



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT HOMA BAY**

**CRIMINAL APPEAL NO.36 OF 2017**

**BETWEEN**

**NELSON MANDELA NYAWARA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from original conviction and sentence in Sexual Offences Act Case No.15 of 2016 of the PM's court at Mbita)*

**JUDGMENT**

[1] The appellant, **NELSON MANDELA NYAWARA**, was charged with attempted defilement; contrary to **Section 9 (1) (2)** of the **Sexual Offences Act** and in the alternative, with committing an indecent act with a child, contrary to **Section 11 (1)** of the **Sexual Offences Act**.

It was alleged that on the 26<sup>th</sup> May 2016, within Homa Bay County, the appellant attempted to defile **J A O**, a child aged fifteen (15) years or intentionally and indecently touched her private parts.

[2] On appearing before the Resident Magistrate at Magunga, the appellant pleaded not guilty and was thereafter tried, convicted and sentenced to ten (10) years imprisonment on the main count.

Being aggrieved by the conviction and sentence, the appellant preferred this appeal on the basis of the grounds in the petition of appeal filed herein on 3<sup>rd</sup> August 2017, in which he complains that he was compelled to proceed with the hearing of the case on the day of plea and without being provided with witnesses' statements. That, his several applications to recall the complainant were denied by the trial court which proceeded to convict him on the basis of insufficient evidence of identification and without the testimony of two essential witnesses.

[3] At the hearing of the appeal, the appellant appeared in person and fully relied on his written submissions in support of his case.

The respondent, through the learned prosecution counsel, conceded the appeal and asked for a re-trial. It was thus submitted that the trial commenced with the testimonies of PW1, 2 and 3 on the 27<sup>th</sup> May 2016, when plea was taken. Therefore, the appellant may not have been ready to proceed with the trial and the several attempts he made to recall the witnesses were rejected by the trial court.

[4] The respondent referred to **Article 50 (2) (c)** of the **Constitution** and submitted that regard being given to that provision the appeal is merited.

On re-trial, the respondent submitted that there is real likelihood of a conviction and that the witnesses are available and ready to re-testify.

The respondent contended that the offence being a serious one, the scales of justice tilts in favour of a re-trial.

[5] This court has given due consideration to the submissions by both the appellant and the respondent and to the fact that the appeal is conceded mainly based on the concept of fair trial. However, the duty of this court was to reconsider the evidence adduced on the trial and arrive at its own conclusion bearing in mind that the trial court had the advantage of seeing and hearing the witnesses. (See, **OKENO –VS- REPUBLIC (1972) CA 32**).

[6] In that regard, the prosecution case was that at the material time the child complainant, **J A (PW1)**, was a primary school pupil aged fifteen (15) years. She had a younger sister called **H A (PW2)** and on the material date they left home at about 2.00 p.m. heading to a sports competition at a place called Nyandhiwa. In the process, they passed through a maize plantation while in a hurry but a person appeared from their rear. He held the complainant and tried to pull her into a bush. She told him that she would report him as she had seen his face. She tried to scream but he held her mouth before leaving the scene.

[7] The complainant's sister (PW2) indicated that when the person appeared and held the complainant, she ran back and made noises which attracted people to the scene.

She said that the person had spectacles and a shirt on his face. She identified him as the accused (appellant).

The complainant was later examined by a clinical officer, **HYDEN OMOYO (PW3)**, who was based at Suba District Hospital. He thereafter completed and signed a P3 form (**P. Exhibit 3**) showing that the complainant suffered bodily harm only.

[8] The complainant's father **E O (PW4)**, confirmed that the complainant was aged 15 years. He was informed that she had been defiled by a person who was identified by Hellen (PW2) as the appellant.

He (PW4), with the help of the Kinda Beach Leader traced and had the

appellant apprehended and handed to **APC WILSON OMONDI (PW5)** at Nyandhiwa AP Post. Later, **CPL JAMES RAGIRA (PW6)**, based at Magunga police station investigated the case and preferred the present charge against the appellant.

[9] In his defence, the appellant denied the offence and stated that he was arrested on the material date while playing a game of football at Kinda Beach.

In the process, the ball hit the roof of the beach Management Unit (BMU) Office and he was asked to give an explanation. Shortly thereafter, a crowd gathered and the complainant appeared. She remarked that "**alivaa nguo kama hiyo**" (He had clothes like those) and a person said that he was a foreigner. He was then beaten up and taken to the BMU Offices before being taken to Nyandhiwa AP Post and then Magunga police station where he was charged with the present offence.

[10] The trial court considered the evidence in its totality and concluded that the prosecution had proved its case beyond reasonable doubt. The appellant was thus convicted and sentenced accordingly.

[11] In this court's opinion, the issue arising for determination was whether an attempt to defile the complainant (PW1) was made and if so, whether the appellant was responsible for the offence.

[12] In her evidence, the complainant merely said that a person appeared from her rear and held her eyes before trying to pull her into a bush. She threatened to report him but he held her mouth when she tried to scream. He then left and went away.

Clearly, this evidence did not show that there was any attempt to defile the complainant. If anything, she was merely harassed by a male person who did not show by any serious overt act that he made an attempt to defile the complainant.

[13] Contrary to what the trial court found, this court finds that the act of attempted defilement was not established by the prosecution. Even the evidence of the Clinical Officer (PW3) was negative in that regard. It showed that the complainant may have been assaulted rather than being defiled or an attempt being made to defile her.

[14] With regard to the alleged identification of the appellant, the evidence **by the prosecution was insufficient even though the alleged incident occurred in broad day light.**

From her evidence, the complainant did not identify the appellant. The alleged identification came from the complainant's sister (PW2) but she indicated that the offender had spectacles and had covered his face with a shirt. How then was she able to identify the offender? Her alleged identification of the appellant was therefore suspect and unreliable.

[15] In sum, the appellant's conviction by the trial court was neither safe nor proper. It is hereby quashed with the result that the sentence of ten years imposed upon the appellant is set aside. It is to that extent that the appeal succeeds.

The appellant shall forthwith be set at liberty unless otherwise lawfully held.

[16] The concession of the appeal by the respondent was based on the fact that the appellant was not accorded a fair hearing of the case as the same commenced on the day the plea was taken and several applications by the accused/appellant to re-call witnesses were rejected by the court. However, the trial court's record indicates that the appellant raised no objection to the commencement of the trial on the day of plea. He never even sought for an adjournment to prepare for the case. This meant that he was comfortable and never prejudiced by the start of the case on the plea date.

[17] In any event, there is nothing prejudicial in starting a hearing on the day of plea particularly if no party has expressed any reservation in that regard.

All parties facilitating the hearing of a case on the first day it comes to court ought to be praised for their efficiency and resolve in the expeditious disposal of cases.

In rejecting the appellant's various application to recall witnesses, the trial court was simply exercising its discretionary powers.

This court does not think that the appellant was not accorded a fair hearing of his case. There was no breach of **Article 50 (2) (c)** of the

**Constitution** as implied by the State.

**J.R. KARANJAH**

**JUDGE**

**05.07.2018**

**[Delivered and signed this 5<sup>th</sup> day of July, 2018].**