



REPUBLIC OF KENYA

High Court at Meru

Criminal Appeal 99 of 2011

MARTIN MWIRIGI MAJAU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an appeal against both conviction and sentence in Criminal Case No.803/09 in Nkubu Law Courts- before S. M. Githinji)*

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

The appellant MARTIN MWIRIGI was charged with an offence of attempted defilement contrary to Section 9(1), (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on 20<sup>th</sup> day of May, 2009 at (particulars withheld) sub-location, (particulars withheld) location Imenti South District within Eastern Province the appellant attempted to commit an act which would cause penetration with his genital organ into genital organ of N.K.M, a child aged 8years. The appellant faced alternative count of indecent Act with a Child, contrary to Section 1(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence are that on 20<sup>th</sup> day of May, 2009 at (particulars withheld) location of Imenti Sought District, within Eastern Province, the appellant did an act of indecency with N.K. M, a child aged 8 years by touching her private parts namely the vagina and buttocks.

The appellant was convicted of attempted defilement and sentenced to 10 years imprisonment. Being aggrieved by the conviction and sentence he filed this appeal setting 9 grounds of appeal as herein below:-

1. *That the Learned trial Magistrate erred in law and fact in determining the matter against the weight of evidence.*
2. *The learned magistrate erred in law and fact in convicting the appellant notwithstanding the fact that the prosecution failed to discharge the burden of proof fully and satisfactorily.*
3. *The learned magistrate erred in law and fact in wrongfully applying the law of sentencing in a most unusual manner hence the sentence is excessive in the circumstances.*
4. *The learned magistrate erred in law and fact in not realising that the evidence in record did not support the charges against the appellant.*
5. *The learned magistrate erred in law and fact on failing to consider the inconsistency and contradictory of the prosecution witnesses.*
6. *The learned magistrate erred in law and fact in that without any medical and corroborative evidence the conviction could not stand.*
7. *The learned magistrate erred in law and fact in not finding that the case against the appellant was not adequately investigated.*
8. *The learned magistrate erred in law and fact by failing to give due cognizance and recognition of the appellant's defence.*

**9. *The learned magistrate erred in law and fact by not considering that the accused was entitled to proper investigation and hence required presence of his counsel.***

This is the first appeal and being first appellate court I have the duty and obligation to re-evaluate and re-analyse the evidence that was adduced at the lower court to enable me reach my conclusion. When doing so I have to bear in mind that I never had the opportunity to observe or hear the witnesses give evidence and observe the manner and demeanor of the witnesses. Those basic principles were set down in the case of **OKENO –V – REPUBLIC(1973) EA 32** where Court of Appeal set out the duty of the first appellate court in the following terms:

**“An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [Pandya vs. Republic (1957) EA 336] and to the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)”**

The appellant was represented by Mr. Kimathi Kiara, learned Advocate who made the following submissions. Mr. Kimathi Kiara combined all the 9 grounds of appeal and opted to argue all of them under ground No.4. He urged that none of the prosecution witnesses gave evidence in support of the charge of attempted defilement.

He urged PW1, mother to the child testified that she noticed her child as bending with pain. That she tried to find out why but the child did not tell her. She decided to call a neighbor to talk to the complainant. Complainant then disclosed to the neighbor the reason. He urged that the neighbor was not called as a witness and submitted the evidence is hearsay. He urged that the complainant stated that the appellant did bad things to her by chasing her with a panga when she was going to school. He submitted that PW2 stated that appellant removed her pant. He urged that evidence is contradictory to that of complainant’s mother. He further submitted there was no medical evidence of attempted rape. Mr. Kimathi, learned advocate urged the complainant was coached by her mother to give false evidence against the appellant. He further submitted the offence was allegedly committed in presence of other 5 children and none was called to give evidence. He submitted the court was left with uncorroborated evidence of a child of tender years. He urged the evidence was not enough to sustain conviction.

The appeal was strongly opposed by Mr. Jackson Motende, learned State Counsel, who urged that the appeal to be dismissed for lack of merits. Counsel urged that there was sufficient evidence to support the offence of defilement. He urged PW2 the complainant was truthful. That she stated she knew the appellant by his name and at the time of the commission of the offence PW2 was with other children at the company of PW4. That the appellant took the complainant to the house of PW4. That PW2 gave details as to what happened. That in the house the appellant threw PW2 to the bed and defiled the complainant. The learned Counsel submitted that there was no grudge nor reason to frame the appellant with the offence of defilement. The learned Counsel referred court to Section 124 of the Evidence Act and stated that evidence of a victim need not be corroborated in Sexual Offences of a minor. He urged there is silence on the medical report. He urged however the evidence of the minor was sufficient to prove the charge. The State Counsel urged in his conclusion that the appellant was charged with attempted defilement as there was no penetration and that in offences of attempted defilement there is no legal requirement for medical document so long as there is other evidence to support the offence.

The learned State Counsel urged that the evidence of PW1 and PW4 dislodged the appellant’s defence of alibi. He urged that the appellant is a neighbor and was seen at the scene by PW2 who knew him. He urged that the conviction and sentence were proper and the appellant was sentenced to the minimum sentence prescribed by law.

The facts of the prosecution case are that PW1 P.K.M on 20/5/2009 about 8.00 a. m the complainant, N.K, aged 8 years daughter to PW1, left to visit her grandmother about 300 metres away. The child PW2, left with her brother V.M aged 6 years.

The children returned at 4.00 p.m. PW1 told PW2 to clean the kitchen and she cried saying she was in pain. The mother requested the child which part was paining and she pointed at her genitalia but refused to explain what had caused the pain. PW1 called her neighbor and asked her to find out what had happened to PW2.

PW2 told the neighbor that her uncle the appellant threw her to bed, removed her clothes and inserted his urinary organ into hers. PW1 took PW2 to a private clinic and reported to the police. PW1 took P3 form and took it to Igoji Police Post. PW2, N.K a minor aged 8 years testified that she knew the appellant by his name as Martin Mwirigi and as a neighbor. PW2 testified that there is a time she went to her uncle's house and appellant was at PW1's uncles home. That PW1's uncle was at home. That PW2 testified that the appellant removed her pant. He also removed his clothes. He lowered his trouser. That he inserted his penis into her vagina. That PW1 bled. Appellant then left and PW2 went back to his home. PW2 told her mother about the incident and was taken to the hospital. PW3 No.87016414 PC Michael Cheptoo confirmed that one P. M reported of defilement of PW2 by a person known to them. He was referred to Igoji Police Post. He testified that they later found the appellant surrounded by members of public and they arrested him. PW4 D.B.M testified that PW2 and other children visited his home. That the appellant passed by and PW4 left him with the children as he went to cut grass for his cows. On return PW4 found the appellant had left but children were there. PW4 testified that when he left he had not locked his house. He testified that he was told by PW2's parents their daughter had been defiled at his house. PW5 No.41470 PC Richard Ombui testified that on 20/5/2009 at 10.00 p.m., PW3 and APC Mugendi in the company of the complainant and her parents brought the appellant on alleged attempt of defilement. PW3, booked the appellant, issued P3 form to the complainant, P3 form was filled. He later recorded statement of witnesses and charged the appellant. The prosecution closed their case without calling a Medical Doctor.

On the appellant being placed on his defence he gave sworn statement. The appellant gave a defence of alibi. He averred that on 20.05.2009 he went to fetch grass for the cows. That after that he went to visit a carpenter called Mutugi but he did not find him. That at around 11.00 a.m. he joined a lorry which was going to carry firewood and returned to the market at 4.00 p.m. whereby he remained at the market with young men chewing Khat and later in the evening police came and arrested him as many young men wanted to lynch him. He stated that he was not told why the youth wanted to lynch him. He testified that M came with N.K and claimed that he had defiled a girl at 3.00 p.m. He testified that he had not known N. K before but her father. He averred that he was fixed.

The conviction of the appellant was based on evidence of PW1, PW2 and PW4. PW2 N. K was a minor aged 8 years at the time of commission of the offence. It is important when dealing with evidence of a minor in a Sexual Offence to look at whether in absence of corroboration whether the conviction can be sustained. Under Section 124 of the Evidence Act it is provided:-

***“124. Notwithstanding the provisions of section 19 of [the Oaths and Statutory Declarations Act](#), where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.***

***Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”***

In the instant case the offence is a sexual offence. The direct evidence is that of PW2, the alleged victim of the offence. There was no medical document produced in this matter. There was however evidence of PW4 D.B.M who had placed the appellant at the scene of incident and who had left the appellant with

PW2 and other children at his home. The learned trial Magistrate who had the opportunity to hear PW2's evidence and assess her demeanor found PW2's evidence to be realistic, factual and cogent. Court also did not doubt the evidence of PW1 as to what followed and leading to the arrest of the appellant. The learned trial Magistrate was satisfied the victim (PW2) was telling the truth. In the circumstances I find and hold that PW2's evidence met the threshold as set out under Section 124 of the Evidence Act and it did not need to be corroborated by other material evidence in support thereof implicating the appellant.

The absence of a Medical Report did not in anyway affect the evidence of the minor victim as the appellant was convicted of an attempted defilement for which medical report was not a must to prove the offence, so long as there was other evidence to support the offence. In this case there was evidence of PW1 and PW4. PW1, PW2 and PW4 knew the appellant. Appellant was seen by PW4 who met him at his house, talked to him and left him at his home with PW2 and other children. PW2 gave a detailed and well narrated evidence as to what the appellant did to her. PW1 testified her daughter was unable to bend and she explained the pain was from her private part though she did not tell her mother who had injured her. It is understandable a child of 8 years would be ashamed and scared of the consequences that shall befall her incase she discloses to her parents what had happened. PW2 was able to inform a neighbor who told PW1 what had happened to her leading to the arrest of the appellant. The fears of PW2 in disclosing the name of her assailant to her mother cannot be taken as a frame up case against the appellant.

The incident took place during day time at the home of PW4. PW4 saw and recognized the appellant when he came to his home. PW2 knew the appellant. He was equally known to PW1.

I have carefully examined the evidence of the complainant, PW4 and basis upon which they claim they saw and recognized the appellant. My observation is that the complainant and PW4 gave the name of the appellant to the police. They claimed to have known the appellant by his name and as a neighbor.

I find the evidence of PW2 and PW4 to be consistent and unshaken and carefully pointed to the identification of the assailant as the appellant. The appellant denied having committed the offence with which he was charged. He gave a sworn defence. The appellant's defence was of alibi. The trial Magistrate considered the appellant's defence and investigated the issue of whether indeed the appellant was at the scene of the incident.

The trial court found the defence to be uncorroborated and weightily discredited by evidence of PW1 and PW4 who placed the appellant at the scene of the crime. PW1 and PW4 had no grudge against the appellant.

I have carefully looked at the evidence of PW1, PW2, and PW4 and have found that the evidence of the aforesaid prosecution witnesses dislodged the appellant's defence of alibi. The appellant was known to PW1, PW2 and PW4 and had been seen at the scene of the crime and even left with PW2 by PW4. The appellant was properly recognized.

I am therefore convinced the evidence of PW2 needed no corroboration as it met the threshold under Section 124 of the Evidence Act and was safe to found conviction. In addition to the above PW4 placed the appellant at the scene of crime.

I accordingly dismiss the appeal, since the same has no merits. I hereby uphold the conviction and confirm the sentence that was imposed by the learned trial Magistrate.

Right of Appeal explained.

DATED, SIGNED AND DELIVERED AT MERU THIS 9<sup>TH</sup> DAY OF MAY, 2013.

**J. A. MAKAU**  
**JUDGE**

DELIVERED IN OPEN COURT IN THE PRESENCE OF

1. Mr. Motende for State
2. Mr. L. Kimathi for the appellant
3. Appellant present in person

**J. A. MAKAU**  
**JUDGE**