



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 47A OF 2013

TOM MONGARE NYAMACHE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant, **Tom Mongare Nyamache** was charged with attempted defilement contrary to section 9(1)(2) of the Sexual Offences Act, No. 3 of 2006. The particulars were that on the 23rd November, 2011 at *[particulars withheld]* village in Transmara West District within Narok County intentionally attempted to cause his penis to penetrate the vagina of S K, a girl aged 13 years old.

2. He appellant also faced the alternative count of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. Particulars were that on 23rd November, 2011 at *[particulars withheld]* village in Transmara West District within Narok County intentionally touched the breasts of S K a child aged 13 years.

3. The appellant was tried at Kilgoris by Senior Principal Magistrate. He was convicted and sentenced to 10years imprisonment. He now appeals against the conviction and the sentence of the trial court delivered on 24th May, 2013. His grounds of appeal are as listed herebelow:

1) The learned trial magistrate erred in law and in fact by misdirecting himself fundamentally in the first instance, by proceeding with the trial of the suit without advising him that the offence he was charged with was a very serious.

2) The learned trial magistrate erred in law and in fact by allowing the appellant to proceed with the criminal case in the lower court without his advocate on record prematurely and in particular without prosecution's witnesses statements.

3) The learned trial magistrate erred in law and in fact by misdirecting himself that the prosecution evidence was not contradictory.

4) The learned trial magistrate erred in law and in act by misdirecting himself placing the appellant on his defence and yet the prosecution had not established any prima facie case against the accused.

5) The trial magistrate erred in law and in fact by not taking into consideration the ingredients of identification and recognition of the appellant by the complainant.

6) *The trial magistrate erred in law by shifting the burden of proof from the prosecution to the Appellant/Accused.*

7) *The trial magistrate erred in law and misdirected himself by not taking into consideration accused's evidence.*

8) *The trial magistrate erred in law and misdirected himself by arriving to a decision that the prosecution/Respondent had proved its case beyond any reasonable doubt.*

4. The appellant's submission.

1) *The appellant submitted that it was wrong for the trial magistrate to convict without first ascertaining the age of the complainant.*

2) *That since the appellant owed a debt to the complainant- there was bad blood, so these charges are framed up and fabricated.*

3) *That the complainant was old enough, 15 years, to have a relationship with the appellant.*

4) *That it is unbelievable that the complainant was held tight by the neck and yet did not scream to attract attention.*

5. The respondent's submission.

1) *The trial court was satisfied with the age of the complainant. Her age assessment was produced as exhibit.3, see P.24.*

2) *There was struggle between the complainant and the appellant, see p.9 of the record*

3) *The scream is impossible when the neck is tightly held as on the complainant.*

4) *The court's duty is to review and evaluate the evidence.*

5) *The burden of prove remained with the prosecution but when the appellant brought in the issue of a grudge, it was incumbent upon in to prove the same.*

6) *The prosecution case and the evidence remained unrebutted by the appellant.*

7) *The trial magistrate was convinced, see P.29 of the record, and rendered the judgment accordingly.*

6. This appeal is unmerited. The appellant has adduced no reason why this court should interfere with the findings of the trial court. The prosecution case was proved to the standard required. Therefore I ask that this appeal be dismissed because it lacks merit.

7. Conclusion.

Upon analysis of the evidence of the trial record and the judgment thereof and having listened to submission of both counsels for the respective parties hereto, I find that there is no merit in the appeal hereof, therefore the appeal dated 10th July, 2013 be and is hereby dismissed.

8. Orders accordingly.

Dated and delivered at KISII this13th day of February, 2014.

C.B. NAGILLAH,

JUDGE.

In the presence of:-

Abobo holding brief for Misota & Kerosi for the appellant.

Majale for the respondent

Edwin Mongare - Court Clerk.