



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**CRIMINAL APPEAL NO. 236 OF 2012**

JAMLICK KATHURI MITARO ..... APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

**(APPEAL ARISING FROM THE JUDGMENT OF THE PRINCIPAL MAGISTRATE'S COURT  
AT GICHUGU (M. ONKOBA – R.M) IN SEXUAL OFFENCE CASE NO. 6 OF 2012  
DELIVERED ON 20<sup>TH</sup> NOVEMBER, 2012**

**JUDGMENT**

JAMLICK KATHURI MITARO the appellant herein was on 20<sup>th</sup> November 2012 convicted by M. ONKOBA (Resident Magistrate Gichugu Court) for the offence of attempted defilement contrary to **Section 9 (1) and (2) of the Sexual Offences Act and sentenced to serve ten (10) years imprisonment.**

Being aggrieved by that conviction and sentence, he has filed this appeal in which he raises the following grounds:-

1. *That he pleaded not guilty*
2. *That the trial magistrate erred in law and in fact by failing to consider that PW1 and PW2 claimed that he had tried to induce PW2 to have sex with her by giving her 200/= yet they never reported this to the police*
3. *That the trial magistrate failed to consider that there was a grudge between him and PW1 who owed him some money and had failed to pay and instead stage managed the alleged offence*
4. *That the trial magistrate failed to consider that although the offence was alleged to have been committed on 30<sup>th</sup> May 2012, he was arrested on 6<sup>th</sup> June 2012 yet they stay in the same plot*
5. *That the trial magistrate erred in law and in fact when he relied on the evidence PW3 who doesn't live in the same plot and who infact lives some 200 metres from him so there was no way she could have seen him coming from complainant's house yet there is no electricity*
6. *That the trial magistrate erred in law and in fact by failing to consider that there was no light to enable the complainant identify him*
7. *That the trial magistrate failed to consider his defence and mitigation*

TWN (PW1) is mother to complainant (PW2) who was born on 6<sup>th</sup> February 1997 and was therefore 15 years at the time of the incident subject matter of this case which occurred on 30<sup>th</sup> May 2012. According to PW1, the complainant was unwell on that night so she left her in bed and took food to her grandmother telling complainant not to close the door from inside so she could open for herself from outside. PW1 stayed at the grandmother's place upto 10 p.m. and while heading home, she heard screams and saw the appellant running from the plot where she resides. The appellant asked her if she

had met anyone on the road and she responded in the negative. He then told her that there was someone in her house. She insisted that he returns with her to the plot where they found many people with the complainant crying saying that “Baba Maureen” which is the appellant’s nickname at the plot had entered the house and started removing her bikers with the intention of having sex with her and so she screamed and the appellant ran away. At that point, the appellant alleged that PW1 was framing him and he went to his house and shut the door behind him. PW1 reported the matter to the Police the following morning.

Complainant testified that as she lay in bed that night, she heard someone touching her thighs and first thought it was her mother feeling her temperature as she was un-well. Then the person started removing her biker and when she turned, she recognized the person as the appellant also known as “**Baba Maureen**”. She was able to see him as there was a tin lamp. Since the appellant had previously offered her 200/= for sex, she knew that the appellant wanted to have sex with her so she shouted his name and he started running away and people assembled and her mother arrived with the appellant and she told her what had happened. Appellant became arrogant and disappeared. The matter was reported to Kianyaga Police Station the following day.

F N K (PW3) lives in the same plot and at about 11 p.m. on the material night, she had gone to answer a call of nature when she heard someone shout “**Baba Maureen**” from PW1’s house and spotted the appellant dashing out of PW1’s house into his house wearing a jacket and moments later, he emerged wearing a T-shirt, stood for a while and went to the gate. It was then that the complainant told her that appellant had gone to her house and started stripping her of her inner clothes. People started gathering and the appellant emerged accompanied by PW1 and complainant again explained to her how appellant went to the house intending to have sex with her. The appellant started protesting and went into his house. The matter was reported to the police.

CPL EUNICE MUTISO (PW4) of Kianyaga Police Station testified that she recorded the evidence of the witnesses in this case and visited the scene where she found that complainant and appellant live in the same plot in rooms adjacent to each other and on 1<sup>st</sup> June 2012, she had the appellant arrested and later charged.

In his defence, the appellant gave an unsworn statement in which he said that on the material day, he had gone to work upto 11 p.m. and when he arrived home, he met PW1 and PW2 who told him that someone had gone into their house but complainant had not identified the intruder. So he retired into his house and the following morning he went about his usual business but on 5<sup>th</sup> June 2012, he was arrested by the assistant Chief and taken to Kianyaga Police Station where he was charged with the offence which he said he did not commit. He added that in 2010, the complainant had also alleged that he lured her with 200/= yet he is a parent who cannot do such a thing.

I have considered the evidence afresh so as to draw my own conclusions as required. What is clear is that the complainant and appellant live in the same plot. The Investigating officer testified that their houses are adjacent to each other and therefore they are not strangers to each other. This incident happened at night and the complainant says she was able to recognize the appellant because there was light from a tin lamp. The trial magistrate considered if the circumstances were favourable and stated as follows in his judgment:-

***“ Having dealt with the lighting situation outside the house, I now turn to consider the situation inside the house where the complainant was at the time of the alleged incident. The complainant had stated that they had lit a tin lamp in the house. She stated that she recognized the intruder using light from the tin lamp. PW3 too in her testimony had stated that when she rushed to the plot responding to screams, she noted light from the tin lamp. In my view therefore, there is no doubt that there was sufficient light in the house that could aid a proper and mistake free identification ---”***

Taking into account the surrounding circumstances, I agree with the trial magistrate’s findings above. It must be remembered that according to the complainant, the appellant went to her bed and

started removing her bikers. The complainant was therefore very close to the appellant and this aided a proper recognition. The fact that the complainant was even able to call out the appellant's names i.e. "**Baba Maureen**" is indication enough that she was certain as to who wanted to have sex with her. In her testimony, she told the trial magistrate the following:-

***“ I then felt a second touch and the person started removing my biker. I turned and saw the accused person known as Baba Maureen. The house was lighted by a tin lamp. I was able to identify him”***

Therefore the complainant's evidence was not that of identification of a stranger. It was that of recognition of a person she knows well and who is her neighbour and who was on her bed. This was therefore not a case of identification by a single witness at night under unfavourable circumstances but rather the evidence of recognition by complainant of a person she knew well. Recognition is more reliable than mere identification of a stranger and given the circumstances in this case, I am satisfied that the trial Court arrived at a correct finding that the appellant's recognition was free from doubt.

The appellant also takes issue with the fact that PW3 said she saw her yet she was 200 metres from him and there was no electricity. PW3 said there was moon light and when she heard complainant screaming, she spotted the appellant rush out of complainant's house and into his house before emerging again having removed his jacket and now wearing a T-shirt. She said that at that point, the complainant told her that appellant had gone to her house and started removing her clothes. Again this witness was a neighbour to appellant and recognized him as she had enough time to see him dash from complainant's house into his own house before leaving. And on the way, the appellant met complainant's mother who not only spoke to him but decided to take him back to the scene. The complainant was not a child of tender years whose evidence would require corroboration but if any corroboration was required, it is to be found in the evidence of PW1 and PW2. Although the appellant has raised the issue that there was a grudge between him and complainant's mother (PW1) over some money, no such questions were put to the witness during trial.

Appellant also raises the issue that although the offence was committed on 30<sup>th</sup> May 2012, he was only arrested on 6<sup>th</sup> June 2012. Nothing long on that as there is no time limit within which he ought to have been taken to Court for an offence under the ***Sexual Offences Act***. It is also of no consequence that the complainant had not reported to the police a previous attempt by appellant to offer her 200/= for sex.

The record shows that the Court considered the appellant's defence which it dismissed as "***a bare denial of an offence he committed***". This was after weighing his case against that of the prosecution. The record also shows that the trial Court considered his mitigation before passing sentence.

Having considered the evidence in this case, I am satisfied that the appellant was properly convicted. The sentence of ten (10) years imprisonment was mandatory under the law. This appeal is accordingly dismissed.

**B.N. OLAO**

**JUDGE**

**31<sup>ST</sup> OCTOBER, 2013**

31/10/2013

Coram

B.N. Olao – Judge

CC – Muriithi

Appellant – present

Mr. Sitati State Counsel present

Language – Kiswahili/English

COURT: Judgment delivered in open Court this 31<sup>st</sup> day of October 2013

Mr. Sitati State Counsel present

Mr. Muriithi Court clerk present

Appellant present

Right of appeal explained.