



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

**Criminal Appeal 7 of 2007**

**JUMA MNYARU MWACHARO ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

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**JUDGEMENT**

The Appellant Juma Mnyaru Mwacharo has filed this appeal against both his conviction and sentence imposed by the Resident Magistrates Court at Wundanyi. The Appellant relied wholly on his written submissions duly filed before the court. Mr. Onserio appearing for the State gave his oral submissions opposing the appeal.

The brief facts of the case before the lower court were as follows. On 26<sup>th</sup> June 2006 the Appellant was charged with the offence of Defilement of an Imbecile contrary to Section 146 of the Penal Code Cap 63 Laws of Kenya. In the alternative the Appellant faced a charge of Indecent Assault on a female contrary to Section 144(1) Penal Code.

The prosecution case as narrated by the prosecution witnesses was that on the material day of 2<sup>nd</sup> July 2005 the Appellant went to the home where the complainant G.K lived with her mother. PW1

P.M the said complainant's mother was not at home when the Appellant arrived as she had gone to attend a funeral in M. PW1 did inform the court that her daughter (the complainant) is "dumb and an imbecile". The Appellant found the complainant at home with two young grandchildren of PW1 namely PW2 P.M (probably so named for her grand-mother) and PW3 C.M. The Appellant told the two young children that he needed to take the complainant outside in order to administer to her some herbal medicine. He then took the complainant to a nearby shamba. PW2 and PW4 did what young children the world over normally do, and followed the pair to see what would happen. In broad daylight and in full view of the two young children the Appellant proceeded to strip the complainant of her clothes including her underwear and when she was naked, he – in the words of both PW2 and PW3 "slept on top of the complainant". An uncle to the family one C.M happened by and caught the Appellant in the act. Later on when the complainant's mother PW1 returned the two children told her what they had seen. She reported the matter to W Police Station and then took the complainant to Voi Hospital where she was treated. Accused vanished from the neighbourhood until one year after the incident when he returned home and was arrested. He was later charged.

Hon. J. Ndubi, Resident Magistrate heard the evidence and placed the Appellant on his defence. The Appellant gave an unsworn defence and called no witness. The learned trial magistrate delivered his judgement on 28<sup>th</sup> December 2006 in which he convicted the Appellant. After listening to the Appellant's mitigation the trial magistrate proceeded to sentence him to a seven (7) year jail term. It is against this conviction and sentence that the Appellant now appeals.

Being a court of first appeal I am mindful of my duty to consider and re-evaluate the evidence adduced in the lower court, whilst making allowance for the fact that I neither saw or heard the witnesses testify in person. In the case of Ajode –vs- Republic Criminal Appeal No. 87 of 2004 the Court of Appeal sitting at Kisumu held that:-

*"In law it is the duty of the first appellate court to weigh the same conflicting evidence and make its own inferences and conclusions but bearing in mind always that it has neither seen nor heard the witnesses and make allowance for that."*

I have carefully perused the Appellant's written grounds of Appeal and I find that he has basically raised two main grounds as follows:-

- (i) *Insufficiency of evidence which includes his ground No. (2) failure to prove the case against him beyond a reasonable doubt and*
- (ii) *The sentence which he describes as being both harsh and excessive.*

On the first ground the Appellant submits that the prosecution failed to call two crucial witnesses in support of their case. The first was one C M who both children mentioned as a witness to the incident and the second was the doctor who examined the complainant and filled out her P4 form.

First on the issue of the said Mr. C.M I have perused the record from the lower court and note that both PW2 and PW3 mentioned this person in their evidence. At page 3 line 13 PW3 states –

*“Mombo came and met accused on top of complainant”*

On that same page at line 36 PW3 states -

*“My uncle one C.M came and got accused on top of the complainant in the shamba. CM asked accused why he was on top of the complainant. Accused said “leave me alone”*

From the evidence on record it is clear that the said CM was an eyewitness as it is claimed that he found the Appellant in the very act. However the prosecution did not call this CM as a witness and no reason has been given for this omission. No doubt CM was a key witness and his evidence may have strengthened the prosecution case by corroborating the evidence of the two children PW2 and PW3. The question is, was the failure to call this witness fatal to the prosecution case? I think not. As Mr. Ondari for the State pointed out in his submissions the prosecution did call two eye witnesses who were PW2 and PW3. Failure to call a third eye witness does not in my view devalue the evidence of PW2 and PW3 in any way. Both were children aged 9 and 12 years respectively. The trial magistrate did take the precaution of examining them both before they were sworn. The record shows that they both answered directly the questions put to them and they both were unshaken under cross-examination by the Appellant. Their evidence was consistent and there were no variations or contradictions between what both witnesses said. The learned trial magistrate did address this issue on page 10 line 3 of his judgement when he stated as follows:-

*“Both PW2 and PW3 are children aged below 14 years and I will have no reason to doubt their evidence as I don’t expect any grudge between them and the accused person”*

I hold a similar opinion. The fact that there may have been several eye witnesses to an incident does not mean that all must be called to testify. The prosecution is quite at liberty to call some and leave out others especially if their evidence would amount to mere repetition. As I have stated earlier on both PW2 and PW3 were impressive witnesses despite their young ages. The incident occurred in broad daylight and they were able to see well. They both describe in graphic detail how the Appellant removed the complainant’s clothes including her underwear and then lay on top of her. In my opinion failure to call a third eye-witness does not in any way reduce the weight of their evidence and is certainly not fatal to the prosecution case. As such I do hereby dismiss this limb of the appeal.

The second witness whom the Appellant claims failure to call was crucial was the doctor who examined the complainant after the incident. PW1 in her evidence told the court that after reporting the matter to the police she took the complainant to Voi Hospital for examination. A P3 form was filled out and signed by a doctor which P3 was produced as an exhibit by PW5.PC. Reuben Guya who was the arresting. I note from the record that at the trial the Appellant stated that he had no objection to the production of the P3 form by this witness. At page 6 line 5 it is stated –

*“PW5 .....*

*This is the P3 – produced (Exb No. 1)*

*Accused – No objection”*

After this the Appellant proceeded to cross-examine the witness. The Appellant raised no issue about the absence of the doctor at this stage neither did he raise it in his defence. Having failed to object at the trial stage the Appellant cannot now purport to raise the issue of the failure of the doctor to testify at the appeal stage. The P3 form Pexb1 indicates that upon examination the complainant was found to have a whitish foul smelling discharge from her private parts but no spermatozoa were found. The doctor made no finding on whether or not she had actually been raped. As such this P3 report was as Mr. Ondari states *“inconclusive”*. The presence of the doctor to testify and personally produce it would have in my view made no difference to the content of that report. The Appellant did himself state that he had no objection to the production of the P3 by the investigating officer. He made no demand that the doctor be called. Having waived the doctor’s evidence at trial state the Appellant cannot now use that as a ground of appeal. I therefore find no merit in this limb of the appeal and I hereby dismiss the same.

It is my considered opinion that notwithstanding the inconclusive nature of the P3 form the evidence adduced before the trial court was still sufficient to support a conviction under the section with which the Appellant had been charged. S. 146 Penal Code under which the Appellant was charged reads:-

*“146. Any person who, knowing a person to be an idiot or imbecile, has or attempts to have (my underlining) unlawful carnal connection with him or her under circumstances not amounting to rape, but which prove the offender knew at the time of the commission of the offence*

*that the person was an idiot or imbecile, is guilty of a felony and is liable to imprisonment with hard labour for fourteen years.”*

The law provides that even an attempt to have carnal knowledge of an idiot or imbecile amounts to an offence. The fact that the Appellant took the complainant out of her house into a shamba, undressed her and lay on top of her could only mean that he was after one thing. This coupled with the evidence of PW1 that she noted seminal fluid on the complainant's private parts the evidence of the two eye-witnesses and the foul-smelling discharge from the complainant's private parts are all clear evidence of an assault of a sexual nature on the complainant. The Appellant was positively identified by PW2 and PW3 who knew him well as Juma. As pointed out by the learned trial magistrate in his evidence the fact that the Appellant absconded from the village immediately after the incident is further evidence of a guilty mind. The Appellant only returned to the village after one year and has offered no explanation as to his whereabouts. The upshot is that I am satisfied that the conviction of the Appellant was based on sound evidence and I have no inclination to interfere with the same. I do hereby confirm and uphold this conviction as against the Appellant.

The Appellant has also appealed against his seven (7) year imprisonment terming the sentence harsh and excessive. I note that S. 146 provides for a sentence of fourteen (14) years with hard labour. The Appellant's act was abhorrent in that he chose to take sexual advantage of a mentally challenged girl. In my view the sentence is commensurate with the crime committed. The sentence is lawful and it is neither harsh nor excessive. As such I do uphold this sentence.

Based therefore on the foregoing I do hereby dismiss this appeal in its entirety and confirm both the conviction and sentence from the lower court.

Dated and Delivered at Mombasa this 6<sup>th</sup> day of November 2009.

**M. ODERO**

**JUDGE**

Read in open court in the presence of:

Mr. Monda for State

Appellant in person

**M. ODERO**

**JUDGE**

**6/11/2009**