



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 84 OF 2015

ATHUMAN SHARIF DADU APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the Original Conviction and Sentence in Criminal Case No. 33 of 2013 of the Chief Magistrate's Court at Malindi – C.N. Nzibe, RM

JUDGEMENT

The appellant was charged with the offence of attempted defilement contrary to section 9 (1) (2) of the sexual offences Act No. 3 of 2006. The particulars of the offence were that the appellant on the 14th January, 2013 at 3.00 am in Malindi District within Kilifi County intentionally and unlawfully attempted to cause his penis to penetrate the vagina of LW a child aged 16 years by trying to remove her panty.

The appellant also faced a second count of being in possession of narcotic drugs contrary to section 3 (1) (2) (a) of the narcotic and Psychotropic substances control Act number 4 of 1994. The particulars of the second count were that on the 14th January 2013 at Lango Baya Location in Malindi District within Kilifi County was found being in possession of three small rolls of cannabis with a street value of Kshs.30/= in contravention of the said Act.

The trial court convicted the appellant on both counts and sentenced him to serve 10 years imprisonment for the first count and 1 year for the second count. The grounds of appeal as per the amended grounds are mainly in relation to the count of attempted defilement. The grounds are that the conviction was based on evidence of recognition yet that evidence was not safe, that there was evidence indicating that there was struggle between the complainant and the appellant yet no medical evidence was produced, that his arrest had nothing to do with the case, that the case was not proved beyond reasonable doubt and that the appellant's defence was not considered.

The appellant filed written submissions. He states that the circumstances were not conducive for positive identification as the alleged offence occurred at night. The identification was by way of voice and voices are at times similar. The trial court simply assumed that the appellant was identified. The complainant did not tell her friends that she had identified the appellant through his voice immediately. It is also submitted that there was evidence of torch light that was used to identify the appellant but that evidence is not believable. The torch light was shown while the appellant was allegedly running meaning that the lights only reflected his back and not the face. The appellant further contends that he

was arrested on suspicion that he is a petty thief and not because of defilement. The case was not proved beyond reasonable doubt and the conviction is based on suspicion. The appellant's defence was reasonable but was ignored by the trial court.

Mr. Alenga, prosecution counsel, opposed the appeal. Counsel submitted that the complainant's age was assessed and she was a minor. The appellant was identified through his voice when he asked the complainant to relax. He was also recognized by the complainant when he ran out of the house. The appellant had an intention to defile the complainant as he touched her thighs. He was overpowered and ran away. The complainant's evidence was corroborated. The second count was proved as a government analyst testified and the drugs were found to be cannabis.

Being the first court to deal with the appeal, it is expected to evaluate the evidence adduced before the trial court and make its own conclusion. The record of the trial court shows that seven witnesses testified for the prosecution. PW1 L W was a class 5 pupil at [particulars withheld] Primary School aged 13 years old. On the night of 14th January 2013 at about 3.00 am she was sleeping in their room with L C and M K. The room has two beds but they were sleeping on one bed. She felt someone touching her thigh. It was dark and she woke up. She checked L C and M K who were asleep. She heard the appellant saying "M tulia" – M calm down. She identified the appellant through his voice as he was a neighbor and also used to go to their home and eat together. The appellant was pinning her down and she struggled with him while screaming. She managed to rescue herself and the appellant fell down. They all came out the house and there was moonlight. His brother in law, C K C (PW4) was sleeping in a nearby house and went there with a torch. He flashed the torch on the appellant and the appellant ran away. They had closed their door using a stone and did not know how the appellant managed to enter the house. The next morning, they went to report the matter at Lango Baya station. The appellant was later arrested. She knows the appellant very well as he has a reputation of breaking into people's houses.

PW2 L C was 12 years old and a class 4 pupil at [particulars withheld] Primary School. On that night, she was asleep with PW1 and PW3 when the appellant went there and touched PW1 on her thighs. PW1 woke up and told them that there was a man in the house. The appellant spoke and told them to keep quiet. She knew the appellant's voice. Her father woke up and flashed his torch. The appellant ran away. Her father ran after him and found him sitting on a car. They went there and saw the appellant wearing a white shirt and kikoy. She later recorded her statement.

PW3 M K was 14 years old and a class 7 pupil at [particulars withheld] Primary School. She is the elder sister to PW1. On the 14th January, 2013 they were asleep in their room at about 3.00 am the appellant went there. The appellant touched PW1 on her thighs and PW1 screamed. The appellant said "M tulia". Their father went with a torch and flashed on the appellant's face. The appellant ran away. Their father ran after him and caught up with him at a vehicle that had been parked. They went there and identified the appellant. It is her evidence that the appellant was targeting her instead of PW1.

PW4 C K C is the brother in law to PW1. On the 14th January, 2013 he was asleep at about 3.00 am when he heard PW1 screaming that there was someone in their house. His house neighbours the house where PW1 was sleeping. He went out with a torch and saw the appellant running fast. He knew the appellant as his in-law and also a driver of his motor cycle. The children told him that the appellant wanted to rape PW1. The children had seen the appellant's face when he flashed his torch. He went to the appellant's home and informed his parents. He found him in the morning but he ran away and boarded a matatu.

PW5 GEORGE LAWRENCE OGUDA is a government analyst who analysed the drugs in relation to count 2 and found the drugs were cannabis. PW6 APC JOHN KIGUNYA was attached to the Lango Baya AP post. On the morning of 14th January, 2013 at about 7.00 am he received a report from PW4, C K C, that the appellant had that night entered the room where three girls were sleeping. PW4 informed him that the appellant had boarded the same vehicle he had boarded when going to report at the station but had alighted on the way. They suspected that he was running away. They looked for the appellant but were unable to find him. At around midday he got information that the appellant had been seen near Lango Baya High School at a homestead. They went there and arrested the appellant. The appellant had a

radio and when it was opened they found three rolls of dry plant.

PW7 MWANACHENGONI SALIM was attached to the Malindi police station. On 14th January 2013 at about 5.00 pm she was at the station when the appellant was taken there by APC Kinyua while handcuffed. There were also three girls and another man. The case was reported to her and she carried out the investigations. The appellant was later charged with the offence.

In his unsworn defence, the appellant testified that he is a farmer at Chakama. On the 13th January, 2013 at about 9.00 pm he went to his farm to guard his maize from wild animals. At about 2.00 pm he went to the stage and he met C K C (PW4). They had fought with him the previous day and he had told him that he will teach him a lesson. They had disagreed over money. C K C told him that he had entered into his children's house but he denied. He proceeded to Lango Baya Market to sell his produce. Later that day two police officer went there and arrested him. He was told that he had attempted to defile a child. He told the police that he had a disagreement over money with C K C. He was shocked when he was told that he also had drugs when he was taken to police station.

The prosecution evidence shows that there was no defilement. It was an attempted defilement. The issue to be determined is whether there was attempt to defile PW1 and if so, whether the offender was identified. According to PW1, PW2 and PW3 they were all asleep on 14th January, 2013. PW1 felt someone touching her thigh. That person talked and told her to keep quiet. She identified his voice as that of the appellant. There is the evidence of PW4. He heard screams for the girl's house and went with a torch. He flashed the torch and the appellant ran away. The evidence of PW2 and PW3 is similar to that of PW1. There is the evidence of PW2 AND pw3 THAT pw4 ran after the appellant and caught up with him. PW4 testified that he found the appellant the following morning and he boarded a vehicle.

The evidence shows that the identification was by voice. There is no evidence that police were informed that the appellant was identified through his voice. The incident took place at night. When PW4 went to the house and flashed a torch, the offender ran away. I am not convinced that PW4 caught up with the offender. The matter was reported at 7.00 am at the Lango Baya A.P Post. The incident occurred at 3.00 am. It is evident that the offender ran away. The identification of the appellant through torch light is not convincing. According to PW2, her father caught up with the appellant who was sitting on a car. I believe she was referring to PW4. It is the evidence of PW4 that he did not get the appellant.

It is possible that there was an attempt to defile PW1. According to PW3, the appellant's intention was to get her and not PW1. It was dark and no one saw the appellant that time. The voice identification is doubtful. It is further doubtful if PW2 and PW3 heard what the offender said that night as they were asleep. The defence evidence does not raise any doubt on the prosecution case in relation to the sequence of events. However, the prosecution evidence does not prove the offence beyond reasonable doubt. I am satisfied that the appellant was found with the drugs he was found with. He has by now served his one year sentence.

Given the evidence on record, I am not satisfied that the prosecution proved its case beyond reasonable doubt. The identification of the appellant is doubtful. The appellant is entitled to the benefit of doubt. The appeal is merited and is hereby allowed. The appellant shall be set at liberty unless otherwise lawfully held.

Dated and delivered in Malindi this 15th day of November, 2016.

S.J. CHITEMBWE

JUDGE