



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL 145 OF 2009

R.M.N.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Sentence and Conviction of S.M. MOKUA Senior Resident Magistrate Siakago in Criminal Case No. 235 of 2008 on 27th July 2009)

J U D G M E N T

RAPHAEL MUTEMBEI NAMU hereinafter referred to as the appellant was charged with the offence of attempted defilement contrary to Section 9(1)(2) of the Sexual Offences Act No. 3 of 2006. The particulars as per the charge sheet were as follows:-

On the 21st day of March 2008 at n Mbeere District of the Eastern Province, attempted to defile TM a child aged 12 years.

He also faced an alternative count of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars being as follows:

On the 21st day of March, 2008 at Mbeere District of the Eastern Province, committed an Act of Indecency with TM a child aged 12 years by caressing her and touching her private parts.

The matter proceeded to full hearing and the appellant was convicted of the alternative count and sentenced to serve 10 years imprisonment. And being aggrieved by the Judgment he has appealed against both conviction and sentence citing the following grounds.

- 1. That the learned trial Magistrate erred in law and facts in basing a conviction and sentence relying on the evidence of identification which was not conducive.***
- 2. That the learned trial Magistrate erred in law and facts by accepting and relying with the evidence of PW2 which was contradicted by PW2 and PW2.***
- 3. That the learned trial Magistrate erred in law and fact by accepting and relying with the evidence of PW2 which was contradicted by PW1 and PW3.***
- 4. That the learned trial Magistrate erred in law and fact by rejecting my defence, in addition, reasons of its rejection was not disclosed as stipulated by the provisions of section 169 (I) of the Criminal Procedure Code.***

When the appeal came for hearing the appellant relied on written submissions. He cites contradictions in the evidence of PW1, PW2 & PW3. He says their evidence did not tie up. This he says is on time and date of offence; secondly the complainant's family had a grudge against him.

The state through Ms. Macharia opposed the appeal. She stated that the appellant was identified by PW1-PW3 who had a torch. PW1 was not defiled but somebody was touching her breasts and thighs. The appellant was found under the bed of PW1 and PW2. He took off.

This being a first appeal I have a duty to reconsider/reevaluate the evidence adduced and arrive at my own conclusion. I also bear in mind that I did not have the opportunity of seeing the witnesses.

Ref. **1. NGUI VS REPUBLIC [1984] KLR 729**

2. SIMIYU & ANOTHER VS REPUBLIC 1 KLR

The Prosecution called a total of 5 witnesses to support its case. The evidence was that PW1 and PW2 who are a sister and a brother had gone to sleep on 20/3/2008 after meals. The two were aged 12 years and 10 years respectively. The learned trial Magistrate conducted a *voire dire* exam before they testified. PW1's evidence was that in the wee hours of morning she felt somebody touching her on her thighs and breasts.

PW2 felt somebody under their bed. They went to the father's room (PW2) room and reported to him. PW3 took his torch and he saw somebody under the bed. He hit the stranger with a stick and the stranger told him he was called Mutembei. The said Mutembei managed to escape leaving behind his tee shirt, trouser, slippers, plastic bangles and wallet (EXB.1,5,6).

Mutembei is the appellant. He is said to have run away in shorts and a tee shirt. Both PW1, PW2 & PW3 say they knew the appellant before this date as he is from their village. PW3 reported the matter to the police and PW1 was escorted to hospital. The medical evidence by PW4 (EXB.8 & 9) confirmed that PW1 had not been defiled. The appellant was also medically examined and there was nothing unusual detected. PW5 was the investigating officer and re-arresting officer. He had received a report of defilement.

In his unsworn defence the appellant denied the charges. He stated that he was at home when he was arrested by the assistant chief and village elder for defiling the complainant who he said had a grudge with him. It is clear that the report to the police station was that the appellant had defiled the complainant which was found not to have been the case. So the appellant was acquitted of the principal count of defilement.

The appellant said he was framed up. Reason? PW1 a child of 12 years had a grudge with him. The issue of identification was key in this case. PW1 & PW2 heard a stranger in their room under their bed. PW1 had felt the person touching her breasts and thighs. PW3 was called and on flashing his torch he found a man. The man was well known to them as he is a neighbour. He was even beaten by PW3 and he ran away in a tee shirt and a pair of shorts. He left behind other clothes which were identified as belonging to him. The man was identified as the appellant.

It was also discovered that he had gained entry through the window. His slippers were outside the window. PW3 reported this matter the same morning. There was no reason given to show why PW1, PW2 & PW3 would gang up to lie against the appellant. What could he have been doing under these children's bed at that time? PW1 was too young then to harbour any grudges against the appellant.

The clothes EXB.1-6 were well identified as belonging to the appellant. He too was well identified as PW3 even beat him. There was light from the torch. I am satisfied that the learned trial Magistrate well considered the evidence before him and rightly convicted the appellant of the offence of indecent act with a child contrary to Section 11(1) of the Sexual offences Act No. 3 of 2006.

The sentence he got is the minimum sentence for the offence and I can't interfere with it. The end result is that the appeal lacks merit and is dismissed.

Right of appeal explained.

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

H.I. ONG'UDI J U D G E

In the presence of:-

Ms. Macharia for State

Appellant

Njue CC