



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 48 OF 2009**

**VINCENT KHACHALI OUNDO .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(An Appeal arising out of the conviction and sentence of M.W. NJAGI R.M. delivered in Busia  
Criminal case No.1305 of 2008)**

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

1. It is said that on 26<sup>th</sup> December 2008 J T (**The Complainant**) and her friend had visited [*particulars withheld*] in R Market within the now Busia County. After entertaining themselves they left the Bar at about 11 p.m. As they made their way home a man confronted the Complainant and attempted to defile her.
2. That man was said to be the Appellant, whom after Trial, was found guilty of the offence of attempted defilement of a child contrary to section 9(1) of the Sexual Offences Act (Cap No. 3 of 2006). By way of punishment, the Trial Court imposed a prison term of 10 years. Aggrieved by both conviction and sentence, the Appellant preferred this Appeal.
3. Although the Appellant had also been charged with two other counts of attempted arson contrary to section 333(a) of the Penal Code and being in possession of Narcotic Drugs contrary to section 3(1) of the Narcotic Drugs and Psychotropic Substance Act (Act No. 4 of 1994), this Appeal only discusses issues of fact and Law in respect to the offence for which the Appellant was convicted. This is because in the Decision under challenge the Learned Trial Magistrate acquitted the Appellant in respect to those two other counts.
4. The Complainant testified how she had on the material day and time being accosted by someone unknown to her. The two walked together for about 5 minutes and after making unwelcome overtures to her, the man led her into some nearby bushes. Feeling comfortable that they were now in an isolated place, the man removed a panga from his left waist side and placed it on her neck. At a moment, which is unclear from the testimony of the witness, the stranger forced his victim to ground, removed her trouser to the knee and tore her underpants. Faced with the danger, the Complainant screamed in distress. Lucky for the Complainant, and unlucky for the Assailant, four police officers who were on the beat came to her rescue. They found the man sitting on his victim.
5. The four police officers were William Onyango Onyuna (PW2), Antony Mwangi Mureithi (PW3), Lucas Ochieng Madang'o (PW4) and Jackson Mugo Kairu (PW5). At about 11 p.m., on 26<sup>th</sup> December 2008, the four were on foot patrol in Ruambua area when they heard screams from some nearby bushes. When they responded to the distress call they found a man with a girl. They gave accounts of what they saw and found at the scene. PW4 says that they found a girl laying on the ground with her back down and a man was on top of her. The two were struggling. The girls' pants and blouse were torn. PW3 in almost a similar account said that the girl was sleeping on her

- back and the man was on top of her. PW4s' account was that the Appellant was laying on the back of the victim. As for PW5 he saw a man on top of a girl who lay on her back, the girl was in a skirt and her pant had been removed and was torn. A detailed analysis of the evidence of each of these four witnesses shall be the subject of these Court's determination as the Appellant argued that the evidence of the four was inconsistent and unbelievable. As would be expected the four Police Officers arrested the Accused person and it then fell to PC Kevin Kipsuiua (PW6) to investigate the crime.
6. As part of his investigation, PW6 requested Ernest Achola (PW7) to carry out a Clinical Age Assessment of the Complainant. PW7 was at the time of the age assessment a Clinical Officer at Busia District Hospital. The witness returned a finding that at the time of assessment, being 12<sup>th</sup> March 2009, the Complainant was between the ages 16 and 18.
  7. At the close of the Prosecution case, the Trial Court found that the Prosecution had established a *Prima facie* case and invited the Accused person to make a Defence. In a sworn statement, he testified that at around 9.30 p.m on 26<sup>th</sup> December 2008 he was confronted by five Police Officers at a place near Ruambua Junction. They asked him questions as to where he was coming from and where he was going. They sat him down alongside two other people who were under arrest. At about midnight the Police Officers took them to Ruambua AP Camp where he was placed in the cells. Whilst there he was identified by CPL Masinde who told the other officers that the Appellant was a bad man who had in fact fought with him at one time. The Police Officer promised to ensure that the Appellant would die in prison. Hearing this other Police Officers set on the Appellant and assaulted him. The following morning at about 8.30 a.m., PW3 came with four other Police Officers and three girls. One of them was the Complainant and although the Officers attempted to have her implicate the Appellant, the Complainant told them that she had never seen him. It was his position that the charges against him were fabricated.
  8. This being a first Appeal the court has a duty to reevaluate the evidence and draw its own conclusions bearing in mind that it did not have the advantage of testing the demeanor of the witnesses during the Trial [**Okeno –vs- Republic [1932] EA 32**].
  9. The Appeal is a challenge of the quality and reliability of the Prosecution evidence. In his written submission, the Appellant takes up five issues in respect to that evidence. The arguments will be considered in their detail as this Court determines the matter. It would be sufficient for now to outline those issues. This Court was asked to make a negative inference for the non-availability of one B as a witness when it is said that she was with the Complainant at the time the Appellant accosted her. The Court was also asked to find that there was material inconsistency as to how the victim was forced into the bushes and the panga used to threaten her. Thirdly, the Appellant saw contradictions in the evidence of PW1, PW2, PW3, PW4, and PW5 as to the position of victim and the Appellant when they were allegedly found together in the bush. Connected to this is what was seen as contradiction as to the clothes worn by the Complainant and the Appellant, and the state of the clothes found at the scene. Lastly, it was submitted that the incident is said to have happened in the night and there was insufficient light for the Complainant to identify the Appellant.
  10. Responding to each of the issues Mr. Owiti appearing for the State asked this Court to disallow the Appeal. Counsel argued that the Law does not require the prosecution to call any minimum number of witnesses so as to prove its case. As to the supposed contradictions in the Prosecution evidence, this Court was asked to find that any contradictions were slight and immaterial.
  11. The evidence of PW1 is that on the material day she was dressed in a trouser and a blouse. Her attacker forced her to the ground and removed her trouser. As they struggled to remove her underpants it got torn. When the police officers came to her rescue the attacker was sitting on her back. Compare this with the evidence of PW2. He found a man on top of a girl, and the girl was laying on her back. He saw the two struggling. The girls blouse and pants were torn. At the scene and next to the girl was a panga. Then there is PW3. His account was similar to that of PW2. As to the panga, he gave two statements that did not agree. In his testimony in chief he stated that they found the Appellant having placed the panga on the girl but in cross examination he stated;-

**“The Panga and petrol were down”**

As for PW4 his account was similar to that of PW2.

12. PW5 saw a man on top of a girl who was laying on her back. His testimony on how the girl was dressed was that she was wearing a skirt. For the first time the evidence is that the girl was wearing a skirt not trousers. But his evidence agrees with the other witnesses that the panga was on the ground near where the girl lay.
13. The evidence of the five witnesses is consistent in some aspects and inconsistent in others. There is consistency that four Police Officers heard screams and responded to the distress. That response led them to a bush. There they found a man and a girl. Consistency also is that the man was sitting on the girl. Inconsistency however, is whether the girl was laying on her stomach or her back. The four Officers saw her on her back but the victim herself says she was on her stomach. It must however be remembered, that as told by the victim, the Police Officers got to the scene as they were struggling with the stranger who had attacked her. If that struggle meant that the victim was constantly moving her body so as to avoid being defiled then it may not be a material contradiction if she says that she was on her stomach when the Police Officers got to the scene and when the Police Officers say that they found her on her back. What seems material is that the Assailant was in fact on top of her.
14. To the credit of the five Prosecution witnesses they were all consistent as to the position of the panga at the scene. All stated that at the time the police officer got to the scene the panga lay by the side of the Complainant. Of course this Court is reminded that PW3 had at first said that they had found the Appellant having placed the panga on the neck of the girl. He nevertheless in cross examination aligned his evidence to that of the other witnesses. Consistency as well was the evidence as to the state of underclothing of the victim. In the struggle and eagerness to remove the victims' underpants the Appellant tore it. That was the victims' testimony. All the four Police Officers in their testimony found a torn underpant at the scene.
15. There is however, a glaring inconsistency of one aspect of the evidence by PW5 as against the evidence of PW1, PW2, PW3 and PW4. The four told Court that on the fateful day the Complainant was dressed in trousers. Somehow PW5 saw her in her skirt. It must be difficult to confuse a skirt for a trouser. But as to whether this inconsistency is so material as to defeat the prosecution case will turn on the overall strength or weakness of the Prosecution evidence. This Court turns to another aspect of the Prosecution case.
16. How was the attacker dressed on that night? PW1 said nothing of those clothes. As for PW2 he mentioned that a match stick was recovered from the Appellants jacket. PW3 was more elaborate on the clothes worn by the Appellant. That he had a green jacket which he had removed and a flowered shirt. As for PW4 he confirmed that a jacket was found at the scene but says nothing about its colour. He then told Court that the Accused wore a brown trouser. As for PW5 he testified that they recovered bhang and a match box from the Appellants jacket. On my Analysis the five witnesses give different aspects of the Appellants clothes. Four of the witnesses were in agreement that the Appellant had a Jacket. Some like PW3 were more detailed. That said, none of the five gave any contradictory evidence.
17. Before this incident, the Appellant was unknown to the Complainant and the incident happened at 11 p.m. at night. Four of the five key witnesses told Court that they were able to see the Appellant because there was moonlight. These four were PW1, PW2, PW3 and PW5. As for PW4 he stated that it was a dark night. Is the argument by the Appellant that he was not properly identified because of the quality of light therefore a good argument? Perhaps not, because the evidence is that the Appellant was caught redhanded. He was arrested while on top of the Complainant. The four Police Officers who arrested a person who was on top of the Complainant escorted the Arrested person to Ruambua AP post. There is no doubt that the arrested person was the Appellant.
18. What Defence was put forward? Although the Appellant accepts that he was arrested by some police officers near Ruambua area he does not accept that it was in the circumstances told by Prosecution. The Appellant explained that he was arrested while walking home. For no good reason he was locked up in the cells at Ruambua Administration Police Camp. He was assaulted while in the cells and on the following morning the current Charges were fabricated. To his mind it was CLP Masinde who led in fabricating the charge. But was this Defence theory put to the Prosecution witnesses? Confronting PW1 on cross examination, the Appellant put it to her that

she had fabricated the story because he (the Appellant) had refused to buy her beer. No question was fielded about CLP Masinde. And even more curiously the Appellant did not take up the issue when cross examining the four key police officers who would have had to co-operate with CLP Masinde in trumping up the charges. Interestingly when given the opportunity to cross examine PW4, he put it to that witness that the witness and himself were both lovers of the Complainant and so PW4 was using the Criminal Justice process to punish him. Nothing about CLP Masinde! This Court takes the view, and in agreement with the Learned Magistrate, that the Defence was an afterthought and pale when compared with the strength of the Prosecution case.

19. The Prosecution case was so strong that this Court cannot make any negative inference on the failure of the Prosecution to call one B. B is the girl who was said to have been with the victim at the time she was confronted by the Appellant. There is nothing to suggest that B did not testify because of some ill motive on the part of the Prosecution. It seems to me that the facts that needed to be proved by the Prosecution were sufficiently proved by the witnesses it called. The Prosecution is not obliged in law to call a particular number of witnesses. See section 143 of The Evidence Act which provides:

**“No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact”**

20. As would be clear my view is that the Appeal on conviction lacks merit and is for dismissal. A short observation on the sentence. Under section 9(2) of the Sexual Offence Act a person who attempts to defile a child is liable to imprisonment for a term not less than 10 years. There was Clinical evidence that the victim was a child at the time of the attempt. The Learned Magistrate cannot therefore be faulted when she imposed a 10 years’ imprisonment which is the minimum jail sentence prescribed by the law.

21. The upshot the Appeal is dismissed in its entirety.

**DATED, SIGNED AND DELIVERED AT BUSIA THIS 5<sup>TH</sup> DAY OF MARCH 2015**

**F. TUIYOTT**

**J U D G E**

**IN THE PRESENCE OF:**

**KADENYI.....COURT CLERK**

**PRESENT IN PERSON.....FOR THE APPELLANT**

**OWITI.....FOR THE RESPONDENT**