



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 104 of 2006**

BENSON MBURU NJAUAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No. 645 if 2995 of the Senior Magistrate's Court at Kiambu – Mrs. L. Muhiu SRM)

JUDGMENT

BENSON MBURU NJAU, the appellant, was charged before the subordinate court with the offence of defilement contrary to section 145(1) of the Penal Code. The particulars of the offence were that on 31st December 2004 at [*particulars withheld*] in Kiambu District within Central Province, had carnal knowledge of JW a girl under the age of 16 years. He was also charged with an alternative count of indecent assault of a female contrary to section 144(1) of the Penal Code. The particulars of the offence were that on 31/12/2007 at [*particulars withheld*] in Kiambu district within Central Province unlawfully and indecently assault JW by touching her private parts, a girl under the age of 16 years. After a full hearing, he was convicted on the alternative count and sentenced to serve ten (10) years imprisonment: Being dissatisfied with the decision of the learned trial magistrate, he has appealed to this court. His amended grounds of appeal are that –

1. The learned trial magistrate erred in both law and fact in convicting him on evidence that was contradictory with discrepancies and inconsistencies.
2. The learned magistrate erred in law in failing to appreciate that the case for the prosecution was unproved and based on a defective charge sheet.
3. The sentence was harsh and excessive.
4. The defence was not considered, which was a serious error in law.

The appellant also filed written submissions to amplify his grounds of appeal.

The learned State Counsel, Mrs. Gakobo, opposed the appeal and supported both the conviction and sentence. Counsel contended that the conviction of the appellant on the alternative count of indecent assault was proper. In counsel's view, the evidence of PW1 the complainant established that the appellant indecently assaulted her by removing her trousers and causing his private parts touch hers. That action of the appellant was without consent. It was counsel's contention the appellant did not challenge the evidence of PW1.

Counsel contended that, though there were contradictions in the prosecution evidence, the trial court was

alive to the said contradictions, which the court found not material. In counsel's view, the contradictions were curable under section 382 of the Criminal Procedure Code (Cap. 75). In addition, the court found that the complainant was somewhat retarded and could not remember dates. Therefore, the variance in dates was not material and the court exercised its discretion properly under section 214 of the Criminal Procedure.

I have considered the evidence on record, the grounds of Appeal, as well as the submissions of the appellant and the learned State Counsel. The appellant was charged with a main count of defilement and, in the alternative, with indecent assault. He was convicted on the alternative count of indecent assault.

In my view, the conviction of the appellant is not safe and is not sustainable. The key witnesses in the case is the complainant (PW1). It is clear from the evidence that the said complainant had serious memory lapses. She could also not remember her age, she could also not remember dates. She appears to have mentioned the appellant merely because she was scolded by her aunt, and merely because she used to go to the shop of the appellant. Her age is not also known, and though she was taken for medical examination, her age was not scientifically assessed. Therefore if it is not known whether she is a child of tender years or not. She appears to have been mentally retarded and her evidence is not straight forward and doubtful.

The test to apply in cases where the evidence to be relied upon does not appear to be straightforward was considered in the case of **NDUNGU –vs- REPUBLIC** [1979] KLR 282 in which the court stated –

“The witness upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straight forward person or raise a suspicion about his trustworthiness, or do (or say) something which indicates he is a person of doubtful integrity and therefore unreliable witness which makes it unsafe to accept his evidence”.

The evidence on record is that the complainant (PW1) appears to have been mentally retarded. She is not even able to remember her age or dates. She dropped from school at a very early age, apparently in nursery school. The doctor did not assess her age but estimated it. Her evidence, without corroboration or independent supportive evidence, cannot be relied upon to found a conviction. I find no independent evidence or corroboration to sustain a conviction on her evidence.

Secondly, there is the issue of contradictions. The contradictions in the prosecution evidence were, indeed, appreciated by the trial magistrate, who said thus in her judgment –

“Such discrepancies include PW1 saying that she started living with PW2 about one month before the date she was testifying and PW2 saying that she started living with PW1 in April 2003. The place of defilement also differed as PW1 said it was at the veranda, PW2 said it was on the next house's veranda and PW3 said it was at the shop. The court finds that this discrepancy is not material as what matters is whether it has been established that the accused had carnal knowledge of PW1 and the court finds positively on this issue.”

The test to be applied in cases of discrepancies or inconsistencies in the prosecution case, was discussed in **JOSEPH MAINA MWANGI –vs- REPUBLIC Criminal Appeal No. 73 of 1992**, Nairobi in which Tunoi, Lakha and Bosire JJA held –

“An appellate court in considering those discrepancies must be guided by the wording of section 382 Criminal Procedure Code, viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence”.

With due respect to the learned trial magistrate, I do not agree that the discrepancies in the prosecution case are not material.

In my view, having considered discrepancies and inconsistencies, I find that they are material especially the discrepancies on where the alleged defilement took places. They cannot be confused or interchanged

for each other. The veranda of the aunt of the complainant; the veranda of the neighbouring house; and the shop are totally different place. All this information or evidence of the locus of the crime comes from the same source, that is the complainant (PW1). I am not certain that indeed the appellant committed the offences charged. I am fully satisfied that the conviction entered by the learned trial magistrate on the evidence which is riddled with contradictions is not safe.

Lastly, the appellant was convicted on the offence of indecent assault. The evidence of the prosecution was set out to prove the offence of defilement. The allegation was that the complainant was made pregnant by the appellant. The evidence on record on the pregnancy is hearsay evidence, as the person who medically examined the complainant did not testify in court. It is also instructive to note that on the first time when the complainant was examined for pregnancy, she was said not to be pregnant. It does not come out clearly whether indeed the complainant was pregnant. In any case, as I have said earlier, the evidence on pregnancy is hearsay. There is no credible evidence, in any case, that the appellant met the complainant and touched her private parts with his penis. Therefore, in my view, the magistrate having found the appellant not guilty of the main count of defilement, should not have found him guilty of the alternative charge of defilement, as there is no evidence to support the lesser charge.

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 forthwith unless he is otherwise lawfully held.

Dated and delivered at Nairobi this 8th day of October 2007.

George Dulu

Judge

In the presence of –

Appellant in person

Mrs. Gakobo for state

Eric - court clerk