



JOHN MWANIKI MUSYIMI..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the conviction and sentence by S.M. MOKUA Senior Resident Magistrate at Siakago in Criminal Case No. 651 of 2008 on 27th February, 2009)

J U D G M E N T

JOHN MWANIKI MUSYIMI the Appellant was charged with two offences under the Sexual Offences Act.

COUNT I

ATTEMPTED DEFILEMENT CONTRARY TO SECTION 9(1)(2) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006

JOHN MWANIKI MUSYIMI: *On the 16th day of July 2008 at G[...] village G[...] location in Mbeere District within Eastern Province attempted to defile P.W. M., a child aged 10 years.*

ALTERNATIVE COUNT

INDECENT ACTS WITH A CHILD CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006

JOHN MWANIKI MUSYIMI: *On the 16th day of July 2008 at GATUNGATI village, Jigoo Sub Location, GICHICHE location in MBEERE district within the Eastern Province committed an act of indecency with P.W.M., a child aged 10 years by touching her private parts.*

The appellant pleaded not guilty and the matter proceeded to full hearing whereby the appellant was convicted on the principal count and sentenced to 10 years imprisonment. He was aggrieved by the Judgment and has appealed against both conviction and sentence. He has raised the following grounds.

- 1. That the learned trial Magistrate erred in both points of law and fact by putting reliance on the evidence adduced by PW1, PW2 and PW4 which was surrounded by a lot of doubts.***
- 2. That the learned trial Magistrate erred in both points of law and fact by putting reliance on the evidence adduced by PW1, PW2 and PW4 which was surrounded by a lot of doubts.***
- 3. That the learned trial Magistrate erred in both points of law and fact by overlooking the grudge that***

was between the complainant's PW1, PW2, PW3 and appellant.

4. That the learned trial Magistrate erred in both points of law and fact by putting reliance in hearsay evidence adduced by PW3.

5. That the learned trial Magistrate erred in both points of law and fact by rejecting my defense without sufficient reasons.

When the matter came before me for hearing the appellant presented the Court with written submissions which turned out to be a plea of mitigation. He explained to the Court how he has reformed and has learnt a lot while in Prison.

The State through the learned State Counsel Ms. Matiru opposed the appeal saying the evidence against the appellant was overwhelming and that the sentence was lenient. In response the appellant indicated that the witnesses were from the same family and they had refused to pay him after he had worked for them.

Since this is a first appeal it is my duty to re-evaluate and re-consider the evidence that was adduced in the Court below and come to my own independent conclusion. I am alive to the fact that I never saw nor heard the witnesses. This was the holding in the case of

1. OKENO VS REPUBLIC [1972] EA 32

2. NGUI VS REPUBLIC [1984] KLR 729

The Prosecution called a total of 4 witnesses. PW1 P.W.M. the complainant was examined by the Court for her competence to testify. She was found to be competent and gave sworn evidence. She said she was aged 11 years and was in Standard 3. She explained how on 16/7/2008 at 5 p.m. she was washing utensils and heard somebody banging behind the house. She checked and saw it was the appellant. She screamed on seeing him because he had once chased her as she came from the posho mill. The appellant told her not to scream and he offered her 200/= for soda. She continued screaming. Meanwhile the appellant who had a knife tore her pant (EXB1). She bit him on his shoulder. He was found by PW2 still struggling with PW1.

On being found the appellant ran away and crossed the fence to his land. PW3 who is the mother to PW1 received the complaint and confirmed that the daughter had not been defiled. She reported the matter to Gitari Police Post. PW4 an officer at the said Police Post confirmed receiving the report. The appellant was known to the witnesses (PW1 and PW2). He is a neighbour. The knife he had threatened PW1 with was recovered from his house and produced as EXB2 while the torn cream pant was produced as EXB1. PW1 had identified it as it looked like a pipe and there was no other similar knife in the house.

In his defence the appellant explained how he was arrested at 5 p.m. on allegations of defilement. He denied the allegations and said he was fixed because a grudge over hens. He called no witness. This is a case of attempted defilement. The evidence of PW1 and PW2 is that the appellant was struggling with the complainant and even tore her cream pants (EXB1). PW1's screams made PW2 come to the scene. She explained what she saw on arrival.

The appellant had a knife which was recovered by PW4 from his house and identified by PW1 and PW2 as what the appellant had on that day. The appellant is known to the witnesses PW1-PW3 as he is a neighbour and he had even constructed a house for them. The incident herein took place during broad daylight and was immediately reported.

The appellant says he was framed up because of a grudge over his hens which PW3 used to attack. This issue of hens was never put to the witness in cross examination for her to admit or deny. There is a meeting he says was arranged and he still did not bring up this in cross examination.

I have re-evaluated the entire evidence i.e. the prosecution and defence evidence. I do find that the learned trial Magistrate analyzed the evidence well. The evidence of the Prosecution was well corroborated and there was no error in the identification of the appellant. His defence could not dislodge the evidence of the Prosecution witnesses. I find the conviction to be safe and sound.

In his submissions he mitigated for a reduction of sentence. He was charged under Section 9(1) as read with Section 9(2) of the Sexual Offences Act. Section 9(2) of the said Act provides for a minimum sentence of 10 years. He was given the minimum sentence and is lucky to have escaped with that.

I find no merit in the Appeal which I dismiss.

DELIVERED, SIGNED AND DATED AT EMBU THIS 28TH DAY OF JUNE 2012.

H.I. ONG'UDI

JUDGE

In the presence of:-

Ms. Macharia for the State

Appellant present in person

Njue CC