



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO. 178 OF 2011

STEPHEN MWANIKI NJUKI.....APPELLANT

VERSUS

REPUBLICPROSECUTOR

From original conviction and sentence in Criminal Case No. 999 of 2011 at the Chief Magistrate's Court at Embu by Hon. M. WACHIRA -CM on 7/10/2011

J U D G M E N T

STEPHEN MWANIKI NJUKI the Appellant was charged and convicted of the offence of indecent act with a child aged 6½ years. This was an alternative count to Defilement. He was sentenced to ten (10) years imprisonment. He filed this appeal citing the following grounds;

1. *That the Appellant pleaded not guilty before the trial Magistrate.*
2. *That the trial Magistrate erred in law and fact when she convicted the Appellant relying on evidence which was in consistent and uncorroborated.*
3. *That the learned trial Magistrate failed to consider the fact that the Appellant was unable to communicate without a special interpreter.*
4. *That the learned trial Magistrate failed to consider the fact that PW1's evidence was not supported by any other witness.*
5. *That the trial Magistrate also failed to consider the fact that no test was done on the Appellant i.e. DNA to confirm whether he had been in contact with the complainant.*

The facts of the case are that the complainant (PW1) was going to school on 13/5/2010 at 7am when she was held by a man who dragged her to a coffee plantation. He removed her pant and biker (EXB1 & 2) and made her lie on his coat on the ground. He then defiled her. He then finished and told her to go to school. She walked back home. On the way she met her sister and informed her. They reported to their grandfather and mother later. She did not know the defiler before that date.

PW6 who was also said to have been defiled is the one who knew the Appellant. Her complaint against the Appellant was dismissed by the learned trial Magistrate and he was acquitted of that charge. Doctor G. Njuki Njiru who examined PW1 stated that PW1 had bruises on her valve but there was no penetration (EXB 4).

The Appellant in his unsworn defence denied the charges.

When the appeal came for hearing the Appellant who appeared incoherent stated that he had been framed up.

The state conceded the appeal and asked that the Appellant be confined for treatment.

This is a first appeal and this Court is enjoined to re-evaluate the evidence and come to its own conclusion. The Court of Appeal in the case of KINYANJUI & ANOTHER [2004]2 KLR 364 held thus;

1. ***On a first appeal in criminal cases, the High Court is also mandated to consider the grounds of appeal put forward by the Appellant in reaching its judgment.***
2. ***In reaching its decision, the High Court has to put in mind the fact that it did not have an opportunity of seeing the witnesses as they testified and therefore could not be expected to make any findings as to the demenour of the said witnesses.***

I have considered the submissions by the State and the Appellant. I have equally considered the grounds of appeal and the evidence on record. There is no doubt that PW1 was sexually assaulted. The main issue for determination is if the Appellant was the culprit.

In the course of the hearing of the appeal it became apparent that the Appellant has some challenges but he could still address the Court. The record at page 17 lines 7 does not show the language of use by PW1. And at page 18 lines 14-15 the record shows that the Appellant had no question for PW1 in cross examination. Again at page 20 lines 16-17 it shows he had no question for PW2 in cross examination. This appears to be a strange scenario. It has not been demonstrated that the Appellant understood the language used as none is indicated. PW1 did not know the person who sexually assaulted her. PW6 said she knew the person who defiled her and the person was the Appellant. PW6 was not with PW1 when this happened. Since PW1 did not know her attacker she should have attended an identification parade to identify him. This was not done. PW5 was on patrol when PW6 accompanied by PW1 showed them the Appellant as the culprit and he was arrested at the market. At what point did PW1 point out the Appellant as the person who had defiled her? Its PW6 who knew him. The learned trial Magistrate did not make any finding on the issue of identification of the Appellant. Even though the proviso to section 124 Evidence Act allows the Court to convict on the evidence of a victim alone the Court must be keen to ensure the victim's evidence is wholly reliable and dependable. That's why the Court is called upon to give reasons for believing the victim's evidence and using that evidence to form the basis of a conviction. After evaluating this evidence I do find that the evidence on identification is wanting making the conviction unsafe. The result is that the appeal is allowed. The conviction is quashed and sentence set aside. Since the appellant is said to be on medication the officer in charge G.K. Prison Embu is directed to hand over the Appellant to his parents/family on or before 21/10/2013 to enable him continue with medication.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 18th DAY OF OCTOBER 2013.

H.I. ONG'UDI

J U D G E

In the presence of;

M/s Ing'ahizu for State

Appellant

Mutero/Kirong – C/c