



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
CRIMINAL APPEAL NO. 87 OF 2013

**Appeal from the original conviction and sentence of the Acting Senior Resident Magistrate at
Mwingi in Criminal Case No.696 of 2012 (V.A Otieno)**

MUTHENGI MUNYOKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

Introduction

Muthengi Munyoki is charged with assault causing actual bodily harm contrary to section 251 of the Penal Code. It is alleged that on 19th December 2012 in Migwani District within Kitui County unlawfully assaulted J M thereby occasioning her actual bodily harm.

After taking evidence of four prosecution witnesses and the appellant's defence, the trial magistrate found the charge proved and convicted the appellant. He was sentenced to serve 3 years imprisonment.

Brief facts

Briefly, the appellant accosted the complainant J M, PW1, on 19th December 2012 at about 10.00pm. He covered her mouth and grabbed her neck causing her bruises. The matter was reported at Migwani Police Station leading to the arrest of the appellant and charge. In the meantime the complainant was taken for treatment and a P3 Form completed.

Petition of appeal

The appellant filed an amended petition on 4th June 2014 with leave of the court in which he listed six grounds of appeal, namely:

- i. That the trial was unfair to him.
- ii. That the case was not proved beyond reasonable doubt.
- iii. That the prosecution evidence is inconsistent.
- iv. That he is a first offender.
- v. That the trial magistrate did not consider his defence of alibi.

The appellant made brief submissions in support of the case. He submitted that he was not accorded a fair trial and that the trial magistrate handled the case carelessly; that there are inconsistencies in the evidence

by the prosecution and that investigations were not conducted.

Respondent's submissions

The appeal was opposed by the respondent. The learned state counsel submitted that the appellant was accorded a fair trial; that he was present during the entire time his case was being heard and he participated in the trial and cross examined witnesses; that the appellant was not prejudiced by the alteration of the charge sheet and the alterations were legally done.

Learned state counsel further submitted that the prosecution proved the case beyond reasonable doubt; that the defence of alibi was not raised at the lower court and the appellant did not give notice to the prosecution that he would be raising the defence of alibi and that his defence is a mere denial. Counsel urged the court to dismiss the appeal for want of merit.

Determination

I have read the record of the lower court. The appellant was initially charged with attempted defilement contrary to section 9(1) (2) of the Sexual Offences Act and an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. These charges were in respect to the same complainant in the current charge subject of this appeal. Hearing of the case started on 20th February 2013 when the complainant testified as PW1. After her testimony the prosecutor amended the charges. Actually, it is not amending. It was substitution of the charge of defilement and alternative charge of committing an indecent act with a charge of assault causing actual bodily harm. The court ordered the hearing to proceed under per the provisions of section 200 Criminal Procedure Code. The court took evidence from other witnesses and placed the appellant on his defence. I wish to state here that section 200 of the CPC is irrelevant in this case. This was not a case where a different magistrate had recorded the evidence. It was the same magistrate. The relevant section is 214 CPC.

Section 214 of the Criminal Procedure Code addresses situations where it becomes necessary to alter the charge either by way of amending, substituting or adding to the charge. In this case, the prosecutor applied to substitute the charge after the complainant had testified. The original charge was attempted defilement and alternatively committing an indecent act with a child. The substituted charge was read over to the appellant who pleaded not guilty and the proceedings continued. He did not demand to have PW1 recalled to testify afresh or to be cross-examined.

The record of the proceedings does not show how the appellant was arrested. PW4, Corporal Purity Katii testified to taking the complainant for treatment and not about the arrest and charge of the appellant.

PW3, Thomas Gichohi, the clinical officer who treated the complainant testified that the complainant had bloodstained dress, had bruises on the neck and the legs were weak. There is no evidence to show where the blood on her dress came from. The complainant did not testify to bleeding as a result of the alleged attack. Does this court assume that the blood came from the neck?

I have looked at the P3 Form. Obviously, the P3 Form is in respect to alleged attempted defilement and not assault causing actual bodily harm. PW3 found "presence of blood; neck pains; chest pains and weakness of legs". It is not explained where the blood came from given that the P3 Form is about attempted defilement as shown in Part 1 and 11 of the Form.

In his defence the appellant does not talk about 19th December 2012 when the alleged assault occurred but 20th December 2012. He testified that he met the complainant who seemed angry and that he was told by his employer that the Chief had summoned him. He testified that he was surprised after he was detained. He told the court that there existed a grudge between him and the complainant.

My careful analysis of the evidence leads me to the conclusion that this case was casually handled. The complainant did not testify to being injured on her neck. She told the court that she was accosted by the appellant as she slept by covering her mouth and grabbing her neck and that she did not know his

intentions. Nowhere does she state that she was injured either on the neck or any other part of her body. Add this evidence to that of the P3 Form that supports attempted defilement and this leads me to one conclusion, that the evidence does not prove this case beyond reasonable doubt. On this ground alone, this appeal succeeds with the result that the conviction is hereby quashed, the sentence is set aside and the appellant is set free forthwith unless for any other reason he is held in custody. It is so ordered.

Dated, signed and delivered this 28th July 2014.

S.N.MUTUKU

JUDGE