



JOSEPH OCHIENG OTIENO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant was charged with the offence of attempted defilement contrary to Section 9(1) and (2) of the Sexual Offences Act 2006 (*No. 3 of 2006*).

He was also charged with an alternative count of committing an indecent act contrary to Section 11(1) of the Sexual Offences Act 2006 (*No. 3 of 2006*).

He was acquitted of the main charge of attempted defilement, but was convicted of the alternative charge of committing an indecent act and was sentenced to ten years imprisonment. Aggrieved with both the conviction and sentence the appellant came to this court on appeal. He submitted an Amended Memorandum of Appeal in accordance with the provisions of Section 350 (v) (c) of the Criminal Procedure Code (*Cap. 75, Laws of Kenya*).

(1) That the learned trial magistrate erred in law and fact in convicting the appellant despite the fact that some very essential witnesses were not availed to testify,

(2) That the learned trial magistrate erred in law and fact in disregarding the existence of a grudge between PW1's father and the appellant over a debt owed to the latter,

(3) That the learned trial Magistrate erred in law and fact in failing to find that the appellant's defence was strong enough to overthrow the weak prosecution's case, and

(4) That the learned trial Magistrate erred in law and fact in failing to find that the prosecution failed to prove their case as required (in law).

For those reasons the appellant prayed for total success of his appeal, that his conviction be quashed, the sentence set aside, and he be set at liberty.

Though the State did not oppose the appeal, it is still the statutory duty of this court as the first appellate court to examine and re-evaluate the evidence before the lower court and make its own findings and draw its own conclusions.

In this regard therefore, I have examined the prosecution evidence, and I entirely agree with submissions of Miss Idagwa learned State Counsel that the learned trial magistrate failed to evaluate the evidence of the prosecution.

The scene was set at about 5.00 p.m. PW1 and PW2 were chopping vegetables no doubt for the evening meal. The appellant a mechanic had had a poor day according to his unsworn statement. He was a *jua kali* mechanic. He had had no customer the whole day. He retired early and was given a lift by a neighbour and reached Subukia's Maseno Centre at 3.00 p.m. or thereabouts. He had no bread or

"**unga**" to take to his family. He remembered, a customer owed him sh 350/= for a job of cutting or trimming a boundary hedge. The appellant says he went to the customer at 9.00 p.m. This is unlikely, creditors do not usually visit debtor's homes or houses at that hour of night. One could be mistaken for a robber, or a thief. The sworn evidence of PW1 and PW2 that the appellant went to their home at about 5 p.m. is the more likely credible evidence as to time of the visitation. The evidence of PW1 and PW2 as to the time is corroborated by the evidence of PW3 to whose house PW1 ran very fast saying that the appellant had threatened to beat her.

According to the evidence of PW3 the appellant informed him that the complainant (PW1) had abused him, and he wanted to beat her, and that he saw the appellant ran after the complainant to his house. For the complainant, PW3 testified that the appellant had told the complainant "**bad words**". PW3 advised PW1 to enter his kitchen, and asked the appellant to leave his compound as he did not want any noise (*disturbance*) at his house. PW3 did not observe anything unusual either upon the appellant's clothing for any stains or dirt or whether they were torn.

PW4 and PW5 were the arresting officers. They never saw what happened. PW5 testified that the appellant went to the home of PW1 and PW2 while drunk, and PW1 escaped to her neighbour's house, while the appellant told him that he had gone to ask for his debt from the father of PW1 and PW2.

From the evidence, the learned trial magistrate came to a correct conclusion that there was no evidence to support the principal charge of defilement and properly acquitted the appellant of that charge. By definition attempted defilement is an act which would cause penetration with a child. And "**penetration**" means the partial or complete insertion of the genital organs of a person into the genital organs of another person. There was no evidence of attempted "**penetration**" by the appellant.

The learned trial magistrate however found the appellant guilty of the alternative charge of committing an indecent act contrary to Section 11(1) of the Sexual Offences Act, 2006. Again by definition an "indecent act" means any unlawful intentional act which causes -

(a) any contact between the genital organs of a person, his breasts and buttocks with that of another person,

(b) exposure or display of any pornographic material to any person against his or her will, but does not include an act which causes penetration.

The particulars of the charge were that the appellant on the 20th day of July 2010 at M Farm S in Nakuru North District of the Rift Valley Province, intentionally touched the breasts/buttocks of S A a girl aged 16 years old with his hands.

The error or flaw in the alternative charge is glaring from the particulars. It is that the appellant touched the complainant's breasts and buttocks **with his hands** - underlining added. It was the evidence of both PW1 and PW2 that the appellant touched the buttocks and breasts of PW1. When asked by the court whether the appellant attempted to insert his penis into PW1's vagina, PW1 answered - "*No, he only touched my buttocks and vagina*". PW2 never mentioned that the appellant touched the complainant's vagina. PW1, a girl of 16 years unless retarded and there was no suggestion or evidence of retardation, must know the difference between touching breasts or buttocks, and, if there was any evidence of touching her vagina the sister PW2 another girl of Std 7, should surely tell the difference. Her evidence only related to touching of breasts and buttocks, and not "vagina". PW3 saw the appellant running after PW1 to inform PW3 that the appellant wanted to beat her. It was the appellant's unsworn statement that he had gone to PW1's home to inquire about some debt which PW1's father owed him, and that when the appellant inquired of where PW1's father was, PW1 started abusing the appellant and ran to the house of John - PW3.

Clearly, there was no evidence of the appellant committing any indecent act as defined above. There was no evidence of contact between the genital organs of the appellant or his breasts or buttocks with the genital organs of PW1. The learned trial magistrate therefore erred in law and fact in finding the

appellant guilty of the alternative charge of committing an indecent act as defined above.

For those reasons, learned State Counsel was well advised to concede the appeal. I therefore quash the appellant's conviction on the alternative charge, set aside the sentence of ten years, and I direct that appellant be set free forthwith unless otherwise lawfully held.

Dated, signed and delivered at Nakuru this 30th day of May, 2012

M. J. ANYARA EMUKULE

JUDGE