



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KISII**

**Miscellaneous Criminal Appeal 110 of 2009**

**KASSIN NYANGAU.....APPLICANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

**(From original conviction and sentence in the Chief Magistrate’s court at Kisii, Criminal Case no. 444**

**of 2009 by S.R.WEWA(RM)**

This is a first appeal by Kassin Nyangau against his conviction and sentence on the main count of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act. It was alleged in the charge sheet that on 25<sup>th</sup> February, 2009 at about 10.30 p.m at Scooby Enterprises Limited, Kisii Central District, within Nyanza Province, the appellant intentionally and unlawfully penetrated the genital organ of MK, a girl aged 13 years with his genital organ namely the penis. The appellant also faced an alternative count of Indecent Act with a child Contrary to Section II (1) of the Sexual Offences Act. The particulars given were that on same day, place and time the appellant committed an indecent act with M.K, a girl aged 13 years old. The appellant returned a plea of not guilty on both counts. He was subsequently tried and convicted on the main count by the Chief magistrate’s court Kisii, S.R.WEWA (RM). Upon his conviction, the appellant was sentenced to serve 20 years imprisonment.

Aggrieved by the conviction and sentence aforesaid, the appellant preferred this appeal. All through the trial in the subordinate court and in this appeal, the appellant was unrepresented. He drew up the personally the petition of appeal which he filed in court on 20<sup>th</sup> May, 2009 and a subsequent supplementary petition of appeal which came by way of written submissions. Taken together, the appellant appears to complain that the prosecution case during the trial was not proved beyond reasonable doubt, that the burden of proof was shifted to him, the case was purely investigated, the learned magistrate failed to consider and appreciate that there was prevailing grudge between him and PW3 and finally that the trial magistrate erred in imposing 20 years jail term.

The prosecution case came through five witnesses who established the following facts:-

On 25<sup>th</sup> February, 2009, M.K ,(PW2) and the complainant herein, had lost his uncle. She was dispatched by her grandmother, M. N (PW5) to go and call her sister, then a resident of Jogoo area. She was however unable to make to Jogoo as night fall caught up with her. It became dark and she decided to look for a place to stay overnight. She saw some security guards at a verandah and approached them. One of them was the appellant. Indeed the appellant offered to assist and showed her a place where she

could spend the night nearby. He in fact already had carton boxes spread out for the complainant to sleep on. As the complainant slept, she was suddenly attacked at about 9 p.m by the appellant and defiled. There were security lights at the scene. Therefore the complainant was able to identify the appellant positively as the person who had defiled her. She could not scream as the appellant held and covered her mouth. Indeed he was even found in the act by a fellow security guard and co-worker, D.M (PW3). Whilst on the beat PW3 came across the appellant on top of the complainant. He asked the appellant why he was sleeping whereupon the appellant stood up. Shortly thereafter he saw the complainant crying who proceeded to inform him that she had been defiled by the appellant. This witness then took the complaint to Kisii Police Station. She was attended to by P.C. Lucy Makokha (PW4) who examined her and was convinced that she had indeed been a victim of defilement. She thereafter issued the complainant with a P3 form. On the same night in the company of the complainant and PW3, they went back to the scene and arrested the appellant. The complainant was on the following day examined by a clinical officer, at Kisii Level 5 hospital, Jackson Murauni (PW1). Upon his examination he noted that the complainant's vaginal walls were reddish, hymen was torn and there was vaginal discharge. Vaginal swab was taken which showed presence of spermatozoa. On the basis of the foregoing, he concluded that there had been penetration. He thereafter filled the P3 form that he tendered in evidence.

The appellant was upon arrest arraigned in court. In his unsworn statement of defence, the appellant denied having defiled the complainant. All he could remember was that the complainant had come with another person at 8.30 p.m at his place of work and sat on the bench in front of a shop that he was guarding. He chased them away though. Shortly thereafter police came and arrested him. He was taken to hospital where he found the complainant. It was then that it was alleged that he had defiled the complainant.

After reviewing the evidence on record, the learned trial magistrate believed the prosecution witnesses and disbelieved the appellant. She found the case against the appellant proved beyond reasonable doubt stating: - *“On the principal (sic) charge. the complainant’s evidence is well corroborated. There were injuries and sexual intercourse had taken place. Spermatozoa had been seen on the specimen (sic) taken from the complainant’s vaginal (sic). There was corroboration for (sic) complainant’s evidence that she had been defiled. I do find the complainant’s evidence to be truthful. I also find PW3 to be reliable witness. There was no reason to have caused him to want to shift blame to the appellant as alleged by the defence that he is the one who had come with the complainant despite the fact that he was off duty. This is shem (sic) defence. The court indeed thinks (sic)PW3 Mr. D M to have assisted the complainant. I do find the case to have been proved beyond reasonable doubt against the appellant on principal charge of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act. I do find the appellant guilty and convict him accordingly under section 2115 of the CPC.”*

In support of the appeal, the appellant with my permission tendered written submissions which I have carefully read and considered.

In opposing the appeal, Mr. Mutuku, learned Senior Principal State counsel submitted that the prosecution case against the appellant was watertight. There could not have been a case of mistaken identity as the appellant was found in the act. He therefore urged me to dismiss the same.

As a first appeal it is my duty to reconsider and subject the evidence adduced in the trial court to a fresh and exhaustive examination in order for me to form my own independent view of the matter. See Okeno .v. Republic (1972)E.A 32

According to the learned magistrate, the conviction of the appellant turned on the evidence of identification, as well as opportunity to commit the offence. I am satisfied that the learned magistrate clearly isolated the issues in the case for her determination.

On identification, the law is now well settled and that is that a trial court has a duty to consider with utmost care evidence of identification or recognition before it bases conviction on it in particular, if conditions under which such identification is purported to have been made were not favourable and if the identification is by a single witness. Although recognition of strangers, raises less problems than identification of strangers nonetheless, even in cases of recognition, there is need to exercise caution

before a conviction is entered. It is thus established that evidence of visual identification in criminal cases can cause miscarriage of justice if it is not carefully tested. In the case of Kiarie V Republic (1984)KLR 739, the court of appeal made it clear that before a conviction can be entered against a suspect on account of visual identification, such evidence must be watertight as it is possible for even a honest witness to make a mistake.

This offence is claimed to have been committed at night. So the issue as to how the complainant was able to identify the appellant is critical. The complainant testified that having been unable to reach her sister's place at jogoo area a due to nightfall, she saw security guards at a verandah. She decided to hang out with those security guards until the following day. In her testimony, she testified that the place was well lit with security lights. This fact was not seriously contested by the appellant. Indeed when the court itself visited the scene, it confirmed and ascertained the existence of such security lights. PW3 also confirmed that on that night there was light. The complainant was with the appellant for sometime. They even engaged in discussions as he asked her where she came from as well as where she was headed to. He even promised and indeed did find her a place to rest for the night near where he was guarding. He infact took her to a place where carton boxes had been spread. For this period of time, the complainant could not have failed to identify the appellant. After all the lights were on and the appellant and the complainant were in close proximity.

Besides the evidence of the complainant on identification of the appellant, there was also the evidence of PW3. This was a fellow security officer. He was present at Scoopy Enterprises, when the complainant appeared looking for a place to sleep for the night. He shortly thereafter left for a cup of tea. When he returned shortly after 9 p.m he found the appellant on top of the complainant. When he confronted him over the issue, the appellant retorted and asked him whether he had come to take charge of him. Shortly thereafter the witness saw the complainant crying. Clearly then and as correctly submitted by the learned Senior Principal state counsel, the appellant was found in the act. The issue of mistaken identity does not therefore arise. There is no evidence that a part from PW3 and the appellant, there were other security guards in the neighbourhood or nearby that this witness would have confused for the appellant.

The appellant claims that this case was framed against him by PW3 because of the then prevailing grudge between them arising from the fact that the witness was prone to absconding from duty and he feared that the appellant would report him to his superiors. In order to save his skin he framed the appellant with the case therefor. I find this story incredible just like the learned magistrate did. How possible and convenient was it that this witness would have simply found the complainant whom he did not know in the first place and woo or cajole her to falsely accuse the appellant. Further, there is the evidence of the clinical officer which confirms that the vaginal walls of the complainant were reddish and hymen was torn. Is the appellant suggesting that the complainant inflicted those injuries on herself on behalf of PW3 merely to frame the appellant. In any event, this issue of alleged grudge was never raised by the appellant during the trial. For him to raise it is clearly an afterthought. The appellant is merely clutching on any straws available that may savehim from drowning.

It is also instructive to note that the learned magistrate found the complainant and PW3 to be truthful and reliable witnesses. This is a finding on the credibility and demeanor of witnesses. A first appellate court cannot interfere with findings of the trial court which are based on the credibility of witnesses unless no reasonable tribunal could make such findings or where it is shown that there existed errors of law. See Republic .v. Oyier(1985)KLR 353. I do not discern any such misgivings in the circumstances of this case. In the result I have come to the inescapable conclusion that the circumstances obtaining before, during and after the commission of the offence were favourable for positive identification of the appellant by the complainant and PW3.

Did the appellant commit the offence? Of course he did and the evidence in this regard is simply overwhelming. He was indeed found in the act by PW3. The appellant in his written submissions seems to concede that the complainant may indeed have been defiled. However, it was not him who committed the Act. Reason, the investigations were shoddy since the only tests carried out on both him and the complainant was find out whether they were all infected. According to the appellant PW1 ought to have compared his blood sample with the spermatozoa found in the complainant to establish the nexus between the offence and the appellant.

I deally this is what ought to have been done. However, that failure does not necessarily exonerate the appellant from the commission of the crime. If there had not been direct evidence, perhaps that defence would have cast some doubts in the prosecution case. However in this case, there was the direct evidence of PW3 who found the appellant in the act. There was also the evidence of PW1 confirming that there was penetration. The examination of the complainant was the following day so soon after the incident. There was no opportunity for someone else other than the appellant to commit the offence. The complainant after all spent the night near where the appellant was.

On the question of the age of the complainant, the charge sheet specifically stated that she was aged 13 years. In her own testimony, she confirmed that she was indeed 13 years old. PW1, the clinical officer in his testimony as well as the P3 form he filled gave the age of the complainant at the time of offence as 13 years. On the basis of all these, I am satisfied just as the learned magistrate was that the appellant was properly charged and convicted.

The section of the law under which the appellant was convicted attracts a minimum sentence of twenty years imprisonment. This is the sentence that was handed down on the appellant by the learned magistrate. The appellant can thus not be heard to complain that the sentence imposed was manifestly harsh and excess. That is the law and the trial court and this court's hands too are tied. I cannot interfere with the same as it is neither harsh nor manifestly excessive. It is the minimum sentence provided for that kind of offence.

That being my view of this matter, I find the appeal to lack merit. Accordingly, it is dismissed in its entirety.

Judgment Dated, signed and delivered at Kisii this 31<sup>st</sup> May, 2010.

**ASIKE-MAKHANDIA**

**JUDGE**