



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
CRIMINAL DIVISION

CRIMINAL APPEAL NO.62 OF 2016

BETWEEN

ELIJAH NDUBI BUNDI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Kibera Cr. Case No. 1688 of 2013 delivered by Hon. Ondieki, RM on 2<sup>nd</sup> May, 2014).*

JUDGMENT

**Background**

1. The Appellant was charged with one count of defilement contrary to **Section 8(1) as read with Section 8(2) of the Sexual Offences Act**. The particulars of the offence were that on the 22<sup>nd</sup> day of May, 2013 in Riruta within Nairobi County, intentionally and unlawfully caused his penis to penetrate the vagina of FAO a girl aged eleven (11) years which caused penetration.

2. The Appellant was further charged with an alternative count of indecent act with a child contrary to **Section 11(1) of the Sexual Offences Act**. The particulars were that on 22<sup>nd</sup> May, 2013 in Riruta within Nairobi County, intentionally and unlawfully touched the vagina of FAO a girl aged 11 years with his penis.

3. The Appellant was convicted of attempted defilement and sentenced to serve 10 years imprisonment. Dissatisfied with both the conviction and sentence he preferred the instant appeal. I have summarized the grounds of appeal vide an Amended Supplementary Grounds of Appeal dated 3<sup>th</sup> June 2019 as follows-

*a. That the prosecution witnesses were not credible;*

*b. That crucial witnesses did not testify.*

*c. That the evidence was improperly obtained.*

*d. That the trial court failed to take into account the differences between the complainant's family and the Appellant.*

*e. That the Appellant's defence was not considered.*

**Summary of evidence**

4. This is the first appellate court whose duty is to reevaluate the evidence and draw up its independent conclusions. In so doing, the court must consider that it has neither heard nor seen the witnesses and give due regard for that. (*See Njoroge v Republic (1987) KLR, 19*).

5. I have summarized the prosecution case as follows. **PW1, FAO** was heading home from school at about 5.00 pm when she was accosted by the Appellant who was a stranger to her on a deserted road. The Appellant gagged her using a piece of cloth and carried her onto his shoulder to his house. He undressed her, removed his clothes and lay on top of her. **PW1** attempted to scream but the Appellant threatened to cut her into pieces if she did. As he tried to insert his penis into her vagina, her mother, **PW2, FJL**, walked in and found the Appellant on top of her. On seeing **PW2**, the Appellant grabbed a knife and attacked her. In the ensuing struggle, **PW1** ran off leaving behind her underwear,

exhibit 2 and shorts, exhibit 1. It was **PW2's** testimony that she received a tip off from a Miss Karani who was a neighbor of the whereabouts of PW1. She (PW2) was accompanied to the scene by her sister, one Rosemary. They found the Appellant naked lying on PW1. She raised alarm and other members of public joined in and beat up the Appellant.

6. **PW3, RA** a sister to **PW2** entirely corroborated the testimonies of PW1 and PW2. She added that she accompanied **PW2** take **PW1** to Nairobi Women's Hospital where PW1 was examined and treated.

7. **PW5, Dr. Kizia Shako**, prepared a P3 form, exhibit 4 having further examined **PW1** on the 11<sup>th</sup> of June, 2013. This was three (3) weeks after the incidence. It was her finding that the hymen and the external genitalia were intact but there was a brownish discharge consistent with an infection. **PW6, P.C Timothy Sweta** was the investigating officer. He confirmed arresting the Appellant who was naked and hiding from a mob that wanted to lynch him. He had visible injuries. **PW7, Dr Joseph Murimi Karani** examined the complainant and produced a report in which he assessed the age of the complainant at 12 years old. The report was dated 23<sup>rd</sup> January, 2014.

8. After the close of the prosecution case, the court ruled that the Appellant had a case to answer and accordingly put him on his defence. He gave an unsworn defence. He stated that he was at a neighbor's house when he heard his name being called out. When he came out he met a woman, child and three young men. A former girlfriend of his started beating him alongside other people who had since gathered. He then lost consciousness and came to when officers arrived. He was taken for treatment. It was his defence that he had no idea what had led to his beating and consequent arrest.

9. **DW2, Grace Wambui Kamau** was the Appellant's witness. She testified that she was the Appellant's landlady and had known him for five (5) years. It was her evidence that she was in the company of the Appellant and together they were tilling. The Appellant then received a phone call and thereafter left. The landlady shortly thereafter heard a person scream only to find that the Appellant was being beaten.

### **Analysis and determination**

10. The Appellant appeared in person and sought to rely on his written submissions filed on the 3<sup>rd</sup> June, 2019. The Respondent was represented by Miss Akunja. Having analysed the evidence and respective rival submissions, I find that the issues arising for determination are whether the case was proved beyond a reasonable doubt and whether the prosecution failed to call crucial witnesses.

### **Whether the case was proved beyond reasonable doubt**

11. As to whether the prosecution established its case, this is a case in which the Appellant was caught red handed as he attempted to defile PW1. PW2, the mother to PW1 received a tip off that her daughter had been abducted by the Appellant. She called her sister, PW3 to accompany her to the Appellant's house where they found the Appellant was just about to defile PW1. He had forcefully undressed her and he too was naked. When PW2 commenced to rescue her daughter, the Appellant fought her and PW3 off and indeed tried to attack PW2 with a knife. The Appellant accosted PW1 at 5.00 pm when it was still day light. Furthermore, he was caught red handed and so the issue of mistaken identity does not arise.

12. PW1 was candid that her mother arrived just before the Appellant succeeded in defiling her. The medical evidence adduced in court too confirmed that penetration had not taken place. It is my view that all the elements of the offence of attempted defilement as defined under Section 9(1) were established. It provides as under;

***“A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.”***

13. From the foregoing definition, the offence is proved if it is demonstrated that there was an act that was devoid of penetration. In my evaluation of the evidence, it is clear that the Appellant was found in circumstances consistent with the charge he was convicted of. As such the prosecution discharged its burden of proof that the Appellant was culpable.

### **Whether all crucial witnesses testified**

14. It was the Appellant's submission that the prosecution failed to call two crucial witnesses, namely the landlady and a Miss Karani who was a neighbor who both were alleged to be eye witnesses of the incidence. He argued that they would have cemented the evidence of identification. From the evidence, the said Miss Karani tipped PW2 that the Appellant had abducted PW1. It is however clear that the absence of Miss Karani's evidence did not lessen the weight of the evidence of identification. PW3 was able to candidly corroborate the evidence of PW2 in so far as the identification of the Appellant and witnessing the incidence was concerned. Her failure to testify did not therefore weaken the prosecution case.

15. As for the landlady, she was called by the defence as a witness. That notwithstanding, the prosecution entirely carries the discretion of whom to call as a witness. The number and nature of witnesses depends on the evidence they intend to advance. Of paramount importance is that they call only such witnesses they deem are sufficient to prove their case. The witnesses who were called in this case ably established the prosecution case. In the circumstances, the evidence of the landlady may not have added such material evidence to what the prosecution already adduced. The absence of her evidence too was not fatal to the prosecution case.

16. The Appellant in his defence stated that he had visited a friend. He heard someone call for him outside. When he stepped outside he met some people who attacked him and he fell unconscious. It was his defence that he did not know the reason for the attack. He was also clear that he had seen his former girlfriend beating him. DW2 Grace Wambui Kamau stated that on the material day she was with the Appellant tilling land. He then received a phone call from his brother and left. She then heard someone scream and on going to the scene found that the Appellant had been attacked and was being beaten by a mob.

17. The Appellant's defence did not in any way dislodge the evidence of the prosecution. It is also contradictory as he gave a totally different account from that of his witness. The defence was a fabricated alibi and it failed to demonstrate his innocence.

18. The Appellant submitted that the witnesses PW1, PW2 and PW3 were members of the same family. As such, there was a high possibility that their evidence was doctored. The Respondent submitted that the testimonies were of corroborative quality. This is a case in which PW2, the mother to the minor was informed that her daughter had been abducted by the Appellant. As a cautionary measure, she decided to be accompanied by a third party on her mission to rescue her daughter. The third party was her sister. Their testimony was corroborated by another third party, the investigating officer who arrived at the scene only to find the Appellant fleeing from a mob that was baying for his blood. He was found having undressed PW1 and from the scene PW1's underwear was collected. In no way do these events point to fabricated or concocted evidence. He was culpable as charged.

19. I find that the appeal lacks merit and is therefore dismissed. As regards sentence, Section 9(2) of the Sexual Offences Act provides for a minimum sentence of ten years if an accused is convicted for the offence of attempted defilement. The court is alive to the Supreme Court decision of **Francis Muruatetu and Another** in which the Supreme Court declared a mandatory minimum sentence as unconstitutional. In the present case though, had PW2 not arrived on time to save her daughter, the Appellant could have succeeded in defiling her. I say so because he had threatened her with cutting her into pieces if she raised alarm. It is a case deserving stringent punishment. The ten years imposed in my view is sufficient punishment and I will not disturb it.

20. In sum, the appeal against both the conviction and sentence fails. The period the Appellant was in remand of eleven months and nine days prior to his sentencing shall be taken to constitute part of the sentence

**DELIVERED AND DATED THIS 31<sup>ST</sup> DAY OF JULY 2019.**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

*1. Appellant present in person.*

*2. Miss Akunja for the Respondent.*