REPUBLIC OF KENYA

High Court at Nyeri

Criminal Appeal 66 of 2009

JOSPHAT MWAI KANENE.....APPELLANT

-versus-

REPUBLIC.....RESPONDENT

(From Original Conviction and Sentence in Criminal Case No.94 of 2007 in the Senior Resident Magistrate's Court at Karatina)

J U D G M E N T

Josphat Mwai Kanene, the **Appellant**, was tried and convicted for the offence of **Attempted Defilement of a Girl contrary to Section 9(1) of the Sexual Offences Act No.3 of 2006**. The particulars of the offence are that: ***On the 18th day of January 2007, at Kiambu Village in Nyeri District, the Appellant unlawfully and intentionally attempted to penetrate GWM, a girl under the age of 16 years, with his genitals***. The Appellant was then sentenced to serve ten (10) years Imprisonment. Being aggrieved, the Appellant preferred this appeal.

On appeal, the Appellant put forward the following grounds in his Petition:

• ***That the Learned Trial Magistrate erred in points of law in accepting to commence with Kiamariga Police charge without asking them the reasons they had inability of complying with the Provisions of Section 72(3) and (B) and 77(1) of the Constitution thus the case comments with violation of the supreme law of the land.***

• ***That the Learned Trial Magistrate erred in points of law and facts in finding a conviction without resolving the conflicting doubts and inconsistence on the part of the Appellant.***

• ***That the Learned Magistrate erred in points of law and facts in shifting the burden of proof and thus purported to isolate my defence which was true and illustrative.***

When the appeal came up for hearing, the Appellant successfully sought for leave to abandon the appeal as against the order on Conviction, hence this appeal only relates to the sentence. It is trite law that this court being the first Appellant Court, the Appellant is entitled to a re-evaluation of the case that was before the trial court. Notwithstanding the fact that the Appellant has abandoned the appeal against Conviction, I feel enjoined to re-evaluate the evidence which led to the Conviction of the appellant. The complainant, GMW(P.W.1) told the trial court that on 18th January 2007 at about 5.00 A.M., she was at her grandmother's kitchen boiling water for bathing in preparation to go to school when the Appellant who is her uncle came. It is her evidence that the Appellant held her and forcefully removed her pant to the knee level. P.W.1 stated that the Appellant was forced to abandon his mission when she hit him with a torch she had. The Appellant is said to have left the kitchen for his house which is 50 Metres away. P.W.1 quickly wore her pant before going to bath. The complainant claimed that the Appellant came back, followed her to the bathroom whereupon he beseeched her not to tell anyone what had transpired that morning. P.W.1 went and told her grandmother, GW(P.W.2) who in turn took P.W.1 to Kiamariga Police Station to report the complaint. P.W.2 informed MK(P.W.3), P.W.1's father about the incident. P.W.3 came with Police Officers to arrest the Appellant. When placed on his defence, the Appellant denied the offence claiming his mother (P.W.2) had framed him up because she had a grudge against him due to a debt she owed him which was to the tune of Ksh.182,000/-. After a careful re-evaluation of the evidence, it is apparent from the recorded evidence that the Appellant did not deny being at the home of P.W.2 in the morning of 18th January 2007. Even assuming that there was evidence that P.W.2 had a grudge

against the Appellant, I doubt whether the same would have had any impact on the case because P.W.2 was not the complainant. Her evidence could not have sustained any charge nor corroborate the evidence of P.W.1, the complainant. The evidence of P.W.1 was sufficient to sustain a conviction. The complainant's evidence was consistent and was never shaken by the Appellant's intense cross-examination. The Trial Magistrate's finding on Conviction cannot be faulted. The Appellant has not alleged that the complainant had a grudge against him.

The Appellant has urged this Court to reduce the sentence or in alternative to pronounce a non-custodial sentence. He did not provide any reasons to persuade this court to make the order sought. I have reconsidered the facts in mitigation made before the trial court. The Appellant had indicated that he was sick and that he had two children. It would appear the Learned Trial Principal Magistrate took into account those submissions and came to the conclusion that a fair order was to order the Appellant to serve the minimum sentence of ten (10) years. **Section 9(2) of the Sexual Offences Act No.3 of 2006**. The court was not given the discretion to pronounce any other sentence below 10 years imprisonment. I see no merit in the appeal. It is dismissed in its entirety.

Dated, signed and delivered this 18th day of October 2012.

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J. K. SERGON
JUDGE