONDENT**

*(Being an Appeal from the Sentence and Conviction of M.O. OBIERO Ag. Principal*

*Magistrate Runyenjes in Criminal Case No. 166 of 2014 on 7th July, 2014)*

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

The appellant had lodged this appeal against both conviction and sentence on the offence of Indecent Act with a child contrary to section 11(1) of the Sexual Offences Act. The appellant was charged before Runyenjes Ag. Principal Magistrate with defilement contrary to Section 8(1) of the Act with an alternative charge of indecent act with a child. He was acquitted of the main charge and convicted of the alternative charge where a sentence of 10 years imprisonment was imposed. The grounds of appeal as outlined in the petition are that the offence was not proved to the standards required by the law; that his defence was not considered and that his constitutional rights were violated under Section 72(3)(b) of the repealed constitution.

The brief facts of the case is that PW1 the complainant went to the shops to buy sweets where she met the accused. The accused led her to his house where he put her on the bed and undressed her. He then put his penis between her thighs. PW1 managed to escape when the appellant went to tune his radio. She went home and reported to her mother PW1 who was already searching for her daughter. The matter was reported to the police by PW1. The accused was later arrested and charged with the offence.

The State conceded to the appeal on ground that there were material inconsistencies in the evidence of the complainant PW2 and her mother PW1. While PW1 said that PW2 was sexually assaulted by the appellant inserting his finger in her vaginal canal. PW2 said the appellant put his penis between between her thighs before she managed to escape. PW3 a neighbour to PW1 testified that she accompanied PW1 to go look for her daughter Sharon (PW2). The two women could not find the child and PW3 returned to her house. She was later called by PW1 with the good news that the child had been found. When PW3 went to PW1's house, the complainant told her that she had met with one "Nyaga" who tied her hands and dragged her to his house where he had sexual intercourse with her. This account contradicts that of PW1 and of the complainant herself.

PW3 went on to say that the child's mother told her from the road, she was able to see the complainant in the home of the appellant. On the other hand, PW1's testimony was that she did not find the complainant

until she saw her entering the gate of their home. PW3 also came up with the story of the appellant having tied the complainant with a piece of cloth which the complainant did not mention in her testimony.

The appellant denied the offence and called his sister DW2 as a witness. DW2 said that she had seen some children playing under a mango tree in the compound on the material evening before people came to arrest his brother. This ties up with the complainant's answer in cross-examination that she had taken herself to the compound of the appellant so that she could use their latrine.

In his judgment the trial magistrate considered the defence of the appellant as against the prosecution's evidence and found it untenable. However, the court did not address any of the contradictions in the prosecution's case in his judgment. The contradictions were very material to the case because they relate to how the incident occurred. The three main witnesses PW1, PW2 and PW3 contradicted each other in material particulars. PW1 the mother of the complainant appeared to be on a fishing expedition to get evidence to support the allegation that the appellant had sexually assaulted her daughter.

The complainant was the key witness who would have shed light on what happened to her but her version of the incident was sharply contradicted by the evidence of her mother and her neighbour. It was wrong for the trial court to ignore such material contradictions which put the credibility of the prosecution witnesses in doubt and in particular PW2. The conviction was based on very shaky and contradictory evidence which leads me to the conclusion that the conviction was unsafe.

On the contravention of the rights of the appellant under Section 72(3)(b) of the repealed Constitution and Article 49 of the current constitution, the accused did not elaborate on how his rights were violated to give the court a basis of determining whether there was violation. The grounds remained unsupported by any facts or evidence and cannot therefore be sustained.

Due to the foregoing reasons, this appeal is upheld. The conviction and the sentence are hereby set aside. The appellant is hereby set at liberty unless otherwise lawfully held.

**DELIVERED, SIGNED AND DATED AT EMBU THIS 19TH DAY OF NOVEMBER, 2014.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Ms. Matere for State**

**Appellant**

**F. MUCHEMI**

**JUDGE**