



REPUBLIC OF KENYA

High Court at Kisumu

Criminal Appeal 45 of 2012

PAUL SAMUEL ODIWOUR JUMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case No. 290 of 2011 in the Senior Resident Magistrate's at Tamu)

J U D G M E N T

The appellant was charged with two counts namely:-

Attempted defilement contrary to section 9 (1) (2) of the Sexual Offences Act No. 3 of 2006.

The particulars are that on the 19th day of December 2011 at Kisumu county intentionally attempted to cause his penis to penetrate the vagina of **SA** a child aged 10 years.

The alternative charge was indecent act with a child contrary to section 11 of the Sexual Offences Act No. 3 of 2006.

The particulars are that on the 19th day of December 2011 at Saoset area in Muhoroni district within the Kisumu county made an indecent act to **SA** by touching her private parts.

The brief facts of this case are that the complainant, **PW1 SA** was on the material day at her parent's place. The appellant came and told her grandfather that there were carrots in his place and that he could send the children to collect the same.

The complainant together with her sister went to the shamba near a river where they met the appellant. The appellant sent the complainant sister to his home to collect maize. Subsequently, and while her sister was away he attempted to defile her near some banana plants. The complainant screamed and alerted her sister who when she arrived she also started screaming.

The complainant went home and reported the incident to her mother. She carried her torn biker and panty.

PW2 PA, was the complainant's mother. She told the court that when the children went to the appellant's shamba she went to collect firewood. When they came the complainant was shaking and trembling and she informed her that the appellant wanted to defile her. She had both her panty and biker which were torn. The said witness on the following day went and reported the matter at Koru Police Station.

PW3 David Njue, is the police officer who received the information on 20-12-2011. The appellant had been arrested and was brought by the members of public. The minor's pants and biker were equally

brought. He re-arrested the appellant and proceeded to charge him with the offence of attempted defilement.

When put on his defence the appellant gave sworn evidence and denied the charge. He argued that his problem with PW2 was a long term land problem.

I have perused the entire proceedings and the judgment of the learned trial magistrate. I have further heard the parties oral submissions as well as the written submissions by the appellant. The appellant has filed several grounds of appeal but of great significance is that the key witnesses were never called to testify during the main hearing.

There is no doubt in my mind that the parties that is the complainant and the appellant are neighbours and are well known to each other. The question that needs my determination is whether indeed the appellant attempted to defile the complainant .

To answer this question, there is no independent witness to the incident. Both the appellant and the complainant were alone. The only other person who ought to have witnessed the incident was the complainant's sister. According to the complainant her sister came and started to scream.

This was a fundamental witness. For some reason the prosecution failed to call her. What did she know? Did she hear the screams? Did she saw the appellant doing anything that would suggest that he was attempting to defile her sister? What of the panty and biker? Where was it when she arrived?

My considered opinion is that she was a critical nerve in this case. This is not just another case. The offence is serious and this fact the prosecution ought to have taken seriously.

The other evidence which I find lacking is that of the grandfather. Did he actually send the children to collect carrots at the appellant's farm? Where was he when the complainant and her sister came home 'shaking and trembling' This evidence was indeed crucial.

Further according to PW1 the pant and not the biker was torn. However, the evidence of PW2 her mother suggests otherwise. She told the court that both were torn. The discrepancy was not helped either by PW3 who was in law meant to produce the two exhibits. The same were not produced. They were simply marked as PMF 1 and 2. The trial court failed to notice this. As it were now the two crucial exhibits were not produced and therefore the substratum of the case collapsed.

It is my finding that the prosecution did a very shoddy investigation. The same left a lot of lapses that it is very difficult to ascertain that the appellant committed the offence. By failing to call the complainant's sister who was actually the immediate witness at the scene and failing to produce the pant and biker the prosecution case was doomed to fail.

This court considering the nature of the case and the caps in the prosecution evidence would not order a retrial. I shall consequently allow the appeal and set free the appellant unless lawfully held.

Orders accordingly.

Dated, signed and delivered at Kisumu this 21st January 2013.

**H.K. CHEMITEI
JUDGE**

In the presence of:

.....for state

.....for appellant

HKC/va