



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

**CRIMINAL APPEAL NO.22 OF 2016**

**ABDULLAHI ABDI WARKICHA ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*( From the original conviction and sentence in criminal case No.156 of 2015 of the Senior Resident Magistrate's Court at Moyale by Hon. M.S Kimani – Resident Magistrate)*

**JUDGMENT**

The appellant, **ABDULLAHI ABDI WARKICHA**, was convicted for the offence of attempted defilement contrary to section 9(1) (2) (sic) of the Sexual Offences Act No.3 of 2006.

The particulars of the offence were that on 27<sup>th</sup> May 2015 at [**particulars withheld**] village in Takaba area of Mandera County, intentionally attempted to cause his penis to penetrate the vagina of **D.H.I**, a child aged 12 years.

He was sentenced to serve ten years imprisonment. He has appealed against both conviction and sentence.

The appellant was in person. He raised the following five grounds of appeal:

- 1.That the learned trial magistrate erred in law and in fact by convicting him without him having been subjected to medical examination.
2. That the trial was a nullity for he was not given copies of the witnesses' statements.
- 3.That the learned trial magistrate erred in law and in fact by convicting him without the age of the complainant being assessed.
4. That the learned trial magistrate erred in law and in fact by convicting him on the basis of exhibits that did not meet the requisite threshold.
5. That the learned trial magistrate erred in law and in fact by convicting him without sufficient evidence .

The state opposed the appeal through Mr. Chirchir, the learned counsel.

The facts of the prosecution case were briefly as follows:

At about 8 a.m the complainant in company of another girl were looking after their goats. The appellant went to where they were and offered them Kshs.1000/= so that he could have sexual liaison with them. When they declined, he removed his trousers and started to chase them. The complainant fell down. He caught up with her and a struggle ensued as he attempted to undress her. However he could have accomplished his mission but for her companion who beat him with a stick. At that juncture another adult went to the scene and the appellant started to run away. He was arrested and taken to the police.

The appellant denied any involvement in the offence and contended that he was falsely implicated after his employer refused to pay him some money he had worked for.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **OKENO vs. REPUBLIC [1972] EA 32.**

The charge was erroneously drafted. The offence in count one ought to have been contrary:

***to section 9(1) as read with section 9 (2) of the Sexual Offences Act.***

From my perusal of the record of the entire proceedings, I have formed an opinion that the appellant understood the charge against him and he fully participated in the trial. He was therefore not prejudiced. The defect is therefore curable under section 382 of the Criminal Procedure Code.

The issue of medical examination of an accused person was settled in the case of **GEOFFREY KIONJI vs. REPUBLIC CR. APPEAL NO 270 OF 2010**, where the Court of Appeal observed as follows:

***Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person.***

This is what the court said about defilement. The same ought to apply even in cases of attempted defilement where in most cases such evidence may not be forthcoming. In the instant case, the medical examination of the appellant would have not yielded much. I therefore find that this ground has no basis.

On 20th May 2015 when the plea was taken, the court ordered that the appellant to be issued with witnesses' statements. When the prosecutor indicated that he was ready to proceed on 16th June 2015, the appellant told the court that he was ready to proceed. He never indicated to the court that he had not been supplied with copies of statements. He cannot be heard to raise this issue at this stage. By his own conduct he is estopped.

Though the appellant contended that the age of the complainant was not assessed, the record does not support this contention. Samuel Mbuvi (P.W6) produced an age assessment report (exhibit 3). The age of the complainant was given as 12 years.

My perusal of the record does not reveal any irregularly tendered exhibits. This ground has no basis

The evidence against the appellant is that of **D.H.I** (P.W1), the complainant and that of **R.A.I**, (P.W 2). These two minors gave an account of how the appellant approached them with an offer of Kshs. 1000/= so that he could have sexual intercourse with them. when the duo declined, he removed his pair of trousers and started to chase them. **D.H.I** fell down. He caught up with her and attempted to defile her. She resisted and a struggle ensued before **R.A.I** went to her rescue. She hit the appellant with a stick she had and he left her.

When he was fleeing he was arrested by **Alio Ibrahim Mohammed** (P.W 3). This witness testified that he was attracted to the scene by the screams of the girls. He found the appellant running away with his pairs of trousers in his hands. He gave chase and arrested him. This therefore corroborated the evidence of the two girls. I therefore find that there was overwhelming evidence against the appellant. He was convicted on very sound evidence.

Section 9(2) of the Sexual Offences Act provides as follows:

***A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years.***

The appellant was sentenced to the minimum sentence prescribed by the law.

After the analysis of the evidence on record, I find that the appeal lacks merit. The same is dismissed in its entirety.

**DATED at Marsabit this 19<sup>th</sup> day of April, 2017**

**KIARIE WAWERU KIARIE**

**JUDGE**