



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL CASE NO. 343 OF 2010

APPELLATE SIDE

N.M.MAPPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(From the Original Conviction and Sentence in Criminal Case No. 1018 of 2008 of the Senior Resident Magistrate 's Court Voi – J.M. Gandani SRM

JUDGEMENT

N.M.M (hereinafter referred to as the Appellant) was charged with the offence of:

“Attempted Defilement, contrary to Section 9(1) as read with Section 9(2) of Sexual Offences Act No. 3 of 2006”

The particulars of the Charge are that :

“On the 30th day of October, 2008 in Kwale District within Coast Province, attempted to have carnal knowledge of M. N.T.

The case was heard, the Appellant was found guilty, convicted and sentenced to serve **TEN (10)** years imprisonment. He is aggrieved by both the Conviction and Sentence and has appealed accordingly.

In the amended ground of appeal, the Appellant states that; the Learned Magistrate erred both in law and facts by:-

- 1. Convicting him, relying on a charge sheet that was fatal and incurably defective.**
- 2. Failing to realize there was contravention of Article 49 (1) (F) (i) (ii) of the new Constitution**
- 3. Failing to see the evidence of the Prosecution was not proved as required under Section 109 of the Evidence Act.**
- 4. Failure to consider the defence.**

I now wish to give a brief outline of the prosecution evidence as adduced in the trial Court. The Prosecution case is that N.T. (hereinafter referred to as the Complainant) aged 15 years old, was, on the 30.10.08, in bush herding her father's cows and goats. That the Appellant went to her and asked her if she had seen his goats. She told him that she had not seen the goats. That the Appellant started making advances at her, asking her, if she liked him intimately. That she told him that she did not want him. That, the Appellant then held her hand, and told her that, he would make love to her by force. That she struggled and managed to escape. That the Appellant followed her, put her on the ground, sat on her chest, held her neck and he pulled her pant to the knees, tearing it. That he removed his penis and she got hold of it and pulled it, whereby Appellant felt pain and let her go. That she ran to her uncle one K and reported what had happened. She took him back to the scene but the Appellant was not there. She got the herd back home and reported the matter to her step mother. That they reported the same to the village elder who referred them to Samburu Police Station. She reported the matter to the police and she was given a P3 form that was subsequently filled (P.xh. 1).

The Complainant told the trial court that her age was assessed and was given a report indicating she was **15 years** old. She testified that the Appellant was her cousin. After investigation, the Appellant was arrested and charged.

In his defence the Appellant told the trial Court that he is 19 years old and a student at Muliguni Primary School in Standard Seven. That, he was in the shamba when PW4 – Mwangombe told him that the police officers were looking for him. He complied and was escorted to Samburu Police station. He was put in the cells and was denied any chance to say anything. He was taken to hospital and thereafter charged in Court. He testified, the charges are (framed) upon him.

I shall now turn and consider the amended grounds of appeal. The 1st ground relates to the charge sheet. The Appellant submitted that the same is incurably defective and fatal because it does not contain reference to the offence he is charged with. That the particulars omitted vital ingredient which includes the time and the word **unlawfully**.

In reply the Learned State Counsel Mr. Jami submitted the charge sheet was proper.

I have looked at the charge sheet in question and the Provisions of law that, govern the rules of framing of charges and information, (under Section 137 of the Criminal Procedure Code.) I find that the charge sheet herein, indicates the statement of the offence, as:

“Attempted defilement” Section 9 (1) as read with Section 9 (2) of the Sexual Offences Act.

The particulars are straight forward and in ordinary language, stating the date of the offence, the place and the offence itself, the name of the Complainant and her age.

In my considered opinion these particulars are sufficient to inform the Appellant of the charge and the particulars thereof. The omission of the word “**unlawful**” did not prejudice him. As a matter of fact, there is no “**lawful defilement**” I dismiss that ground of the appeal.

In regard to ground two, the, Appellant alleges that provisions of Article 49 (1) (F) (i) (ii) of the Kenyan Constitution were not complied with; Article 49 (1) (F) (1) states

49(1) – An arrested person has the right:-

(f) to be brought before a court as soon as reasonably possible, but not later than-

(i) twenty-four hours after being arrested; or

(ii) If the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;

In response to that ground, the State Counsel submitted that, by the time the offence herein was committed in the year 2008, the Provision of Article 49 (1) (F) (i) (ii) of the Constitution were not in existence, therefore they are not applicable. I concur with the submission of the Learned State Counsel.

I now turn to the third ground, the Appellant submitted that, the prosecution evidence was inconsistent, insufficient and there was no investigation done. That the arresting officer doubled up as an investigating officer. That there were crucial witnesses not called and that, the age assessment reports and the P.3 forms produced did not comply with the requirements of Section 83 (1) and 81 of the Evidence Act.

In reply the Learned State Counsel analysed the evidence adduced at the trial, and submitted that, the same was strong, cogent, and corroborated by the five witnesses.

I shall deal with the Appellant’s last ground of appeal, that the defence was not considered; and more so in relation to the issue of a grudge among the family members. The State Counsel reply to this, is that, the defence was exhaustively considered and the issue of the grudge too was considered.

In considering the 3rd and 4th grounds of appeal as consolidated, and the response there. I shall, (as I am expected to, being the 1st Appellate Court), re-consider and re-evaluate the evidence adduced at the trial court by the prosecution. I find that, the Complainant was aged 15 years, which was confirmed by the age assessment report. I take judicial notice of the fact that a child aged 15 years in Standard six, (as she testified) is knowledgeable enough to appreciate facts of any matter. She gave a detailed account of what happened to her. A plain reading of her evidence (I warn myself, I did not see or hear her testify) reveals, she was straight, clear and detailed. She was even conclusive not just testifying to the evidence of the incident, but the immediate people she reported the incident to, the clothes she wore and the medical examination she underwent.

She was candid. Her clothes were produced before the trial Court as exhibits and the Court observed they were dusty and torn indicating a struggle on a dusty ground. She complained of pains on the body.

Her evidence was corroborated by PW2 who testified that;

“I found her at home (referring to the complaint). Her clothes were full of dust. She told me the accused wanted to defile her”.

PW3 – John Kirui a clinical officer who examined the Complainant testified as follows:-

“On examination there was tenderness with bruises on the neck. The examination was conducted 24 hours after the complained of incident. We noted that this was consistent with attempted rape.”

PW4 Mwangombe whom the Complainant reported the incident to immediately told the trial Court.

“She came crying (referring to the Complainant) and her whole body was covered in dust from head to toe. I asked her what had happened, she told me she had met N.M who chased after her and wrestled her to the ground, then throttled as he set on her chest, she said he had tried to rape her.”

In my mind, all these evidence is very strong, cogent, and corroborative. The torn clothes, the dust thereon and the bodily injuries are a clear indication of a struggle. *The question is, “the struggle for what, why and by who? Is it the Appellant who did what is alleged, that, is attempted to defile the Complainant?* The Appellant has denied the offence. He instead raises the issue of being in school. Most likely an Alibi. He alleges he is not the one named, “N” and that, it’s the grudge (PW4) Mwangombe had against him that led to his being framed.

I shall consider, that defence against the prosecution evidence. First and foremost, it’s clear from the evidence the Complainant and the Appellant are related, they are cousins. Similarly all the prosecution main witnesses PW2, PW3 and PW4 are also related to them. Therefore, the Appellant was well known to the Complainant.

Secondly, would the grudge between the Appellant and PW4 lead to the complainant fabricating the evidence against the Appellant. My findings are in the **NEGATIVE**. Attempted rape is not an incident one takes pride in to use as a tool of revenge for the benefit of a third party.

Thirdly, the issue of Alibi, the same arose during the defence case. It was not raised at the beginning of the trial. It seems to have been mentioned in passing as the Appellant was giving evidence.

I have re-evaluated the evidence adduced by the the prosecution and the defence and I find that, the evidence of PW 1 was corroborated by that of PW 4 that she was held, roughed up, her clothes torn. That, the assailant wanted to rape her. She positively recognized and identified the Appellant as her assailant. He was known to her, as they are related. The Appellant's defence was a mere denial and afterthought.

All in all I concur with the finding of the Trial Magistrate that the prosecution case was proved beyond reasonable doubt. I uphold the finding of the Learned Trial Magistrate. I confirm the Conviction and the Sentence imposed on the Appellant. I note the Appellant was assessed and his age was 18 years. I therefore dismiss the Appeal in total as lacking in merit.

Orders accordingly.

G. L. NZIOKA

JUDGE

28th FEBRUARY 2012

Dated, delivered and signed in an open court at Mombasa this 28th February 2012.

In the presence of:

Appellant in person

Mr. Tanui – State Counsel

Mr. Matano – Court clerk

G.L. NZIOKA

JUDGE

28th FEBRUARY 2012

