



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAPENGURIA**

**CRIMINAL APPEAL NUMBER 22 of 2015**

**CORAM: JUSTICE S.M GITHINJI**

**(From original conviction and sentence in criminal case number 1420 of 2014 of the Principal Magistrate's Court at Kapenguria)**

**STEPHEN KEDITUKEI:..... APPELLANT**

**VERSUS**

**REPUBLIC:..... RESPONDENT**

**JUDGMENT**

The Appellant herein, one **STEPHEN KEDITUKEI**, was charged in the main count with the offence of *Attempted defilement, contrary to section 9 (1) as read with section 9 (2) of the Sexual Offences Act No. 3 of 2006*.

The particulars of this offence are that on the 8<sup>th</sup> day of October 2014 at around 7:00 p.m. at Ortum Division, within West Pokot County, the appellant herein unlawfully and intentionally attempted to cause his penis to penetrate the vagina of D N, a girl child aged 4 years.

There was a preferred alternative charge of *indecent Act with a child, contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006*.

The particulars hereof are that on the 8<sup>th</sup> day of October 2014 at [particulars withheld] in [particulars withheld] division within West Pokot County, the appellant did cause his penis to come into contact with the vagina of (D.N) a girl aged 4 years.

The evidence adduced by the prosecution is briefly that PW-1, who is the complainant in this case was aged 4 years at the time of the alleged incident. On 8/10/2014 at about 3:00 p.m. PW-2 who's the mother of the complainant left the complainant at home and went to the market in [particulars withheld]. It's while she was away that the appellant, who is referred to by the complainant as Baridi, went to the house where the complainant was. He removed her clothes and pant and did what she referred to as "Tabia Mbaya" (bad manners) to her. He then offered her money of which she refused to take. He left. The mother got back home at around 7:00 p.m. The children used to run to meet her whenever she returned home but at this particular time the complainant did not. She asked her what the problem was. The complainant told her that Ngaliech Baridi removed her pant and urinated on her vagina. She was given "pesa moja". The incident happened at a shade. Some three neighbours namely E, N and S checked the complainant and saw mucus like substance. She was taken to Ortum Mission Hospital. She was examined there by PW-3 who found that she was 4 years old, her genitalia were intact with no tears and no

bleeding. Labia Majora and Minora were intact. The hymen and cervix were also intact. There was no discharge. The said mucus like substance was not noticed. Urine analysis was done but nothing was noted. Her clothes were dry but her inner garments were torn and wet. She was sober but confused. She had tenderness on both thighs. She concluded that it was a case of attempted defilement. The P-3 was thus filled. It was produced together with age assessment report as exhibits.

The appellant in his unsworn testimony in defence indicated that his sheep and chicken had damaged the tomatoes of PW-2 and it's out of that, that he was framed with the preferred offences of which he did not commit. PW-2 demanded Kshs.30,000/- for her damaged tomatoes.

The appellant was found guilty of the offence in the main count and was sentenced on 24/3/2015 to serve 10 years imprisonment.

The appellant dissatisfied with both the conviction and sentence appealed on the grounds that:-

- 1. The elements of the alleged offence were not proved beyond reasonable doubt.**
- 2. The evidence was insufficient to warrant a conviction.**
- 3. The prosecution evidence was contradictory and inconsistent**
- 4. His defence was rejected without cogent reason.**

I have re-evaluated the entire evidence adduced in the case. What I find disturbing is the admission of evidence of part antecedents of the appellant, adduced by PW-2 in her evidence –in-chief. She stated;

“The accused is known for defiling children. He had defiled two children before. He has been locked up severally at Ortum for other offences”

The trial magistrate picked it in the judgment when he said, “she explained that the accused had a daughter but he was known for defiling other people’s children.” This shows that the evidence influenced the Magistrate in making his final decision. Admission of the said evidence, and it’s consideration in arriving at a verdict offends the provisions of **section 57 of the Evidence Act** which provides that:-

***1. In criminal proceedings the fact that the accused person has committed or been convicted of or charged with any offence other than that with which he is then charged, or is of bad character, is inadmissible unless –***

***(aa) such evidence is otherwise admissible as evidence of a fact in issue or is directly relevant to a fact in issue; or***

***a) The proof that he has committed or been convicted of such other offence is admissible under section 14 or section 15 to show that he is guilty of the offence with which he is then charged; or***

***b) He has personally or by his advocate asked questions of a witness for the prosecution with a view to establishing his own character, or has given evidence of his own good character; or***

***c) The nature or conduct of the defence is such as to involve imputations on the character of the complainant or of a witness for the prosecution; or***

***d) He has given evidence against any other person charged with the same offence:***

***Provided that the court may, in its discretion, direct that specific evidence on the ground of the exception referred to in paragraph (c) shall not be led if, in the opinion of the court, the***

***prejudicial effect of such evidence upon the person accused will so outweigh the damage done by imputations on the character of the complainant or of any witness for the prosecution as to prevent a fair trial.***

***2. Notwithstanding the provisions of subsection (1), evidence of previous conviction for an offence may be given in a criminal trial after conviction of the accused person, for the purpose of affecting the sentence to be awarded by the court.***

Such consideration prejudiced the appellant herein and one can hardly conclude that if such evidence was omitted, the appellant would still have been found guilty.

Complainant's evidence is not clear on what exactly the appellant did to her. She stated that he removed her clothes and pant and did "Tabia Mbaya" (bad manners) to her. She did not explain what to her constitutes "Tabia mbaya or bad manners". PW-2, the mother appears to have exaggerated on her evidence to fix the appellant. She alleged that the complainant told her that the appellant urinated on her, suggesting he ejaculated on her. However the complainant herself never said so and PW-3's evidence did not support such. PW-2 went further to state that three neighbours examined the girl and saw mucus like substance. The three named neighbours were not called as witnesses, and no any other evidence suggested that there was such a substance or that the appellant ejaculated. The prosecution case does not explain what made the appellant not complete commission of the offence if actually that is what he was set for.

The complainant did not say that her pant was torn, but said it was removed. The question is who tore the pant of which was produced in court? She also did not say that the appellant removed his clothes or any part of them for purpose of defilement. The evidence of PW-3 suggests nothing had happened to the complainant which exclusively can be connected to the offence the appellant was charged with. There are definitely many other causes for tenderness of the thighs which is the only positive thing noted by PW-3.

The effort by Pw-2 to reveal part antecedents or bad character of the appellant is most likely than not, part of crafted intention to frame the appellant.

The appellant defence is to the said effect as he indicated he was framed as his sheep and chicken had destroyed PW-2's tomatoes. This is a case where considering the entire evidence he deserved the benefits of doubt. Prosecution case was not established beyond reasonable doubt.

I do so find, and consequently quash both the conviction and sentence. He, the appellant should be set free unless otherwise lawfully held.

Judgment read and signed in the open court in presence of Mr. Mark for the State and the Appellant in person this 31<sup>st</sup> day of January, 2017.

**S. M. GITHINJI**

**JUDGE**