



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT CHUKA**

**HCCA NO.33 OF 2015**

**(FORMERLY MERU HCA NO.90 OF 2013)**

**EPHANTUS MUTEMBEI BAUNI.....APPELLANT**

**VERSUS**

**REPUBLIC.....PROSECUTOR**

**(An Appeal from the Judgment of Hon.C.K. OBARA SRM made on 2<sup>nd</sup> October, 2013 in Chuka  
Principal Magistrate's Court**

**in Criminal Case No. 267 of 2012)**

**JUDGMENT**

1. Ephantus Mutembei Bauni, the Appellant, was on 2<sup>nd</sup> March, 2013 arraigned before the Principal Magistrate's Court, Chuka with the offence of defilement contrary to section 8(1) (4) of the sexual offences Act No. 3 of 2006. It was alleged that on the 29<sup>th</sup> day of February, 2012 at Njaina in Karingani Location in Tharaka Nithi County within Eastern Province, the Appellant intentionally and unlawfully caused his penis to penetrate into the vagina of S. K. G a child aged 16 years. The Appellant also faced an alternative charge of indecent Act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. It was alleged that on the material day, the Appellant touched the vagina of the named child.
2. After trial, the court found the Appellant guilty of the offence of attempted defilement, convicted him of the offence and sentenced him to 10 years imprisonment. Aggrieved by that decision, the Appellant has now appealed to this court against both the conviction and sentence. The Appellant has set out a total of eight (8) grounds of appeal which can be summarized as follows:-
  - a. that the trial court conducted the trial in a partial and irregular manner;
  - b. that the trial court failed to consider the Appellant's mitigation;
  - c. that the trial court failed to make a finding that the Appellant was not medically examined;
  - d. that the trial court failed to consider that vital witnesses mentioned were not called and that the alleged identification or recognition of the Appellant was not free from the possibility of error;
  - e. that the trial court failed to consider the existence of a grudge between the Appellant and his family members; and
  - f. that the conviction and sentence was against the weight of evidence and that the judgment flouted the provisions of section 169 (1) and (2) of the Criminal Procedure Code (C.P.C).
3. This being a first appeal, this court is enjoined to review and re-evaluate the evidence afresh and

come to its own independent conclusions. However, in so doing, the court must have in mind that it did not have the advantage of seeing the witnesses testify. See Okeno - VS – Republic[1973] EA.

4. The evidence in the court below was that on 29<sup>th</sup> February, 2012 at about 6.30pm, the complainant, PW1, was taking milk to one Mercy Karimi. On the way, the Appellant grabbed her from behind and held her throat that she was unable to scream. He took her to the farm, removed her pant and did bad things to her. The pant was torn when being removed. He then raped her for 30 minutes. He asked her if she recognized him but because of fear of being harmed, she answered in the negative. She ran home and met PW2 and PW3 to whom she narrated what had happened. The two accompanied her and reported the incident to the area assistant chief, PW4, who told them to go to the police. On their way, they found a police vehicle which took them to hospital. Pw1 was treated and told to go make her statement to the police the following day. Although she admitted in cross –examination that the Appellant used to quarrel with the complainant’s uncle and aunt, she denied that that was the cause for their framing the Appellant.
5. PW2 and PW3 narrated how they were together on the evening of 29<sup>th</sup> February, 2012 when the complainant came and informed them that the Appellant had raped her. PW1 was at the time carrying in her hand a torn pant and was in shock. They took her to (PW4) who referred them to the police. On the way, they met a police vehicle on their way which took them to Chuka Hospital where the complainant was treated. They both denied framing the Appellant. PW4 told the court that when PW1 was taken to her that evening, she had soil on her head and shoulders. She also had some scratches on the neck and she was in shock. She referred PW1, PW2 and PW3 to the police. Later she received a letter from the police to arrest the Appellant which she did on 1<sup>st</sup> March, 2012 with the help of PW5, the sub-area and members of the community policing. PW6 was the investigating officer. He recalled how on 29<sup>th</sup> February, 2012 while on a night patrol, he saw three (3) ladies run to his police vehicle. They informed him that one of them had been defiled by a person known to her. He took them to Chuka Hospital. After treatment, he asked them to return the following morning to record statements. The following morning he saw PW1 with scars on her back. He ordered for the arrest of the Appellant from whom he took samples which, together with PW1’s pant, he sent to the government chemist. The result however showed that the pant neither had blood nor spermatozoa. He charged the Appellant with the offence before court. Pw7, the clinical officer from Meru South District Hospital told the court that he is the one who filled the P3 Form based on the hospital records. That when PW1 was examined, she was found to have scratch marks on the right side of the neck. On genital examination, there was nothing significant. Voutine examinations proved nothing significant. PW1 was put on antibiotics and painkillers for the injury sustained on the neck.
6. When put on his defence, the Appellant gave sworn testimony and called two other witnesses, his wife (DW20 and sister (DW3) respectively. He told the court that on the material day, he was at home with DW2 when DW3 came to pick her beans around 6pm. He went with DW3 to her home where he stayed until 9.00pm. The following day when strolling within the village in the evening he met the sub area with his team. They beat and arrested him. He was not told why he was being arrested except at around 10pm when the police collected him from the assistant chief. He denied having committed the offence and contended that he was being framed because of a grudge between him and the relatives of PW1. DW1 and DW2 repeated what the Appellant had told the court as to his whereabouts on the material day.
7. At the hearing of the appeal, the Appellant relied on his written submissions which the court has carefully considered. Ms Njagi, Learned Counsel for the state opposed the Appeal. She submitted that all crucial witnesses were called by the prosecution that there was proper identification of the Appellant by the victim; that no forensic examination was undertaken on the Appellant as the same could not yield any positive results as the Appellant was arrested after 24 hours; that the conviction of the Appellant was in accordance with section 180 of the Criminal Procedure Code and that the trial of the Appellant was regular and in accordance with Article 50 of the constitution.
8. The Appellant’s first complainant is that the trial Court conducted the trial in a partial and

irregular manner. Although the Appellant had raised this ground as ground No. 8 in his Petition of Appeal, he never submitted on it. This court has carefully considered the record. The trial was conducted by a total of three (3) magistrates. At every point of change from one magistrate to the other, the provisions of Section 200 of the Criminal Procedure Code were complied with and each time, the Appellant indicated that the trial do proceed from where it had reached. The trial court duly gave directions to that effect and proceeded with the trial in terms of that Section. After the conclusion of the prosecution case and finding that the Appellant had a case to answer, the provisions of section 211 of the criminal procedure code were explained to the Appellant who opted to give sworn testimony and call witnesses. He was not only given ample time to cross-examine the prosecution witnesses, but was also accorded ample time to tender his defence. His witnesses were also allowed to testify. At any time he was not ready for the hearing of his case, the trial was adjourned. In this regard, this court finds that there was no irregularity in the conduct of the trial and that the provisions of Article 50 of the Constitution of Kenya as to fair trial were fully met. That complaint has no basis and is rejected.

9. The second complaint was that the trial court failed to consider the Appellant's mitigation. This court has considered the record. The Appellant told the court that he has a family who depends on him and that he has only one parent who is unwell. In meeting out the sentence, the court indicated that it had noted the mitigation and that the Appellant was a first offender and thereby sentenced him to 10 years imprisonment. Although the judgment did not specify the exact section of the law under which it convicted the Appellant, it is clear that the trial court found the Appellant guilty of attempted defilement and convicted him accordingly. Section 9(1) and (2) of the Sexual Offences Act provides:-

**“9(1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed as attempted defilement.**

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

10. It is clear from the foregoing that the term of ten (10) years imprisonment is the minimum sentence given by the law. Can it therefore be said that the trial court failed to consider the appellant's mitigation? This court does not think so considering that the trial court indicated that it had considered the mitigation and meted out the minimum sentence imposed by the law.
11. The other complaint was that the trial court failed to consider that the Appellant was not medically examined. The evidence of PW6 was that after the Appellant was apprehended, he took samples from him and that of the complainant and sent same together with the pant to the Government Chemist. The samples taken were that of blood. The tests were negative. As regards, tests on spermatozoa, this court does not think that it would have been necessary as the Appellant was arrested after 24 hours of the alleged incident. When he must have by then taken a bath as well as changed clothes. This complaint was not well taken and it is accordingly rejected.
12. The other complaint was that vital witnesses mentioned were not called and that the alleged identification or recognition of the Appellant was not free from the possibility of an error. This court has perused the record. The Appellant did not indicate either in his petition or submissions who these so called **“vital witnesses mentioned”** were. Having considered the entire record, PW1 the victim did testify as did the two women (PW2 and PW3) to whom she narrated the incident to immediately after the incident. The assistant chief to whom the report was made and the police officer who PW1, PW2 and PW3 sought help from were also called. To my mind, there was no crucial witness who was named that was not called to testify by the prosecution as alleged.
13. As regards identification or recognition, the evidence of PW1 was that the incident took place at about 6.30pm and that it was not yet dark. PW2 and PW3 stated that PW1 came to them at about 7pm to tell them what had befallen her. PW1's testimony was that she recognized her assailant as the Appellant but when the later asked her if she had recognized him, she answered in the negative

because of fear of reprisal. The Appellant spoke to the complainant. The complainant's failure to disclose the assailant's identity in my view was well explained that she feared harm. The evidence on record and in particular that of PW5 shows that the Appellant and the complainant were distant relatives but lived within the local vicinity of each other. Indeed the Appellant's home was said to be within the neighbourhood of where the complainant lived. The Appellant was well known to the complainant. In this regard, the complaint of a possibility of an error in recognition is without basis and the trial court cannot be faulted. The same is hereby rejected.

14. The other complaint was that the trial court failed to consider the existence of a grudge between the Appellant and his family members. The Appellant further complained in his submissions that his evidence and that of his wife on this issue and generally was not considered. During the trial, the Appellant did cross – examine the prosecution witnesses. He did put to PW1, PW2, PW3 and PW4 about there being a grudge between him and the families of the said witnesses. PW1, PW2 and PW3 denied existence of any such grudge. The record shows that the Appellant did not put any specific facts or incidents to these witnesses which would form a basis for saying that there existed a grudge between them. However, as with PW5, who said he was the Appellant's class mate, the Appellant asked him about a case of timber which the two had but PW5 was firm that there had never existed such a case. In his defence, the Appellant did not tell the court the incidents or facts that he relied on as a basis of the existence of a grudge between him and his accusers. To this court's mind, a mere sweeping statement that a grudge existed without giving the incident(s) or facts forming the allegation cannot suffice. The mere fact that the complainant's relatives were closely related to the Appellant cannot justify a conclusion of existence of a grudge. In this regard, this court finds that no grudge was established as having existed between the families of the complainant with the Appellant for the accusation to amount to being framed.
15. As regards both the defence of the Appellant and his wife, this court finds that the same were properly considered by the trial court which gave reasons why it rejected the same. There is no basis for faulting that court.
16. The final complaints were that the conviction was against the weight of evidence and that the judgment flouted the provisions of section 169 (1) and (2) of the Criminal Procedure Code. The Appellant submitted that the medical evidence proved that there had been no penetration contrary to the testimony of PW1 who had stated that she had been raped for 30 minutes. That the evidence on record did not prove the offence of defilement. It is clear from the record that when the complainant was examined about four (4) hours after the incident, her genitalia was found to be normal. PW7 told the court that routine examination proved nothing significant. It is for this reason that notwithstanding the testimonies of PW1, PW2 and PW3, the trial court declined to convict the Appellant of the offence of defilement.
17. The trial court however found that the pant of PW1 was torn; she had some injuries to the neck; PW1, PW2 and PW3 took the trouble at night to go to report the incident not only to the assistant chief (PW4), but went to the police at night. There was also the evidence of PW4 that she saw PW1 with soil on her head and shoulders. PW4 also testified that when she saw the complainant, the latter was in shock. PExh 2 the general out patient record for the complainant from Chuka District Hospital shows that when the complainant was examined, she complained of neck and chest pain and that she had scratch marks on the right side of the neck. Because of her mental state of shock, Dr Mathenge who attended her administered trauma counseling and proposed further counseling. This led the trial court to conclude that there was attempted defilement for which it convicted the Appellant. This court has reviewed the evidence on record and the judgment of the trial court and comes to the conclusion that there exists no reason to disturb that finding. The testimony of the complainant was that the scratch marks on her neck were sustained when she was being prevented from screaming. The soil on her head and shoulder shows that she must have been pinned down to the ground. The torn pant may have been as a result of someone attempting to reach the Complainant's private parts. Her state of shock that was noted by PW4 and the examining doctor is evidence that PW1 had undergone or was about to undergo a terrible experience. In this court's view, the Appellant attempted to penetrate the complainant and his

conviction therefore was proper.

18.As regards the judgment, section 169 (1) and (2) of the Criminal Procedure Code provides:-

***“169(1) Every such judgment shall, except as otherwise expressly provided by this code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.***

***(2) In the case of a conviction, the judgment shall specify the offence of which and the section of the penal code or other law under which, the accused person is convicted, and the punishment to which he is punished.”(Empasis supplied).***

19.This court has carefully looked at the judgment of the trial court. The same has satisfied all the requirements of section 169 (1) of the Criminal Procedure Code. However, there appears to be a problem with the requirement of sub section (2). The relevant portion of the judgment reads:-

***“Guided by the section of the Criminal Procedure Code, I find the accused guilty of the offence of attempted defilement and accordingly convict him under section 215 of the Criminal Procedure Code.”***

20.Section 180 of the Criminal Procedure Code permitted the trial court to convict the Appellant for the offence that had been proved. Section 169(2) requires the court to specify the offence and the section of the law for which the accused person is convicted. In the present case, the trial court does not seem to have specified the section of the law for which it was convicting the Appellant. The question therefore determination is, is that fatal to the conviction and sentence.

21.The provisions of section 169(1) and (2) are in mandatory terms. The requirements in sub section (2) of that section are meant to notify an accused and the whole world, the offence for which he is being convicted and also show that such an offence is one known in law or is provided for in law. That is the reason why a judgment of the court must specify the offence it is convicting an accused for and the section of the law permitting such conviction. It is meant to guard against conviction of an accused for an unknown offence or for an offence not provided for in the law. In the present case, the trial court did properly specify that it was convicting the Appellant for the offence of attempted defilement. It only failed to specify the section that creates that offence. This court has already set out in paragraph 9 of this Judgment, Section 9 of the Sexual Offences Act. That section creates both the offence and punishment for the offence of attempted defilement. In this court’s view, the failure to specify the section of the law for the offence the trial court convicted the Appellant off must have been an oversight. The offence clearly exists in our laws and that oversight in this court’s view did not prejudice the Appellant. That complaint in my view therefore is without merit and it is rejected.

22.Accordingly, this Appeal is without merit and the same is hereby dismissed.

**Dated and delivered at Chuka this 22<sup>nd</sup> day of January, 2016.**

**A.MABEYA,**

**JUDGE.**