



REPUBLIC OF KENYA

High Court at Nyeri

Criminal Appeal 2 of 2010

JOHNSON WANJOHI NJOGU.....APPELLANT

versus

REPUBLIC.....RESPONDENT

(Appeal arising from the the judgment of Hon. L. Mbugua Ag.

Principal Magistrate Karatina in criminal case No. 753 of 2007)

RULING

The appellant herein was charged with the offence of Sexual assault contrary to section 5(a)(1) of the Sexual Offence Act the particulars of which were that on the 24th day of April 2007 at [particulars withheld] Central province had carnal knowledge of G W K a boy of 13 years against the order of nature.

He also faced a second count of attempted defilement contrary to section 4 of the Sexual Offences Act the particulars of which were that on 26th day of August 2007 at [particulars withheld] Central Province attempted to do an act of penetration of defilement to J W M a girl under the age of 11 years.

He also faced an alternative charge of indecent act to a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006 the particulars of which were that on 26th August 2007 at [particulars withheld] Central Province unlawfully and intentionally assaulted J W M a child under the age of 11 years by touching her private part.

He pleaded not guilty and was tried convicted and sentenced to serve 10 years on count I

Being dissatisfied with this conviction and sentence the appellant filed this appeal before the court.

When the appeal came up for hearing the appellant who was not represented submitted written submissions which he relied upon.

Miss Nyalyuka appeared for the state and conceded to the appeal on the ground that the case was not proved beyond reasonable doubt.

She submitted that rather than the evidence of P.W.1 the other witness was P.W.3 the complainant's mother and that the appellant was said to be new in the neighbourhood and therefore it was assumed that he was the attacker.

I must point out that the court is not duty bound to allow the appeal on the basis that the same is not opposed to by the state but is required to evaluate the evidence tendered before the trail court so as to come to his own conclusion.

The appellant submitted that he was convicted on the evidence of a single minor witness which lacked substance and that the mother who is said to have reported to P.W.3 was not called to testify.

He has further submitted that his constitutional rights to be taken to court within 24 hours was violated in that he was arrested on 28th August 2007 and taken to court on 6th September 2007. He has submitted that no explanation was given for the said delay. He has further submitted that he was not tried within reasonable period and that he was charged even before the investigation was completed and that his hearing was delayed for a period of three (3) years thereby denying him the right to fair, speedy and open trial.

The prosecution's case against the appellant was as follows:

P.W.1 G W K testified that on 24th August 2007 at around 3.00 pm he had been sent by his mother to collect milk money from the home of one Muriuki and on his way back the appellant called him and told him that he was called Mwangi and allegedly sent him to the home where he used to work. That on reaching the said place the appellant told him that he was living with someone who had put loud music on his radio and asked that they go to remove the radio.

That when they entered the house he put the radio at full volume and pulled him to his lap and removed his trousers and that he could see a knife on the table.

That he heard the appellant unzipping his trousers and then removed his genital organ but he managed to run away and that the following day he told his father what had happened who then informed the sub chief.

P.W.2 J W aged 12 stated that on 26th August 2007 at 3.00 pm. He was coming from church when she found the appellant milking who told her to get a bucket and put it outside the house. He therefore gave her macadamia nuts to peel and he then told her that she must know what men want. She stated that she wanted to go to the toilet where upon he seized her arm pulling her to the house but she held onto the door and escaped and ran away. She told P.W.1 of the incident.

Under cross examination she stated that they had earlier went to the appellants place with her cousin to borrow macadamia nuts.

P.W.3 S K K stated that on 26th August 2007 at around 3.00 p.m. His wife told him that someone had seized his son P.W.1 and attempted to seize P.W.2. He stated that he did not know the appellant. He stated that P.W.1 told him that his trousers were removed by the appellant who then had sodomized him while threatening him with a knife.

When put on his defence the appellant gave an unsworn statement and stated that he was a farm hand and on Friday together with two others they went to harvest potatoes. He stated that he was with the son of his employer whom he went with to Kiangigi upto Monday. That on evening of 27th August 2007 at night people came and arrested him.

Based upon this evidence the appellant was convicted and sentenced to ten (10) years imprisonment.

The main issue for determination in this appeal is whether the prosecution proved its case against the appellant to the standard required.

I must agree with Miss Ngalyuka that this is a case which was not proved to the required standard. P.W.1 on whose evidence the appellant was convicted stated that the following day he informed his father what had happened whereas P.W.3 his father in his evidence stated that his wife had told him *"that someone has seized my son G W ...G told me his trousers were removed by the accused who then had sodomized him while threatening him with a knife."*

I find that this evidence contradicted the evidence of P.W.1 on material particulars as P.W.1 testified that he would spot a knife on the table

I therefore find as a fact that there was a doubt in the prosecution case as to what actually happened. The benefit of which should have been given to the appellant.

I therefore find that the conviction of the appellant herein was not safe and therefore quash the same and set aside the sentence herein. The appellant shall be set free forthwith unless otherwise lawfully held.

Dated and delivered at Nyeri this 22nd day of November 2012.

J. WAKIAGA
JUDGE

Miss Maundu for the State.
Johnson Wanjohi Njogu – appellant.

J.K. WAKIAGA
JUDGE