



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI

CRIMINAL APPEAL CASE NO. 19 OF 2010

(From original sentence and conviction in Criminal Case No. 993 of 2006 the Senior Resident Magistrate's Court at Kilifi Before Hon. C. O. Obulutsa - SRM)

MWADALU MWANDABO ACCUSED

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

Mwandalu Mwandaso (appellant) was convicted on a charge of defilement of a girl contrary to section 9(1) of the Sexual Offences Act of 2006.

The charge stated that on 7th September 2006 at around 6.00pm in Kilifi District, he attempted to have carnal knowledge of R.K, a girl aged 8 years.

Appellant denied the charge and after due trial in which prosecution called a total of six witnesses, appellant was the only defence witness, he was sentenced to serve ten years imprisonment.

R (PW1) told the trial court that she had been sent to get vegetable from the shamba when the appellant went where she was and threatened her, forcing her into a house which was under construction. He stripped her, then undressed, but just as he was preparing to insert his penis into her, she screamed for help so one Chome and one Katana rushed to her rescue. She said the appellant was like an uncle to her. Kiazi Chombo whose relationship with the child is not recorded, testified as PW3. He told the trial magistrate that on 7-9-06 while at home, he was informed that R had been attacked – he rushed to the scene and found the girl, the appellant and the people who had arrested him. Katana Gangu (PW4) was grazing cows when he was requested by one Chome to go into the house where the incident had taken place. He found the appellant, and PW1 who was said to have been defiled by appellant.

PW5 (Anaglet Chome Ngala), a watchman recalled how on 7th September 2006, he saw a girl enter the site which he as guarding. He thought she was going to pick materials. He also saw a man enter the site, but he presumed the man was going to relieve himself. However, he got suspicious and tiptoed to the site, and found the man on top of the girl – both were naked. He then called a witness (who I believe is PW4) and they apprehended the appellant; then reported to the appellant's guardian.

On cross-examination PW5 stated:

“I found you having mugged her mouth. I did not know if you defiled her...”

The girl was examined by Dr. Wekesa (PW1) who found no injuries in her private parts, her hymen was intact and there was no evidence of sexual assault. Which is why PW6 (Pc Melody Aduka) charged him

with attempted defilement.

In his unsworn evidence, appellant confirmed that he knew the girl as his grand daughter because she is a daughter to his nephew. On 7th September 2006 he was on his way home from drinking when he passed by a house and found the girl in there. He was arrested by the guard who accused him of attempting to defile the girl.

The trial magistrate found that:

- 1) Appellant and the girl were known to each other.
- 2) Appellant met the girl inside the house and was apprehended there.
- 3) PW3 and PW4 confirmed found appellant naked, lying on top of the girl.
- 4) Appellant's defence did not cast doubt on the evidence of prosecution witnesses.
- 5) The prosecution evidence was credible, consistent and proved the charge

Appellant contested these findings on the following grounds;

- (1) Complainant's evidence was not corroborated.
- (2) The medical evidence did not point to the appellant
- (3) The prosecution evidence was contrasting
- (4) The trial magistrate did not consider his defence.

Appellant filed written submissions in which he stated that he was held in custody for a period of 18 days and that this violated his rights under section 72 (3) (b) of the Constitution.

This was a new issue which did not form part of his petition of appeal and which therefore offends section 350 (2) Criminal Procedure Code, which provides that

"...an appellant shall not be permitted at the hearing of the appeal, to register on a ground of appeal other than those set out in the petition of appeal"

I therefore decline to consider that ground.

Secondly he submits that the evidence of PW2 was scanty as she did not say who had sent her to the shamba nor did she state how the appellant threatened her. It was his contention that her evidence was not corroborated and the trial magistrate should not have relied on it.

To this, Mr. Naulikha (the learned Counsel for the State) responded that the girl narrated very well how she went to the site and led her to an unfinished house – this is confirmed by PW5, the watchman, who saw both appellant and the girl go into the site. In fact this is not even an issue to be contested since appellant even confirmed in his own defence that he was inside that house with the young girl. The question of mistaken identity therefore does not arise at all.

The girl's evidence was, as a matter of fact corroborated by PW4 and PW5 who both confirm finding the appellant and the girl inside the structure, in a naked state. This is further fortified by PW5 who arrived just in the nick of time and found appellant on top of the girl naked which indeed confirms Pw2's evidence that just as appellant was preparing to accomplish his intentions, help arrived. There was corroboration and I find no contradiction in the material issues.

Appellant also submitted that the medical evidence exonerated him from the offence and that he was framed up just because he was drunk.

Mr. Naulikha's response was that the doctor's evidence in fact confirmed what the girl had said – that no sexual act had taken place – indeed that was why the charge of attempted defilement was preferred. He had demonstrated his intention so well by undressing both the girl and himself, and lying on top of her, and was at preparing to insert his organ into her, when they were interrupted.

There is nothing whatsoever to suggest why PW2, PW4 and PW5 would make up such a situation against the appellant – as a matter of fact when PW5 had initially seen appellant go into the site, he had given him the benefit of good faith, presuming he had gone to relieve himself. No malice or fabrication is detected from the evidence recorded in the lower court.

Appellant's defence in the light of what prosecution had offered, did not dent the evidence at all and the trial magistrate properly rejected it and arrived at a safe conclusion.

My finding is that there is no reason whatsoever to warrant interfering with the trial court's findings and the appeal fails and is dismissed. I uphold the conviction, and confirm the sentence.

Delivered and dated this **10th** day of **March 2011** at Malindi.

H. A. OMONDI
JUDGE