



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
CRIMINAL DIVISION**

**CRIMINAL APPEAL 450 OF 2004**

**(From original conviction and sentence in Criminal Case no.**

**Magistrate's Court at Makadara.)**

**DANIEL MUNGAI WAIRIMU .....APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

The Appellant was tried and convicted of the offence of indecent assault of a female contrary to Section 144 (1) of the Penal Code. It was alleged that on the diverse dates between 1st August, 2002 and 30th November, 2002 at Zimmerman Estate Nairobi within Nairobi Area, the Appellant unlawfully and indecently assaulted E.W.N. by touching her private parts. Following the conviction the Appellant was sentenced to 3 years imprisonment. The Appellant was aggrieved by the conviction and sentence and consequently lodged this Appeal. He cited 10 grounds of Appeal which may be condensed into 5 broad grounds:-

1. THAT the Learned trial Magistrate erred in Law in convicting the Appellant when there was clear evidence from PW3 who told the Court that the alleged offence was committed in August, 2002 and reported to her in November, 2002 a period of six months.
2. THAT the Learned trial Magistrate erred in Law in convicting the Appellant when there was no evidence of the house girl who PW1 alleged to have reported the incident to.
3. THAT the Learned trial Magistrate erred in Law in convicting the Appellant when there was on uncorroborated evidence.
4. THAT the Learned trial Magistrate erred in Law in failing to warn herself of the danger of convicting the Appellant on uncorroborated evidence of PW1.
5. THAT the defence of the Appellant was not properly considered.

When the Appeal came up for hearing, the Appellant was represented by Ms. Ndirangu whereas the State was represented by Mr. Makura.

Mr. Makura, Learned State Counsel readily conceded to the Appeal stating that there was a lapse

of about 8 months from the date of the alleged commission of the offence to the time the Appellant was charged. Although there is no time limit for charges to be preferred against a suspect in Criminal Proceedings however the delay in the instant case was prejudicial to the Appellant. Mr. Makura further submitted that failure by the prosecution to call the house girl to whom the Complainant first made the report of the incident and the Doctor who first treated the Complainant was fatal to the prosecution case and also prejudicial to the Appellant. Consequently the Court ought to have drawn adverse inference in favour of the Appellant. Mr. Makura further submitted that PW6 had testified that the Complainant had an allergy that led her to constantly scratch herself. That fact alone should have raised doubt in the mind of the Court as to whether the Complainant was actually indecently assaulted. Indeed the fresh bruises observed by PW5 on the Complainant could have been as a result of the allergy. This too should have created some doubt in the mind of the trial Magistrate, Mr. Makura concluded his submission.

In her submissions, Counsel for the Appellant more or less reiterated the submissions made by the Learned State Counsel. There is therefore no need to repeat them here. I have as expected being the first Appellate Court re-examined and re-evaluated the evidence on record so as to reach my own conclusion as to whether the conviction of the Appellant was properly arrived at. From the record it is evident that the report about the alleged indecent assault on the Complainant was made in November, 2002 and yet the offence was alleged to have been committed in August 2002. Both the Complainant and the Appellant were neighbours and there was no suggestion that following the commission of the offence, the Appellant disappeared from the neighborhood. I agree with submissions of both Counsels herein that the Learned trial Magistrate ought to have inquired and sought explanation regarding the delay bearing in mind that this was a sex related offence. In my view that delay and which was not at all explained away by the prosecution was prejudicial to the Appeal. The medical evidence if at all, from both the Appellant and the Complainant including the P3 would in those circumstances worthless.

It is also noted that the Complainant immediately after the alleged incident reported the matter to the house girl. The house girl was not called as a witness. No explanation was proffered by the Prosecution as to why they were unable to avail such important and crucial witness to the prosecution case. What is even worrying is the casual treatment of this would be witness by the investigating officer (PW3). When cross-examined by the Appellant on the issue she replied “**...I cannot remember the name of the house girl...**” Once again if the trial Court had properly directed itself to this aspect of the matter, it would have been left with no other alternative but perhaps to draw the necessary inference that the evidence of this particular witness could have been adverse to the prosecution case.

As rightly pointed out by both Counsel's the evidence of PW1 remained uncorroborated having regard to the Provisions of Section 124 of the evidence Act. That being the case and the Complainant being a child of tender years, 7 years to be exact, it was incumbent upon the trial Magistrate to warn herself of the danger of convicting the Appellant based solely on the uncorroborated evidence of the minor Complainant.

There is also the issue of the Complainant's allergy, that made her to constantly scratch her private parts. There is no evidence on record that the allergy commenced soon after the incident complained of. The Police Doctor who examined the Complainant found that there were no injuries to the Complainant's private parts. However he stated that he had seen fresh bruises as a result of an allergy. It should be noted that this Doctor examined the Complainant on 8th March, 2003, a whole seven (7) months after the alleged commission of the offence. There must have been many factors that intervened regarding the Complainant's condition not attributable to the Appellant. This fact should have created some doubts in the mind of the presiding Magistrate as well. This doubt could however have been dispelled had the prosecution summoned as a witness the Doctor who first attended to the Complainant at Kenyatta Hospital. Unfortunately this was not to be. Once again the prosecution offered no explanation as to why they were unable to summon such critical witness.

The Appellant in his defence stated that the case against him was a frame up. That the Complainant's father and the Appellant's mother had frequently disagreed on the issue of rent. The Appellant's mother was apparently a landlord to the Complainant's parents. PW2, the Complainant's father when cross-examined by the Appellant stated thus “**...We sometimes quarreled with accused mother**

***because of rent...***” Considering the circumstances of this case and particularly the time taken between the commission of the offence and the filing of Complaint with the Police, the non-availability of crucial and critical witnesses and the botched investigations, is it beyond realm of possibility that the Appellant could actually have been framed in these proceedings? In my view it is possible. The relationship between the Complaint’s father and the Appellant’s mother over non payment of rent was strained. As submitted by Mr. Makura, and rightly so, in my view, this strained relationship created some doubt as to whether the charge against the Appellant was properly laid. The doubt so created ought to have been resolved by the trial Magistrate in favour of the Appellant.

For all the foregoing reasons, I agree with both Learned Counsel’s for the state and Appellant that the conviction of the Appellant was unsafe and should not be allowed to stand. In the result I allow the Appeal, quash the conviction and set aside the sentence. The Appellant should be set at liberty forthwith unless he is otherwise lawfully held.

Dated at Nairobi this 18th of July, 2005

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**M. S. A. MAKHANDIA**

**JUDGE**