



REPUBLIC OF KENYA

High Court at Machakos

Criminal Appeal 97 of 2010

JOSEPH NGOOSI ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

*(Being an appeal from the judgment of the Principal Magistrate F.M. Nyakundi PM delivered on 19/1/2009 in Makueni Principal Magistrate Criminal Case No. 383 of 2009)*

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*(Before George Dulu J)*

**J U D G M E N T**

The appellant **Joseph Ngoosi** was charged in the subordinate court, with one main count and one alternative count. In the main count he was charged with attempted defilement of a child contrary to **section 9 (2)** of the **Sexual Offences Act No. 3 of 2006**. The particulars of offence were that on 18<sup>th</sup> June 2009 at **{particulars withheld}** of **Makueni** district within Eastern Province attempted to cause penetration of his male genital organ to **M. M.** a girl aged 12 years. In the alternative, he was charged with indecent assault of a female contrary to **section 11 (1)** of the **Sexual Offences Act**. The particulars were that on the same day and place, unlawfully and indecently assaulted **M. M.** by touching her private parts.

He denied the charges. After, a full trial, he was found guilty of the main count, convicted and sentenced to serve thirty (30) years imprisonment. Being dissatisfied with the decision of the trial court, he has appealed to this court against both conviction and sentence. His grounds of appeal are that:-

1. **There was violation of section 214 of the Criminal Procedure Code and therefore the charge was defective.**
2. **The evidence was contradictory and uncorroborated, therefore it was inconclusive in as far as his conviction was concerned.**
3. **Vital witnesses were not availed in violation of section 150 of the Criminal Procedure Code.**
4. **There was misdirection by the trial court contrary to section 207 (1) of the Criminal Procedure Code.**
5. **There was violation of section 72(3) of the Constitution.**
6. **The sentence was harsh and manifestly excessive.**

At the hearing of the appeal, and with the permission of the court, the appellant filed written submissions. He also added that he was arrested at 8 p.m. while coming from his place of work.

The learned State Counsel **Mr Mukofu**, opposed the appeal. Counsel submitted that the conditions at the time of offence favoured positive identification. Counsel argued that according to the evidence of PW3 during cross-examination, the offence was committed at 10 a.m. The complainant came into close proximity with the assailant in the course of commission of the offence. In addition, this was a case of recognition and PW2 and PW3 referred to the appellant by his two names. PW3 saw the appellant fleeing from the scene while pulling up his trousers. The **Clinical Officer** (PW1) found an infection on the complainant, which supported the commission of the offence.

In brief the facts of the prosecution case are as follows. On 18/6/2009 PW2 **M. M.**, a girl of about 12 years was grazing cows at about 10.00.a.m. The appellant came and grabbed her from the back. He removed her pants, fell her down and lowered his trousers and underwear ready to have sexual intercourse with her. At that moment PW3 **M. S. M.** the mother of PW2, came to the scene from buying medicine. When she saw that the cows had strayed to a neighbour's farm, she proceeded to the bush where she saw the appellant running away while pulling his trousers upwards. PW2 then ran off to her grandmother's house, where she stayed for two days and washed her pants. Her mother PW3 reported the incident and took the complainant for medical treatment. On 22/6/2009, the complainant was examined by PW1 **Joshua Muketi** a Clinical Officer. The hymen was found to be intact, though there were pus cells. There was no evidence of penetration. The matter was reported to the police on 23/6/2009 through PW4 Cpl. (W) **Agnes Ikiba**. The appellant was arrested and charged.

On being put on his defence, the appellant chose to give a sworn statement. He stated that on 18/6/2009, he was at his place of work as a watchman at **Wote** town. When he came to the market to sell tomatoes on 20/6/2009, he was arrested and later charged. He denied committing the offence. He was not cross-examined by the prosecution.

Faced with this evidence, the learned trial magistrate found the appellant guilty as charged in the main count, convicted and sentenced him.

This being a first appeal, I am duty bound to re-evaluate the evidence afresh and come to my own conclusions – See **Okeno –vs Republic (1972) EA 32**.

I have re-evaluated the evidence on record afresh. The main issue is whether the appellant indeed attempted to defile the complainant. Though the evidence appears to be straight forward regarding the conditions for positive identification, the offence being said to have been committed during the day, it is instructive to note that the scene was said to be a bush. It is not clear from the evidence whether visibility was not hindered by the bushes and to what extent. It is also not clear how far PW3 was from the appellant, when she saw the appellant running away. Further, it is not clear whether the two faced each other. More important, is the conduct of the complainant PW2. PW3 stated that the complainant PW2 ran away to her grandmother and stayed there for three days. The question is, why could PW2 not stay at the scene and join her mother PW3 so that they could plan together on how to pursue the appellant with neighbours, since the cows had strayed to a neighbour's farm. The evidence of identification or recognition of the appellant, in my view, is not free from doubt.

In my view, the neighbour should have been the first independent witness. The grandmother, to whom the complainant ran and stayed for three days, was also not called to testify. This is in addition to the fact that the incident was reported to the police 4 days afterwards. In **Bukenya & Others –vs- Uganda (1972) EA 549**, it was held that where the prosecution has failed to call important witnesses, then the court may infer that the evidence of those witnesses would be prejudicial to the prosecution case. I find so in the present case as the neighbour near the scene of crime and the grandmother to whom the complainant ran were not called to testify while they were crucial witnesses. No reason was given for failing to call them. The benefit of the doubt is given to the appellant.

The major reason why this appeal will succeed is the failure of the prosecution to displace or even attempt

to challenge the appellant's alibi. The appellant gave an alibi defence on oath. The prosecution did not even ask a single question to him. The effect is that the alibi defence of the appellant stand unquestioned. The burden is always on the prosecution to prove an accused person guilty beyond reasonable doubt. In the case of an alibi defence, the prosecution has a burden to displace that alibi – *See Sekitoleko –vs- Uganda (1967) EA 531*. The prosecution having chosen not to question the sworn alibi defence of the appellant, that alibi stands unchallenged. In effect the prosecution failed to prove that the appellant was at the place where he was alleged to have committed the offence. The appeal of the appellant will therefore succeed.

In the result, I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.

Dated and delivered at Machakos this 5<sup>th</sup> day of **December** 2012.

**George Dulu**  
**Judge**

**In presence of:-**

N/A for State

Appellant present in person

Mutinda – Court clerk