



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Criminal Appeal 306 of 2010**

**PATRIC NDUNGU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant was charged with the offence of sexual assault contrary to Section 5 (1) (a) and Sub section 2 of the Sexual Offences Act No. 3 of 2006. He denied the offence and therefore the Republic had to call evidence. After a full trial, he was convicted and sentenced to 20 years imprisonment. This appeal follows the said conviction and sentence.

The appellant has faulted the learned trial magistrate for failing to appreciate that his fundamental and constitutional rights as envisaged under Section 72 (3), 77(i) and 84 of the Constitution were violated occasioning a serious miscarriage of justice. He also alleged that the learned trial magistrate erred in law and facts in not considering that the charge was defective contrary to Sections 214 and 134 of the Criminal Procedure Code.

He has also complained that the court failed to summon essential witnesses and therefore contravened Section 150 of the Criminal Procedural Code. Additionally, he states that the evidence was inconsistent, contradictory and uncorroborated and therefore no conviction could be based thereon. Further, the standard of proof was far below the required standards and finally that, his defence was credible but not sufficiently and adequately considered contrary to Section 169 (1) of the Criminal Procedure Code.

The prosecution called six witnesses to prove the charge against the appellant who also gave an unsworn statement of defence denying any role in this offence. P.W 1 is the complainant who was then aged 12 years old. On the date of the alleged offence, the appellant who is their neighbour found him outside their home and invited him into his house. He initially refused but subsequently agreed because his cousin whom he had been waiting for had taken long. On entering the appellant's house, the appellant told him to undress and sleep. The appellant started to touch him whereupon the complainant got out of bed and took his trouser, but the appellant pulled him back forcefully and removed his trouser. He then put his radio on full volume and held his mouth. It is then that he sodomised him.

The complainant screamed and his aunt called him. He ran out and encountered his aunt to whom he explained what had happened to him. On the following day, the matter was reported to the Police and subsequently the complainant was examined by a clinical officer who gave evidence as P.W. 5 and confirmed the sexual assault on him. P.W. 2 is a cousin to the complainant who also witnessed the complainant coming out of the appellant's house holding his clothes. On asking him what had happened, he told her that the appellant had sodomised him. The complainant was crying as he came out of the appellant's house.

The evidence of P.W. 3 tallied in all material particulars with that P.W. 2 the aunt. For some reason, the learned trial magistrate allowed the recalling of the key prosecution witnesses and although no reasons appear on the record, I note that one Mr. Wariuki advocate had then come onto record representing the appellant.

In convicting the appellant the learned trial magistrate assessed the evidence of the prosecution witnesses and gave reasons for believing them. She also made an assessment of the appellant's defence which she

found to be a mere denial.

According to the charge sheet the appellant was arrested on 11<sup>th</sup> August, 2008 and presented before the court on 13<sup>th</sup> August, 2008. He was presented to the court within 48 hours and there is no indication that his rights were violated as he alleges under section 72 (3) of the then constitution. In any event, even if I were to find that his rights were so violated, the remedy is not an acquittal but an action for compensation under Section 72 (6) of the then Constitution.

The charge sheet gave sufficient material particulars and I have no doubt whatsoever that the appellant knew what offence he was facing. The court was not bound, neither was it asked, to summon any witnesses at all and no miscarriage of justice has been identified. The learned trial magistrate considered all the evidence on record including the defence of the appellant. She cannot be faulted under Section 169 (1) of the Criminal Procedure Code. There is no requirement in law that the evidence of the investigating officer is essential to any proceedings to justify a conviction. In the instance case therefore, the failure to call the investigating officer was not fatal to the prosecution case.

After assessing the entire record as required of me, I have come to a conclusion that the prosecution case was proved beyond reasonable doubt to warrant the conviction. The appellant was well known to the complainant, aunt and cousin. Their testimonies were consistent and corroborative. There is no reason to justify the allegation that the appellant was framed in this case. He was not a good Samaritan as he alleges and the evidence is against him.

This offence attracts a sentence of imprisonment for a term of not less than 10 years but which may be enhanced to imprisonment for life. The offence was serious and the learned trial magistrate applied the right principles in sentencing the appellant to 20 years imprisonment. If find no reason to interfere with the same. Accordingly this appeal is hereby dismissed.

Orders accordingly.

**Dated and delivered at Nairobi this 14<sup>th</sup> day of November, 2012.**

**A. MBOGHOLI MSAGHA**  
**JUDGE**