



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 218 OF 2017**

**ABANUS NZIOKA MANG'OKA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(An appeal from the conviction and sentence in Shanzu**

**SPM's CR. Case No. 10 of 2017 (Hon. A. Ndun'gu RM)**

**delivered on 25/8/2017)**

**J U D G M E N T**

1. **Abanus Nzioka Mang'oka ("the Appellant")** was charged with the offence of attempted defilement contrary to **section 9 (1)** as read with **section 9 (2) of the Sexual Offences Act No. 3 of 2006**. It was alleged that on 24<sup>th</sup> January, 2017 in Kisauni sub-county within Mombasa County, the appellant intentionally and unlawfully attempted to cause his penis to penetrate the vagina of AK, a child aged 8 years.

2. The appellant denied the charge and after trial, he was found guilty and convicted of the offence and sentenced to 10 years imprisonment. He has now appealed to this court against both the conviction and sentence.

3. This being a first appellate court, the court is enjoined to re-appraise the evidence afresh and come to its own independent findings and make its own conclusions. In so doing, the court must have in mind that it did not have the advantage of seeing the witnesses. **(See Okeno v. Republic [1972] EA)**.

4. The prosecution case was that on the material day at about 7.30 pm, the complainant was from buying some mangoes when she met the appellant. The appellant told her that her mother had given him Kshs.5,000/- which he was to give her. That the appellant held her hand and led her to some bushy flowers and told her he wanted to rape her. He removed his shirt and trousers. She then screamed and run away. She met **PW2** who called others. They beat the appellant. That as at that time, the appellant had changed the clothes he was wearing when he had attempted to defile her.

5. **PW2 Ali Mwamuye** was at his place of work on the material day and time. He saw a child screaming that there was someone who wanted to remove her clothes. They went there and found the appellant with his trouser at half knees. They arrested the appellant and took him to Bamburi Police Station. **PW3 Shady Chula** was with **PW2** when he saw a child come running while crying asking for help with the appellant in hot pursuit. The appellant tried to run away but was arrested and was beaten up.

6. **PW4 Daniel Francis** heard that someone was about to be burnt. He rushed to the scene and found the accused surrounded by many people. He assisted in taking the appellant to the police. **PW5 LMM**, an auntie to the complainant went to the complainant's home at the time but did not find her. She heard that the complainant was in Bamburi where she found her with the chief.

7. **PW6 CLP Beatrice Mwangeli** investigated the case. She interviewed the child and on that basis decided to charge the appellant with attempted defilement. **PW7 Dr. Julian Njambi** produced the PRC form and stated that the complainant was not injured.

8. The appellant raised three grounds; **that the offence was not proved beyond reasonable doubt; that his identification was doubtful and that the case was not properly investigated.**

9. The parties filed their respective submissions which I have carefully considered. This case turns on the issue of the identification of the appellant.

10. In **Wamunga v. Republic [1989] KLR 426** the court stated: -

***“It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction”.***

11. In the cases of **Nzaro v. Republic [1991] KAR 212** and **Kiarie v. Republic [1984] KLR 739** the Court of Appeal held that evidence of identification/recognition at night must be absolutely watertight to justify conviction.

12. In **R.v. Turnbull & others [1973] ALL ER 549**, the court set out the factors which ought to be considered when the only evidence turns out on identification. The court held: -

***“...The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the accused under observation” At what distance| In what light” Was the observation impeded in any way...” Had the witness ever seen the accused before” How often” If only occasionally, had he any special reason for remembering the accused” how long elapsed between the original observation and the subsequent identification to the police” Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance” Recognition may be made reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”***

13. The incident in this case took place at night. The complainant stated that there were street lights at the place where she met the appellant and that she had never met the appellant before. The appellant then led her to some secluded part with flowers where there was no lighting. He then attempted to defile her.

14. **PW1** was categorical that she saw the person who accosted her remove his shirt and trouser. The shirt was blue in colour and the trouser was a jean. He had given her his phone but she handed it over to him before she run away. That aspect of the evidence was very crucial as far as the identity of the attacker was concerned.

15. She then said that after running away from her attacker, she told a man she met what was happening. That man called boda boda people who came and beat up the appellant. That the appellant was found when fully dressed up with different clothing from the ones he had when he had attempted to defile her.

16. According to **PW3** he was with **PW2** when the child came running crying for help. The appellant was chasing her at high speed and trying to put on his trouser. **PW2** however did not see the appellant chase the complainant.

17. The trial court did not address these issues. The question that arises is; was the person who held the hand of the complainant from the road and led her to the flower bush and who removed a blue shirt and trouser jeans, the same person whom **PW2 and PW3** found and assaulted? Given, when **PW1** saw the appellant being assaulted by **PW2** and others, he had different clothes from the ones he allegedly had at the time of the attempted defilement. The trial court did not consider this fact.

18. It was not shown that **PW1** never lost sight of her attacker. She run away and left the attacker in the flower bushes. There was time lapse between the attempted defilement and the time the appellant was arrested. **PW1** run a distance of 25 metres. It took sometime for **PW2** to call the bodaboda people to come and accost the appellant. There was no evidence to show that there were other clothes recovered from the scene. When the appellant was arrested, he had different clothing.

19. The other aspect was the phone that the attacker had. None of the witnesses, including **PW2** and **PW3** who seem to have been the earliest people to come into contact with the incident, **PW1** and the appellant, mentioned about the phone, **PW1** stated that she had given back the attacker his before she took off. No one stated that the appellant was found with a phone.

20. To this court’s mind, the investigations officer did not investigate these two aspects. She left the court to reconcile them, which it did not.

21. It should be remembered that the appellant had cross-examined both **PW2 and PW3** about a miraa deal between them which had gone sour. The trial court did not state why it disbelieved him on it and chose to believe **PW2 and PW3**. It is important for a trial court to indicate or point out instances of demeanor which it notes during a trial and which it relies upon as a basis of accepting the evidence of one witness over the other. In this case the trial court did not do so.

22. With the foregoing shortcomings, it will be clearly unsafe to convict the appellant on the evidence on record. His identification as the perpetrator of the offence was not proved beyond reasonable doubt. It was not for him to explain his innocence.

23. In the circumstances, I find that the appeal has merit and I allow the same. I quash the conviction and set aside the sentence. The appellant is to be set at liberty forthwith unless otherwise lawfully held.

**DATED and DELIVERED at Mombasa this 11<sup>th</sup> day of September, 2019.**

**A. MABEYA**

**JUDGE**