



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
CRIMINAL APPEAL NO.54 OF 2011

JOSEPH NZONGA KAVOI.....
APPELLANT

VERSUS

REPUBLIC OF KENYA.....
RESPONDENT

**(BEING AN APPEAL ON CONVICTION AND SENTENCE FROM ORIGINAL CRIMINAL
CASE NO 1316 OF 2010 IN BUSIA LAW COURTS).**

JUDGMENT

The Appellant was charged with the offence of defilement of a girl contrary to section 8(1) (3) of the Sexual offences Act no 3 of 2006 in that on diverse dates between 20th and 25th August 2010, at [particulars withheld], intentionally and unlawfully caused his penis to penetrate to vagina of M A, a child aged 15 years. He also faced an alternative charge of indecent act contrary to section 11(1) of the Sexual offences Act as read with Miscellaneous amendment bill no 6 of 2009.

The Prosecution called a total of seven witnesses in support of the charge before closing their case. The court then made a ruling of a case to answer against the Appellant who was placed on his defence, and after explaining the provisions of Section 211 of the Criminal Procedure Code, the Appellant opted not to offer any defence. The learned trial Magistrate then proceeded to prepare her judgment which was delivered on 2nd June 2011, in which the Appellant was found guilty on the main charge. The Prosecutor then informed the court that the Appellant was to be treated as a first offender. The court asked the Appellant to offer his mitigation and he pleaded with the court for leniency, saying that he has been in remand for a long time, and that his parents and wife had died leaving him with three children to take care of. The learned trial magistrate, after considering the mitigation, found that the charge the Appellant had been convicted on carried a mandatory sentence and proceeded to sentence him to twenty years imprisonment.

The Appellant being dissatisfied with both the conviction and the sentence, lied his appeal on 13th June 2011 which is based on the following four grounds;

1. That the Prosecution's evidence was speculative and lacked probative value.
2. That nothing incriminating was found on him after the doctor carried out the medical tests.
3. That he was not accorded a fair hearing as contemplated under the Constitution as he was not afforded fair interpretation.
4. That the conviction should be quashed.

That during the hearing, Mr. Kelwon for the State, conceded to the appeal and gave the following reasons;

1. That there is a confusion as to the date the offence is said to have been committed. That while the charge sheet talks about the offence having occurred on diverse dates between 20th August 2010 and 25th August 2010, the Complainant talked of only one date in her testimony in court.
2. That as much as the testimonies of Pw 2 and Pw 3 are consistent with that of each other, they do not collaborate the testimony of the Complainant in respect of the date when the offence was committed.
3. That the testimony of Pw 7 suggested that the Complainant had been sexually assaulted on 25th August 2010, while her testimony had indicated that the incident occurred on 20th August 2010.
4. That for the reasons above, the conviction of the Appellant was unsafe and should be quashed.

I have carefully considered the grounds of appeal and the reasons for the State to concede to the appeal, and I find it is indeed apparent that the evidence adduced by the Complainant is at variance with that of the two main witnesses, Pw 2 and Pw 3. Secondly, the Complainant's testimony do not support the particulars of the charge, that the Appellant was facing before the lower court. The conviction is therefore unsafe and the same is hereby set aside, the sentence vacated and the Appellant should be set free forthwith unless otherwise lawfully held.

It is so ordered.

S.M KIBUNJUA

JUDGE

Dated and delivered on this 17TH day of OCTOBER, 2013

In the presence of;

JUDGE