REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO.99 OF 2010

KILYUNGU NZYOKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence delivered by Gichimu W. J. (SRM) in Criminal Case Number 431 of 2009 in the Senior Resident Magistrate's Court at Mwingi on 16th February, 2010)

JUDGMENT

The appellant was charged before the Senior Resident Magistrate's court, Mwingi with the offence of attempted defilement contrary to section 9 (1) of the Sexual Offences Act. The particulars were that on 17th May, 2009 at Nzauni Sub-location, the appellant attempted to commit act which would have caused penetration with his male genital organ to the female genital organ of **S.N** a girl aged 8 years. The appellant denied the charge and he was tried.

The prosecution called a total of six witnesses. **PW.1 Rose Kamene Simon** told the court that on 17th May, 2009 she met PW.3 and PW.4 who informed her that the appellant was having sex with the complainant in his shamba. She decided to go towards the scene. On the way she saw the appellant and complainant going towards the home of one, **S.** She followed and found them arguing and exchanging words with PW.3 and PW.4. The complainant allegedly informed her that the appellant had had sex with

her. But the appellant was denying. She intervened and stopped the quarrel. She took the complainant to the hospital and also reported the matter to the police.

On 18th May, 2009 the complainant **S.N** testified as PW.2. She stated that on material day, the appellant called her from where she was picking pigeon peas and led her to his shamba. He then removed her pants and pinned her down and defiled her. She further stated that the appellant blocked her mouth which prevented her from screaming.

It was only after PW.3 and PW.4 found him in the act that he stopped. The appellant had also removed his pair of trousers. She stated that she was taken to Migwani hospital and later to Mwingi District Hospital.

PW.3 Pauline Musangi testified that on the material day, she passed by the farm of the appellant in the company of **PW.4 Tabitha Sammy**. They noticed some plastic shoes and when they looked for the owner, they saw the appellant lying on top of the complainant. The complainant did not have a pant on and the appellant also did not have his trouser on. When he saw them, the appellant allegedly rose and asked them why they had trespassed on his land. She then went and informed PW.1 what she had seen.

PW.4 Tabitha Sammy testified along the same lines as PW.3 that on 17th May, 2009 she was with PW.3 when they passed through the farm of the appellant. On the way they came across some plastic sandals near a gulley and when they checked, they found the appellant lying on the complainant (PW.2). He had removed his trousers. PW.2 did not have her pants on either. They then left and informed PW.1.

PW.5 **Doctor William Omondi** produced the P3 form for PW.2 as an exhibit. According to him, it was difficult to determine if there was penetration as the complainant had taken time to go to hospital.

PW.6 Police Constable **Henry Maina** was the investigating Officer. His testimony was that on 18th May, 2009 while at Migwani Police Station the case was reported to him. Following investigations on 19th May, 2009 he arrested and charged the appellant.

When put on his defence the appellant elected to make a sworn statement and called no witnesses. He testified that on the day in question he spent the day at Mutonguni area and came home in the evening. He was summoned at the home of the complainant where PW.1 informed him that he had defiled PW.2. He however, denied committing the offence.

Having carefully considered that evidence as tendered by the prosecution witnesses and the statement of defence made by the appellant, the trial court was persuaded that the appellant had committed the offence. Accordingly he was convicted and sentenced to fifteen (15) years imprisonment.

The appellant was aggrieved by the conviction and sentence. Hence he preferred this appeal on the grounds that, the sentence imposed was illegal, case was not proved beyond reasonable doubt, crucial witnesses were not called, his defence was not given due consideration and finally, that the court acted on hearsay evidence.

When the appeal came before me for plenary hearing on 13th February, 2012, the appellant elected to canvass the appeal by way of written submissions. I have carefully read and considered the submissions as well as the authorities he cited.

Mrs. Gakobo, learned Senior State Counsel submitted orally in opposing the appeal that the offence was committed in broad day light. The complainant and appellant knew each other so that the question of mistaken identity does not arise. The appellant was found in the act. There was no grudge between him and the witnesses. His defence was duly considered and rightly rejected by the trial court. The conviction of the appellant was safe. Section 389 of the Penal Code was inapplicable in the circumstances of this case. Accordingly the sentence imposed was within the law.

I have anxiously considered the evidence on record, the judgment of the learned Resident Magistrate, the grounds of appeal, the rival written and oral submissions as well as the authorities to which I have been referred. In a first appeal as this one, the appellate court is by law enjoined to revisit the evidence that was before the trial court and analyze it, evaluate it and come to its own independent conclusion. In other words a first appeal is by way of a retrial and facts ought be revisited and analyzed afresh.

On the evidence on record, there is no doubt that the complainant was a victim of sexual assault. The offence was committed in broad day light. The complainant knew the appellant very well. Indeed the appellant and complainant are cousins. The appellant conceded that much in his defence. The offence having been committed as aforesaid, it was easy for the complainant to recognize the appellant. The question of mistaken identity does not therefore arise.

The appellant has raised the defence that the case was frame-up as a result of a land dispute between complainant's mother and his father. However, when the offence was committed, the complainant's mother was away in Nairobi. In fact she was at Kenyatta National Hospital attending to a sick person. She did not even testify in the case. I cannot see how she could have influenced her daughter from far away in Nairobi to frame the appellant with the crime and make available PW.3 and PW.4 at the precise time of the commission of the offence. I also do not think that the complainant's mother will put her in a harm's way merely to frame the appellant for the sins of his father. One would imagine that if indeed the complainant wanted to frame anybody with the case, that person or candidate would easily have been the appellant's father with whom she allegedly had a land dispute, other than the appellant. In any event, there was no evidence led by the appellant with regard to the alleged land dispute. He never raised the issue with PW.1, PW.3 or PW.4. in his cross-examination. The issue merely popped up his defence. Finally, the way the complainant narrated the events of the day makes it difficult for me to believe that it was make up or cooked story. There is no evidence either, that the complainant on her own had any reason to frame the appellant. She does not appear to have been coached to testify in the manner she did.

The complainant's account as to how the offence was committed received support from the evidence of PW.1, PW.3 and PW.4 who all found the appellant in the act. In particular, PW.3 and PW.4 found the appellant having removed his trousers lying on the complainant who too had no undergarments. To the complainant, the appellant had removed them. I have no reason to doubt that testimony. These witnesses were not at all related to the appellant. They had no reason to gang up and bear false testimony against the appellant. They had no reason to frame the appellant with the offence. Much as the appellant claimed that PW.3 had a grudge against him after he had stopped her from cultivating his land, I cannot see how that can result in a grudge. In fact in his own written submissions, the appellant does not say that there was such grudge. All that he has said is that:

".....the learned trial magistrate lost sight of the fact that PW.3 Pauline Muchangi while being cross-examined admitted that I the appellant had removed her from cultivating my land without her interest hence the possible cause for the subsequent implications (sic) to the offence charged ....."

By this observation, the appellant is merely being suspicious. There is no hard and credible evidence that indeed there was such grudge. But again assuming that there was such grudge, PW.3 is not the only person who found the appellant red-handed lying atop the complainant. There was PW.4 and to some extent PW.1. The testimony of these witnesses was consistent and corroborated the evidence of the complainant that the appellant removed her pants, his and laid on her.

Much as the complainant says that she was defiled by the appellant, PW.5, **Doctor William Odiori** or **Omondi** could not reach such verdict on account of the complainant having come to the hospital after about 4 days. Therefore, there is no evidence of penetration. In the absence of such evidence, there can be no defilement. However, the fact of the matter is that the appellant was found in the company of the complainant, he had removed the complainant's undergarment and removed his trousers half-way to the knees, and lay on her. These acts were in preparation of penetration which were thwarted I believe by the sudden arrival on the scene by PW.2 and PW.3. This was therefore an attempt at defilement.

Though the appellant states that there was non-compliance with section 389 of the Penal Code, that submission is completely misplaced. That section provides inter alia:

"....Any person who attempts to commit a felony of misdemeanor is guilty of an offence and liable if no other punishment is provided, to one-half of such punishment as may be provided for the offence attempted, but so that if that offence is one punishable by death or life imprisonment he shall not be liable to imprisonment for a term exceeding seven years ...."

As it is self-evident, this section will only come into play where there is no other punishment provided for the attempted offence charged. In this case section 9 of the sexual offences provides for the sentence. In that regard therefore, the sentence imposed was legal and within the law.

The appeal lacks merit. Accordingly, it is dismissed in its entirety.

Ruling dated, **Signed** and **Delivered** at **Machakos**, this **29th** day of **February**, 20**12**.

ASIKE - MAKHANDIA

JUDGE