REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Crminal Appeal 296 of 2006

EMMANUEL NDUNGU KAMAU……APPELLANT

V E R S U S

REPUBLIC……. RESPONDENT

(From the original decision in Thika Chief Magistrate's Criminal

Case NO. 10045 of 2004 – Mrs U.P. Kidula (C.M)

J U D G M E N T

EMMANUEL NDUNGU KAMAU, the appellant, was charged before the subordinate court with attempted defilement of a girl contrary to Section 141 (2) of the Penal Code. The particulars of offence were that on 15th November, 2004 at [*particulars withheld*] Trading Centre in Thika District of the Central Province, attempted to have carnal knowledge of ENN, a girl under the age of sixteen years. In the alternative, he was charged with the offence of indecent assault on a female contrary to Section 144 (1) of the Penal Code. The particulars of offence are that on 15th November, 2004 at [*particulars withheld*] village in Thika District of Central Province unlawfully and indecently assaulted ENN a girl under the age of 16 years by touching her private parts. After a full trial, he was convicted on the main charge of attempted defilement and sentenced to serve twenty years imprisonment. Being dissatisfied with the decision of the trial court, he has now appealed to this court. The grounds of appeal in the petition of appeal filed by the appellant's Counsel M/s J.K. Ngaruiya & Company advocates are that-

1. The learned Magistrate erred in law and in fact in convicting the appellant on uncorroborated evidence of a minor or a child of tender age.

2. The learned Magistrate erred in law and in fact in failing to find (that) enough doubt was created by failing to produce clothes as exhibit on the part of the prosecution.

3. The learned magistrate erred in fact in holding that the evidence adduced proved the offence against the appellant as charged.

4. The learned magistrate erred in law in failing to consider and or rejecting the defence case without giving reasons thereof.

5. The learned magistrate erred in introducing and considering extraneous matters in making her finding (s) which were based on speculations and not supported by the evidence on record.

6. *The sentence is manifestly excessive having regard to all the circumstances of the case*.

At the hearing of the appeal, Mrs Warui appeared for the appellant while Ms. Gateru appeared for the State. Counsel argued grounds 1 and 2 together; grounds 3 & 4 together, and grounds 5 & 6 together.

On grounds 1 and 2, Counsel submitted that the evidence on which the appellant was convicted was that of a minor and required corroboration. Counsel submitted that though the complainant stated in evidence that the appellant led her to the bush and threatened her with a knife, she did not state that she removed her clothes. It was only P.W.2 who stated

that it was dark and that the complainant (P.W.1) appeared naked. It was Counsel's contention that P.W.2 did not corroborate the evidence of P.W.1. Counsel also submitted that in examination in Chief, the complainant did not describe the assailant. The evidence also did not clarify the condition of lighting or identification, and how familiar the complaint was with the appellant. Counsel sought to rely on the case of KARANJA –VS- REPUBLIC [2004] 2 KLR 140. Counsel submitted that the court should have enquired into the familiarity. Counsel sought also to rely on the case of MUSIKIRI –VS- REPUBLIC [1987] KLR 68 and submitted that corroboration had to be material. Counsel contended that the clothes of the complainant, allegedly removed, should have been produced as exhibits.

On grounds 3 and 4 Counsel submitted that there were contradictions in the evidence. Counsel submitted that though the magistrate found that the complainant removed his clothes, there was no evidence to support that finding. Counsel also submitted that there were contradictions on the type of clothes worn by the appellant.

On grounds 5 and 6, Counsel argued that the magistrate introduced extraneous matters in the judgment. The reference to newspaper reports was an error. Also the finding that it was by the mercy of God that the appellant stumbled was an error. Counsel also contended that the defence of the appellant was not considered. Since the burden was on the prosecution to prove the offence, the bias by the learned magistrate prejudiced the appellant.

On sentence, Counsel argued that the maximum sentence for the offence was five years imprisonment. Therefore, the sentence imposed was illegal.

Counsel lastly argued that the language used for taking plea was not clear. Therefore the plea could not be said to be unequivocal. Counsel sought to rely on the case of ADAN –VS- REPUBLIC [1973] E.A. 445.

The learned State Counsel, Ms. Gateru, opposed the appeal and supported the conviction. Counsel submitted that the language of the court was Kamba and Swahili. It was the complainant who knew only Kamba language. The appellant could not say that he did not understand the charge or proceedings. On corroboration, Counsel submitted that the case of MUSIKIRI –vs- REPUBLIC (supra) was no longer good law in view of an amendment to section 124 of the Evidence Act (Cap. 80).

Counsel submitted that the evidence on record proved the offence to the required standards. Counsel contended that the complainant had opportunity and positively identified the appellant, as she knew him physically before. In addition, the place where they first met was well lit. Though P.W.2 did not witness the incident, he saw the complainant (P.W.1) running very fast and appeared naked with only pants on. Counsel contended that the evidence showed that the complainant had already removed her clothes as her mother (P.W.4) confirmed that when the complainant was brought home. She was only dressed in a jacket. Counsel contended that the failure of the prosecution to produce the removed clothes as exhibits, was not fatal to the conviction. There was no reason for a frame up. The defence of the appellant was considered and found to be untenable.

On the sentence, Counsel submitted that it was lawful. However, as the appellant was a first offender, Counsel did not object to its reduction to a reasonable sentence.

In response, the learned Counsel for the appellant submitted the court did not consider the intensity of the lighting and the circumstances for identification. Counsel emphasized that corroboration was mandatory.

This is a first appeal. As a first appellate court, I am duty bound to re-evaluate all the evidence on record and come to my own conclusions and inferences – see OKENO –VS- REPUBLIC [1972] E.A. 32.

I have re-evaluated the evidence on record.

The first complaint of the appellant is on the way the plea was taken. The complaint is that the language of court was not stated. Unlike in the case of ADAN -VS- REPUBLIC [1973] E.A. 445 – this is not a case where the appellant pleaded guilty to the charge. He pleaded not guilty to the charge. The matter went to a full trial. If the language during the proceedings was not indicated, I would not have hesitated to declare the trial a nullity. The language in the proceedings was not indicated. In any event, Counsel was wrong in stating that the language used at plea was not indicated. The record clearly shows that the language used was English translated to Swahili. That ground of appeal fails.

The second complaint is about corroboration. Indeed, the complainant was a child of tender years, being said to be aged only 10 years. However, by an amendment in 2003 to Section 124 of the Evidence Act *(Cap. 80)*, a provisal was added removing the requirement for corroboration. The said provisal states-

124……..

Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person, if for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

From the above, though there is no legal requirement for corroboration, there is a requirement for reasons to be recorded by the court, why the court has believed on the victim. In our present case, the complainant (victim) testified that she was with some other young man when she was picked by the appellant. That other child was not called to testify. No - one gave any reason why that other child was not called to testify. The time was at night, and the description of the light and circumstances for identification were not described in any detail to remove the possibility of error in the identification. The appellant was seen sitting outside a bar, and it is not clear how he was identified, whether by face or clothes. It is possible that the appellant was the culprit. It is also possible that he might have been picked simply because he was sitting outside a bar at night. That in itself, cannot prove that one has committed an offence. People who take alcohol can behave in a funny way. They can even sit in a dark, dangerous place. In my view, the evidence of identification was far from removing the doubt of a possibility of error or mistake. The magistrate observed that the complaint was honest and unshaken. A witness can be honest but mistaken. I am in doubt that the identification is positive and without the possibility of error or mistake. I give the benefit of the doubt to the appellant. On that ground, I will allow the appeal and quash the conviction.

I will not address the issue of sentence,as I will set aside the sentence following the quashing of the conviction.

For the above reasons, 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 Nairobi this 16th day of June, 2008.

GEORGE DULU

JUDGE

In the presence of-

Mrs Warui for appellant – absent.

Appellant – present

Ms. Gateru for State – absent.

Mwangi Court Clerk.