



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**

**Criminal Appeal 215 of 2004**

**(From original conviction and sentence of the Principal Magistrate's Court at Nyahururu in Criminal Case No. 3825 of 2003– L.K.Mutai [R.M])**

**DAVID NDEGWA KARIUKI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant, David Ndegwa Kariuki was charged with the offence of Attempted defilement of a girl contrary to Section 145 (2) of the Penal Code. The particulars of the offence were that on the 18<sup>th</sup> October 2003 at Mairo Inya Township in Nyandarua District, the appellant unlawfully attempted to have carnal knowledge of G W W, a girl under the age of 16 years. He was alternatively charged with the offence of **Indecent assault on a female contrary to Section 144(1) of the Penal Code**. The particulars of the offence were that on the same date and in the same place, the appellant unlawfully and indecently assaulted G W W, a girl of eleven years of age by touching her private parts. The appellant pleaded not guilty to the charge. After a full trial, the appellant was found guilty as charged on the alternative charge of indecent assault. He was sentenced to serve four years imprisonment. The appellant was aggrieved by his conviction and sentence and appealed to this court.

In his petition of appeal, the appellant raised five grounds of appeal challenging the decision of the trial magistrate in convicting him. He was aggrieved that he had been convicted on insufficient evidence of the prosecution witnesses. He was further aggrieved that the trial magistrate had failed to consider the fact that there existed a grudge between him and PW2 R W N who had falsely implicated him with the offence. He was aggrieved that the trial magistrate had failed to consider his defence before he arrived at the decision to convict him.

At the hearing of the appeal, the appellant made oral submissions urging this court to allow his appeal. He stated that he had been arrested due to a grudge that existed between him and his step father over a land dispute. He submitted that when he was taken to the police station, he was detained for a period of two weeks before he was charged with the offence which he was convicted. He denied that he had committed the offence. He submitted that the trial magistrate had not put into account the evidence that he had adduced in his defence before he arrived at the decision that the charge against him had been proved. He took issue with the fact that the trial magistrate had refused to admit evidence which he had attempted to adduce relating to his testimony that he had been assaulted during his arrest. The appellant urged this court to re-evaluate the evidence and reach an appropriate decision in his favour.

Mr. Mugambi for the State conceded to the appeal on the sole ground that the plea which was taken by

the trial magistrate was equivocal because the language of the court had not been indicated. He further stated that the prosecutor who was present in court was a sergeant and therefore an unqualified person to prosecute cases before the said court. He urged this court to order that the appellant be retried in view of the overwhelming evidence that was adduced against him. The appellant on his part replied that instead of being retried he would rather serve his sentence.

This being a first appeal, this court is mandated to re-evaluate and re-consider the evidence adduced in the trial before the magistrate's court so as to reach its own independent determination whether or not to uphold the conviction. In reaching its determination, this court is required to put in mind the fact that it neither saw nor heard the witnesses as they testified and therefore could not make any finding as regard the demeanour of witnesses (*See Okeno -vs- Republic [1972] E.A. 32*). The issue for determination by this court is whether the prosecution proved its case on the charge of attempted defilement against the appellant to the required standard of proof beyond reasonable doubt. This court has considered the submissions made by the appellant and the response thereto made by Mr. Mugambi on behalf of the State. This court has further re-evaluated the evidence that was adduced before the trial magistrate's court.

The first issue for determination is whether the fact that the language in which the plea was taken was not stated would lead this court to reach a finding that the plea that was taken was vitiated and thus became tainted with illegality. This court is further required to consider whether the fact that an unqualified prosecutor was present in court when the plea was taken vitiated the entire trial. I have considered the grounds upon which Mr. Mugambi conceded the appeal. With the greatest respect to the learned counsel, I wish to state that he misapprehended the correct position of the law when he conceded to the appeal on the grounds that he put forward. The appellant was not prejudiced by the fact that the language in which the plea was taken was not stated in the proceedings. This was because the appellant pleaded not guilty to the charge when it was read to him. The fact that the appellant participated in the trial by cross-examining the witnesses who were brought forward by the prosecution and the fact that he ably offered evidence in his defence clearly showed that the appellant followed the proceedings as the same was conducted in a language which he understood. He was not therefore prejudiced by the fact that the language in which the plea was taken was not specified by the trial magistrate.

The appellant was further not prejudiced by the fact that the prosecutor who was present in court when the plea was taken was an unqualified police prosecutor. This is because the plea that was recorded was a plea of not guilty. During the full trial, the police prosecutor who prosecuted the case against the appellant was an inspector of police. He was therefore of a rank of a Police officer who is authorised in law to prosecute criminal cases before a magistrate's court. If the appellant had pleaded guilty to the charge when plea was taken, this court would not have hesitated to set aside the said proceedings for being a nullity. But be it as it was, the irregularity of the presence of an unqualified prosecutor when the plea of not guilty was taken did not vitiate the subsequent trial of the appellant. I therefore hold that there were no legal grounds upon which the learned State counsel could have conceded to the appeal.

Now to the facts of this case. The facts of this case are more or less not disputed. The appellant was known to PW3 V W M, the mother of the complainant PW1G W who was aged twelve years at the time of the incident. PW3 testified that on the material day she had requested the appellant to lend her money which was to be used by the complainant to travel to Nairobi. The appellant acceded to the request made by PW3 but instructed her to sent the complainant to collect the money from him at Nyahururu Township. When the complainant went to see the appellant to collect the agreed sum of Ksh.300/=, the appellant told him that he would give her the money at a centre called Mairo Inya. The complainant agreed to accompany the complainant to Mairo Inya trading centre. When they reached the said centre, the appellant instructed the complainant to enter a room in a lodging which the appellant had rented.

According to the complainant, after she had entered the room, the appellant followed him inside and started touching her private part, breasts and other parts of her body. The complainant threatened to scream. The appellant left the room and locked the complainant inside the said room. PW2 R W N narrated how the appellant hired a room at the lodging where she was employed. The appellant paid Ksh.100/= being the charges of the said room. At about 7.30 p.m., PW2 was called by the complainant

who had been locked in the said room. PW2 opened the room for the complainant. The complainant told PW2 that the appellant had hired the room so that he could sleep with her. PW2 informed the police at Mairo Inya Police Post. PW4 PC Johana Mutai was sent to the scene of Crime and was able to arrest the accused and subsequently charged him with the offence for which he was later convicted.

When the accused was put on his defence, he admitted that he had agreed to loan the mother of the complainant the sum of Ksh.300/=. He corroborated the testimony of the prosecution witnesses in so far as it related to the circumstances under which he hired the room at the lodging at Mairo Inya trading centre. He however denied that he had hired the said room so that he could have sexual intercourse with the complainant. He testified that he had offered to hire a room for the complainant when she was unable to trace the house of her aunt who was said to reside at Mairo Inya trading centre. He testified that the reason why PW2 made the complaint to the police was because he had disagreed with her over an unspecified issue prior to the said incident.

I have re-evaluated the evidence adduced by the prosecution witnesses and the evidence offered by the appellant in his defence. I have also considered the grounds of appeal that he put forward in his appeal. It was clear to this court that the prosecution proved to the required standard of proof beyond reasonable doubt that the appellant took the complainant to a lodging at Mairo Inya trading centre for immoral purposes. The appellant duped the complainant that he would give her the money which he had promised her mother once they reached Mairo Inya trading centre. The appellant had formed the intention that he was going to sexually assault the complainant. He even hired a room at the said lodging and locked up the complainant inside the said room.

I have no reason to disagree with the finding by the trial magistrate that he believed the testimony of the complainant when she testified that the appellant had indecently assaulted her when he locked her in the said room at the lodging. The testimony of the appellant that he had assisted the complainant by hiring her a room to spend the night after she had failed to trace the house of her aunt was incredible. The trial magistrate rightly dismissed the said defence by the appellant as being a fictitious tale which the appellant had weaved with a view of securing his exoneration by the court for the offence which he had committed.

Having re-evaluated all the facts of this case it was clear that the appeal filed by the appellant has no merit and is hereby dismissed. The prosecution proved its case on the charge of indecent assault to the required standard of proof beyond reasonable doubt. I will not interfere with the sentence which was meted out by the trial magistrate because the same was legal. The appellant placed no grounds before this court that would persuade this court to review the said sentence. The upshot of the above reasons is that the appeal filed by the appellant is hereby dismissed and his conviction and sentence is hereby confirmed.

It is so ordered.

**DATED at NAKURU this 23<sup>rd</sup> day of August 2007**

**L. KIMARU**

**JUDGE**