



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO.121 OF 2010

JOSEPH KARIUKI NDUATI.....APPELLANT

VERSUS

REPUBLICPROSECUTOR

From original conviction and sentence in Criminal Case No. 143 OF 2010 at the Chief Magistrate's Court at Embu by Hon. F.W. MACHARIA – SRM on 18/8/2010

J U D G M E N T

JOSEPH KARIUKI NDUATI the Appellant was charged with the offence of attempted defilement contrary to section 9(1) (2) of the Sexual Offences Act No.3/06.

The particulars as stated in the charge were as follows;

JOSEPH KARIUKI NDUATI: On the 12th day of January 2010 in Embu District within Eastern Province intentionally attempted to have sexual intercourse with NW a child aged seven (7) years.

He also faced an alternative count of committing an indecent Act with a child contrary to section 11(1) of the Sexual Offences Act No.3 of 2006.

The particulars of the offence as stated in the charge sheet were as follows;

JOSEPH KARIUKI NDUATI: On the 12th day of January 2010 in Embu District within Eastern Province intentionally touched the private parts of NW a child aged seven (7) years.

The case proceeded to full hearing and he was convicted of the principal count and sentenced to ten (10) years imprisonment. He filed this appeal citing the following grounds;

1. ***The learned trial Magistrate erred in both points of law and facts by failing to consider that the Appellant was not mentally fit to face the trial.***
2. ***That the sentence imposed is manifestly harsh and excessive considering all circumstances of this case.***

The Prosecution called four (4) witnesses. PW1 aged seven (7) years underwent a *voire dire* examination and was found fit and suitable to testify. She gave unsworn evidence. She said she was from school over lunch time when she saw the Appellant seated ahead of her. She had seen him before roaming in Kibugu area. And he had told them to be calling him "Maturu". When she passed him, he followed her and held

her by the neck and dragged her into a nearby coffee plantation. He made her lie on the ground and removed her pant. He also removed his trouser exposing his penis. He contacted it with her vagina and she screamed. He hit her with his fist on her mouth and he ran away. She wore her pant and went and told her mother (PW2). She was taken to hospital at Kibugu. As she walked with her mother (PW2) she saw the Appellant who ran away towards the market. She showed him to the mother (PW2). A report was made and the Appellant was arrested. He was well known at Kibugu market. PW2 upon receiving PW1's report went to the scene and found PW1's school bag and hat. PW1 was examined by Dr. Sheila Moraa (PW4). She was found to have no abnormalities in her genitalia. Her clothes were dirty with stains.

The Appellant in his sworn defence denied the charges. He explained how he was arrested. He denied Knowing PW1 nor defiling her. When the appeal came for hearing the Appellant made oral submissions and all he said was that he was framed and wanted to be set free.

The State through the learned State Counsel M/s Ing'ahizu opposed the appeal saying the evidence was overwhelming and it placed him at the scene.

I have considered the submissions by both the Appellant and the State as well as the grounds of appeal. I have equally evaluated the evidence on record as is required of this Court as a first appeal Court. In the case of **PATRICK & ANOTHER –V- REPUBLIC [2005] 2 KLR 162** the Court of Appeal stated this about a first appeal Court;

***“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court’s own decision on the evidence. It is not the function of first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court’s findings and conclusions; it must make its own findings and draw its own conclusions.*”**

It is given that PW1 was a minor aged seven (7) years. The learned trial Magistrate examined her to satisfy herself of her competence to testify. The child gave unsworn evidence and was cross-examined by the Appellant. The learned trial Magistrate states in her Judgment that even though there was no eye witness who testified that he saw the Appellant commit the offence the evidence of the complainant though a minor was **consistent and convincing**.

PW1 reported to her mother (PW2) immediately she went home. And upon visiting the scene PW2 found the minor's school bag and hat. She clearly described to her mother the person who had attempted to defile her. The sole purpose of making the child lie on the ground and removing her pant and also removing his trouser and placing his penis **“thing”** in her vagina was to defile her. It's her screams that made him run away. The proviso in section 124 of the Evidence Act states;

“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 learned trial Magistrate was well convinced that PW1 was a truthful witness. Even her evidence and her conduct after the incident confirms that. I am satisfied that the Appellant was well identified. His defence was displaced by the evidence of the Prosecution witnesses. In one of his grounds of appeal he says the learned trial Magistrate did not consider that he is not mentally fit to stand trial. This is an issue that did not arise during the trial nor the appeal. No report has been received from the prison to make this Court suspect that the Appellant is mentally unstable. The Appeal has no merits and I dismiss it. The conviction and sentence are upheld. Right of Appeal explained.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 11TH DAY OF SEPTEMBER 2013.

H.I. ONG'UDI

J U D G E

In the presence of;

M/s Ingahizu for State

Appellant

Kirong/Mutero – C/c