



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CRIMINAL APPEAL NO. 69 OF 2010

OLIVER MUINDI PETER APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence of B. Ochieng delivered on 17/9/2009 in Makindu Principal Magistrate Criminal Case No. 1151 of 2007)

(Before Hon. B. Thurania Jaden J)

J U D G M E N T

1. The Appellant, **Oliver Muindi Peter**, was charged with the offence of attempted defilement of a girl under the age of (16) years contrary to **section 9 (3)** of the **Sexual Offences Bill of 2006**.

The particulars of the offence were that on the 8th day of October 2006 at **[particulars withheld] village, Makindu Location, Kibwezi District** within **Eastern Province**, unlawfully attempted to commit an act which would cause penetration with **W K**, a girl aged 14 years.

2. The Appellant pleaded not guilty. After a full hearing, the Appellant was convicted and sentenced to serve ten (10) years imprisonment.
3. The Appellant was aggrieved by both the conviction and sentence and appealed to this court on the following grounds:-
 - v. **That the judgment was not dated.**
 - v. **That the evidence of the prosecution witnesses was unreliable.**
 - v. **That no medical report was produced.**
 - v. **That the prosecution did not discharge the burden of proof.**
 - vi. **That the defence case was not considered.**
 - v. **That the sentence was harsh and excessive.**
4. During the hearing of the appeal, the Appellant relied on his written submissions. The said submissions essentially expound on the grounds of appeal.

5. The appeal was opposed by the State. **Ms. Abuga** the prosecution counsel submitted that the Appellant was caught red handed and that the Appellant was positively identified. That the defence case was not convincing and that the sentence meted out was within the law.
6. This being a first appeal, we are duty bound to re-evaluate the evidence and the record afresh and come to our own conclusions and inferences – See **Okeno –vs- Republic (1972) EA 32**.
7. The case for the prosecution was that on the material date at about 7.00 p.m., PW1 **W K** was going to fetch water. The Appellant who was a neighbour called her and told her that he wanted to send her. They walked together and as they were passing a thicket, the Appellant knocked her down and stripped her naked and sexually molested her. That the Appellant inserted his penis into her vagina but ejaculated before he had achieved full penetration. That the Appellant gave the complainant a Kshs.20/= coin and promised to give her Kshs.1,000/=.
8. The complainant’s mother was worried about the complainant’s delay in returning to the house. The mother followed the complainant only to find her and the Appellant in the bushes naked. The mother called a neighbour, PW3 **R J**. The neighbour found the complainant together with the Appellant pulling up his trousers.
9. The matter was reported at the police station. After investigations the Appellant was charged with the offence herein.
10. In his defence the Appellant described himself as a businessman. He gave unsworn evidence. No witnesses were called. The Appellant denied the offence and stated that he knew nothing about the alleged defilement. The Appellant stated that he was framed up by the complainant’s mother because of business rivalry.
11. The complainant, a 14 year old standard 4 pupil at the time she testified gave sworn evidence. She described the Appellant as a neighbour who she knew well. The encounter with the Appellant was at close proximity. The time of the offence was described by the complainant as about 7.00 p.m. Dusk was just setting in. The circumstances were therefore conducive for positive identification without the possibility of error. Indeed the complainant’s evidence is that of recognition.
12. The complainant’s mother (PW2) and the neighbour (PW3) gave evidence that corroborated the complainant’s evidence. It was the evidence of PW2 and PW3 that they found the complainant and the Appellant in the bushes naked. PW2 who was the first to arrive at the scene found the Appellant with his pants down. PW3 who was called to the scene by PW2 found the Appellant pulling his pants up. PW2 and PW3 moved close to the Appellant and started questioning him before the Appellant fled. The evidence of PW2 and PW3 is also that of recognition. They knew the Appellant as their neighbour. PW3 described the distance between her and the accused before the Appellant fled as 3 metres. The circumstances they found the Appellant in left no doubt what his intentions were.
13. The evidence of PW4 **P.C. Solomon Kamau** confirmed that a report was made at **Makindu Police Post** and investigations carried out and the Appellant arrested and charged.
14. The defence case is that the Appellant was framed up by the complainant’s mother due to business rivalry. I do not find the defence case convincing in view of the overwhelming prosecution evidence. No reason has emerged from the record why PW1, PW3 and PW4 would frame up the Appellant.
15. After evaluating both the prosecution case and the defence case, I am satisfied that the prosecution discharged their burden of proof. The production of a medical report was not necessary as this is an offence of attempted defilement.
16. The original hand written judgment is dated 17/9/09. The failure to reflect the date on the typed copies is a typographical error.
17. With the foregoing, I find the appeal has no merits and dismiss the same. The sentence is within the law. The conviction and sentence of the lower court are upheld.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 7th day of October 2013.

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B. THURANIRA JADEN

JUDGE