



REPUBLIC OF KENYA

High Court at Mombasa

Criminal Appeal 224 of 2011

(From Original Conviction and Sentence in Criminal Case No. 2184 of 2010 of the Chief Magistrate's Court at Mombasa – R. Kirui (PM))

RAMA MASHA APPELLANT

- Versus -

REPUBLIC RESPONDENT

RULING

The Appellant was sentenced to 10 years imprisonment for the offence of attempted defilement of a girl contrary to Section 9(1)(2) of the Sexual Offences Act No. 3 of 2006.

The particulars are that on the 19th day of July 2010 at Kisauni District Mombasa County he unlawfully and intentionally attempted to cause his penis to penetrate the vagina of M.J. a girl aged seven years.

The evidence of the complainant is that she was on her way to school when she met the Accused who held her by hand and took her to some bushes where he told her to lie down on a sweater which he had spread on the ground. He proceeded to take out her pants and also his and started to do bad things to her but she cried and witnesses went to the scene and took both of them to school. Her father was called and she was taken to Police Station and Hospital.

PW3 (**Jabir Athman**) a resident of Utange had gone to load firewood onto his handcart when he saw the Accused while in the company of the complainant. He interrogated the Accused who claimed that the child belonged to his sister. He insisted that the child be taken to school and the witness went with the two upto the gate of the school and he returned home where he informed his brother called Awadh who suggested that they follow the child and the Accused.

They went and checked for them at the place where they had left them but all in vain. Later he met the child coming out of a bush. They sought for the Accused whom they found squatting in the bush. They took the two to the school and handed them over to the Head teacher. The mother and father of the complainant were called. Members of public beat him up before he was taken inside the school compound.

Inspite of several adjournments of the prosecution were unable to avail the attendance arresting officer, the investigating officer and the doctor who examined the complainant if any.

A perusal of the evidence adduced before the trial Magistrate shows that it is riddled with inconsistencies and contradictions. The complainant testified that when bad things were done to her she cried and this attracted people who took her and the Accused to school. PW3 told the Court that he was alone in the bush collecting firewood when he saw the Accused in the company of the complainant entering the

shamba where he was. He followed them and he told the Accused to take the child to school.

Later he saw the child coming out of the bush. At no time did he tell the Court that he was attracted to the scene from the cries of the complainant.

Apart from stating that he saw the Accused in the company of the complainant, there is no evidence to the effect that he found the two in a compromising situation. Either being naked or doing anything to suggest that the Accused had the intention of defiling the girl.

It is not clear whether the complainant was taken to hospital for treatment and or examination. There are no treatment notes. No P3 form or any evidence at all to corroborate that of the complainant. To convict the Appellant the trial Magistrate should have satisfied himself that the child was telling the truth as required under Section 124 of the Evidence Act which provides-

“Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declaration Act, where the evidence of alleged victim admitted in accordance with that Section on behalf of the prosecution in proceedings against any person for an offence, the Accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offence, the Court shall receive the evidence of the alleged victim and proceed to convict the Accused person if, for reasons to be recorded in the proceedings, the Court is satisfied that the alleged victim is telling the truth.”

The evidence of the victim and PW3 who allegedly rescued her is contradictory in nature and the trial Magistrate did not address his mind on this inconsistency, who to believe and who to disbelieve and why. The conviction was not safe. The appeal has merit and it succeeds on both conviction and sentence. Appeal is allowed. The conviction is quashed and sentence set aside.

The Appellant is set at liberty unless otherwise lawfully held.

Judgement read and delivered in open Court this 20th day of March 2013.

M. MUYA
JUDGE

In the presence of:-

Mr. Jami for State

Mr. Nyamboye – Counsel for the Accused

Court clerk – Mr. Musundi