



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO.48 OF 2010

MBITHI MUSANGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against both conviction and sentence in PM.Cr. Case No.81 of 2009 in Judgment delivered on 13th day of May, 2009 by Hon. F.M. Nyakundi, Principal Magistrate at Makueni Law Courts)

JUDGMENT

The appellant **Mbith Musanga**, was charged before the Principal Magistrate's court, Makueni with the offence of attempted defilement of a girl under the age of eleven years contrary to section 9 (1) of the Sexual Offences Act. The particulars of the offence were that on the 21st day of February, 2009 in Mbooni East District within Eastern Province, he unlawfully and intentionally attempted to have carnal knowledge of **M.M.M**, a child under 11 years.

In the alternative charge; the appellant was charged with the offence of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act. The particulars being that on the same day and place, he intentionally and unlawfully did an indecent act to **M.M.M**; a child aged 11 years by touching her private parts. The appellant denied the charges and he was tried.

The case for the prosecution was that on 21st February, 2009, the complainant PW.1 **M.M.M**, a girl aged 11 years took cows to Waani River at about 4.00 p.m. On her way back home; she encountered the appellant, a person who was well known to her as a neighbour. That person is the appellant. The appellant then asked her names and when she did not answer he asked her if she attended the same school as his brother, **Mulei**. She answered in the affirmative, whereupon he tripped her and she fell down on a foot path. The appellant then lay on top of her and removed her pants. As he lowered his trouser and under pant she screamed. Undeterred, the appellant removed his penis and put it in the place she urinates with. When he saw people approach he ran away but he was chased and arrested. During the incident he tore her dress and pant.

PW.2 J.M.C, an aunt to PW.1 had sent her to take the cows to the river. She heard her screams and went to her rescue. She found the complainant on the ground with the appellant lying on top of her with lowered under pant and trouser, while PW.1's dress had been pulled upto her waist. Her pant was on the ground. When the appellant saw her, he stood up and ran. She pursued him to his house and had him arrested. Another aunt to **PW.1, M.M** (PW.3) also heard the screams while with PW.2. She remained behind for a while before she followed PW.2. When she arrived at the scene, she found PW.1 who informed her of what had happened and that PW.2 had pursued the appellant.

PW.2 had earlier stated that she pursued the appellant into his house and was assisted by neighbours to arrest him. They then took him to the local trading centre after first going to the scene and picking up PW.1. and collecting her pant, dress and sweater as well. She then called PW.4 **Jonathan Mutua Ndulu**, the assistant chief of Ngoni sub-location who went to Ngoni market and found the appellant who had been arrested and was also informed of what had happened. PW.4 helped to escort the appellant to Mbumbuni Police Station where PW.5 **PC Jackson Tuja** received him. PW.5 stated that upon receiving the report of attempted defilement he booked the report and also received 3 items of clothing which the child was wearing during the incident which were torn and dusty. These 3 items of clothing were all identified by the prosecution witnesses as the clothes that PW.1 was wearing during the incident. PW.5 then charged the appellant with the offences.

Put on his defence, the appellant elected to give an unsworn statement in his defence and called no witnesses. He stated that on 21st February, 2009 he went and worked in his shamba and thereafter went home and took a bath. He thereafter left for Ngoni market to buy iron-sheets. He returned home at 4.30 p.m. and as he was resting he saw 3 women and one man come to his house. That these people forced him to accompany them alleging that the sub-chief wanted to see him. He went with them to the road and found two sub-chiefs and a lorry which they boarded upto the Police Station where he met the complainant. That he was then told that he had defiled the complainant and on denying was beaten by the APs, handcuffed despite the complainant denying that she knew him he was charged the next day with the offences. He stated further that the charges were a frame up as the aunt to the complainant gave out money so that he could be charged as they had a land dispute and that the said aunt had vowed that she would make him suffer, hence the charges.

The learned magistrate having considered and evaluated the evidence on record was satisfied that the prosecution had proved its case against the appellant to the required standard. Accordingly she convicted him and sentenced him to twelve (12) years imprisonment.

The appellant was aggrieved by the conviction and sentence aforesaid and hence preferred this appeal on the grounds that the charge sheet was defective, vital witnesses were not called, PW.1 was not a credible witness, vital exhibits were not tendered in evidence and the trial court did not give his defence due consideration.

When the appeal came before me for hearing on 13th February, 2012, the appellant opted to canvass the same by way of written submissions.

On her part, **Mrs. Gakobo**, learned Senior State Counsel orally submitted that the prosecution in this case had proved its case against the appellant. The offence was committed at 4.30 p.m. in broad day light. The complainant knew the appellant very well as they were neighbours. It cannot be therefore a question of mistaken identity. Though the appellant alleges in his defence that he was framed, that defence was never raised with the witnesses in cross-examination. This was a mere afterthought and was therefore rightly rejected.

I have anxiously considered the evidence on record, the judgment of the learned Principal Magistrate, the grounds of appeal, rival written and oral submissions of the appellant and learned Senior State counsel as well as the authorities to which I was referred. First, this is a first appeal. In a first appeal, 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 but without witnesses and facts must be revisited and analyzed afresh.

It is common ground that the offence was committed in broad day light. To be precise it was committed at about 4 p.m. The complainant gave a detailed and narrative account as to the circumstances leading to the commission of the offence and how it was committed by the appellant. It was her testimony that on 21st February, 2009; she took the cows to the watering point. On her way back she met the appellant who engaged her in a discussion as to his name and whether she went to the same school with his brother **Mulei**. When she answered him in the affirmative, he immediately tripped her and when she fell down, he forcefully removed her pant and tore it in the process. He also pulled her dress up to the waist and tore it in the process. He then removed his trouser and under pant, his penis and put it in the place she urinates with. She screamed and when the appellant saw people coming towards them having heard the complainant's screams, he ran away. From this detailed account, I am unable to hold that this was a made up and or cooked story by the complainant and or her aunt as the appellant would want us to believe. It flows perfectly and it cannot be that the complainant was coached on what to say. Had that been the case, there would have been some inconsistencies and or contradictions and in particular when cross-examined by the appellant. They were none.

The complainant knew the appellant very well as they were neighbours. She even knew his name as **Mbithi**. The appellant did not dispute both facts. Again the offence was committed at about 4 p.m. That being the case the conditions were favourable for positive recognition of the appellant. There is therefore no question of mistaken recognition of the appellant by the complainant and PW.2.

The evidence of the complainant was complimented and or corroborated by that of PW.2. She was the first to respond to the screams. She went to the scene and found the appellant a top the

complainant. The complainant had no pant and he had removed his trouser. On seeing her, the appellant stood up and ran away. She pursued him to his house. She never lost sight of him during the pursuit. The appellant entered his house. However, with the assistance of the neighbours, this witness caused the arrest of the appellant. PW.2 confirmed just like the complainant, that the appellant was a neighbour. After arresting him, they took the appellant back to the scene, picked the complainant, her pant, dress and sweater and together took them to Mbumbuni police station.

Under cross-examination this witness stated that he saw the appellant in the act about 10 metres away. To my mind this is not such a distance that could not have accorded this witness opportunity to observe and recognize the appellant. Further the evidence of the chase and eventual arrest of the appellant is good evidence of the appellant's guilt if there is no break in the links. From the evidence of this witness, she pursued the appellant to his house from the scene of crime. She never lost sight of him throughout the chase. Just like the learned Magistrate, I am satisfied with this evidence of the chase and eventual arrest of the appellant. It was good evidence and the learned magistrate was right in accepting and acting on it.

However, there is the aspect of the appellant having changed part of his clothing before he was apprehended by PW.2, her brother in law, a worker in a nearby home and one, **Kyalo**. During the incident, the appellant was wearing a red beret, a white vest and brown trouser. This is according to the complainant. PW.2 too confirmed having seen the appellant wearing a red beret and a white vest as she pursued him. During the pursuit, the appellant apparently entered his house and soon thereafter came out changed into a shirt. The learned magistrate was of the opinion that when he entered his house, the appellant had ample time to change into a shirt before he came out and was arrested. The change into a shirt was a clear attempt to avoid detection. I entirely agree with these observations.

From the totality of the evidence on record there is no doubt at all that it is the appellant who accosted the complainant and attempted to defile her. All the material witnesses identified the clothes that the complainant wore which were partly torn just as the complainant had testified to. The court saw the torn clothes. They also had dust on. This confirmed the evidence of the complainant.

The appellant alleges in his defence that he was framed by PW.2. That there was a grudge between the two based on trespass. Apparently, PW.2 and PW.3 who are members of the same family have been allowing their cows to trespass on the appellant's land and graze there. The appellant had warned them to stop and PW.2 threatened that she would make him suffer and that had come to pass. However, it is instructive that the appellant never raised the issue with PW.2 or PW.3 in his cross-examination. He only raised the issue in his defence an indication that it cannot be true and is therefore a mere afterthought. Further, it is inconceivable that these witnesses will put PW.1 through that harrowing experience merely to frame the appellant.

In his written submissions, the appellant has raised the issue that the charge sheet was defective. That the evidence was at variance with the charge sheet since the complainant had testified that the appellant "**had removed his penis and put it in the place I urinate with. I felt pain**". To the appellant, the foregoing clearly indicated that the complainant was actually defiled yet he had been charged with attempted defilement. I think that such submissions miss the point. Defilement is all about penetration of the genital organ. There is no evidence that the appellant penetrated the complainant's genital organ. Putting his penis in a place where the complainant uses to urinate does not amount to penetration. She may have felt pain, but did not say that the pain was from her genital organ. The pain

could as well have been as a result of the appellant lying on top of her. The issue of penetration could have been resolved by the medical evidence. In the absence of such evidence and based on the testimony of the witnesses, I think that the police were right in charging the appellant with attempted defilement, indeed the appellant should be grateful that he was so charged. In any event, what prejudice did he suffer by being charged with attempted defilement as opposed to defilement per se? I cannot think of any.

The appellant has also raised the issue of vital witnesses not being called and that the case was poorly investigated. These complaints are clearly misplaced. According to the appellant, the Investigating Officer in the case ought to have been summoned. He was not. However, the record is clear that **PW.5 PC Dickson Tuja** was the Investigating Officer. He testified as to the basis of him preferring the charges against the appellant. The case was properly investigated and no vital witness were left out in my view.

Finally, the appellant queries failure by the learned magistrate to give due consideration to his defence. That his defence was just rejected without clear reasons although the trial magistrate in his judgment said that it was an afterthought. This accusation has no factual or legal basis. The learned magistrate considered the appellant's defence at length and came to inescapable conclusion that it was an afterthought.

In the result I find the appeal to be unmerited. Accordingly, it is dismissed in its entirety as the sentence imposed was legal.

Ruling dated, signed and delivered at Machakos, this 29th day of February, 2012.

ASIKE - MAKHANDIA

JUDGE