



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A

Criminal Appeal 200 of 2013

**(Appeal from original Conviction and Sentence in Kangema PM Criminal Case No 177 of 2011 – D
Orimba, SRM)**

John Mwangi Njane.....Appellant

Versus

Republic.....RESPONDENT

J U D G M E N T

1. The Appellant herein, **John Mwangi Njane**, was convicted after trial of *attempted defilement of a girl* contrary to **section 9(1)** as read with **subsection (2)** of the **Sexual Offences Act, No 3 of 2006**. It was alleged in the charge that on 02/06/2011 at about 7.00 p.m. at *[particulars withheld] Primary School, in Murang'a County*, he attempted to penetrate the vagina of **L W K**, a girl aged 12 years. He was sentenced to serve 10 years imprisonment. He has appealed against both conviction and sentence. He was not represented in this appeal; nor was he defended by counsel in the trial court.

2. The Appellant's grounds of appeal, as they emerge from his petition, are as follows –

(i) That the complainant's initial report that the Appellant had attempted to defile her was contradictory to her testimony in court that she was defiled.

(ii) That there were serious gaps in the chain of evidence preferred by the prosecution, in that the clothes the complainant wore during the alleged attempted defilement were not produced in evidence; and also that a crucial witness, one Mama Wakori, was not called to testify.

(iii) That the trial court erred in relying upon the testimony of the complainant which was doubtful and weak.

(iv) That the trial court erred in not considering that there was a grudge between the family of the complainant and that of the Appellant.

(v) That the Appellants' defence was not properly analyzed by the trial court.

3. Learned Prosecution Counsel supported the conviction and sentence.

4. I have read through the record of the trial court (including the judgement) in order to assess the evidence on my own and arrive at my own conclusions regarding the same. This is my duty as the first appellate court. I must however give allowance for the fact that I have neither seen nor heard the

witnesses testify.

5. There was no dispute that the Appellant and the complainant met on the material evening. That is common ground. The issue really is what transpired between the two. The testimony of the complainant (PW1) was that the Appellant **defiled** her while both were standing. That is the term used in the testimony of the complainant.

6. **Defilement** is a technical term which is defined in **section 8(1) of the Sexual Offences Act** as follows –

“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”

Surely a child of 12 years would not know what **defilement** is in order to state that she was **defiled** – using that very term! Indeed, let alone a child of 12 years, most lay persons would not know the technical meaning of **defilement** under the Sexual Offences Act sufficient to state that so and so was defiled.

7. So, the complainant could not have used the term **defiled** when testifying about what the Appellant did to her. That term came from the trial magistrate! We do not know what the complainant said in this regard in order for the trial magistrate to put the word **defiled** in her mouth! The trial magistrate should have recorded the actual words used by the complainant, not give meaning to them! All she is recorded by the court as saying in this regard was –

“While with the accused alone, he held me and removed my inner wear.

Accused pleaded with me to have sex, but I refused.

Accused dropped his trouser, removed his penis. All this (while) I was standing. I did not scream since accused had an axe.

Accused defiled me, he then released me to go. I followed a different route.”

8. So where in her testimony is the act of the Appellant that caused penetration if indeed she was **defiled** as she testified in court? But of course the charge that the Appellant faced was **attempted defilement**. The clinical officer (PW5) who examined the complainant stated as follows –

“The clothing had been changed. She alleged to have been defiled by a person known to her on 02/06/2011.

She was in fair condition. The nature of the offence was defilement. The age of the child was 13 years.

There was no laceration, no spermatozoa, no yeast, HIV (test) done. It was negative. I concluded that there was attempt to defile.”

So, what led the clinical officer to this conclusion? Apart from the complainant’s say-so, there was no physical evidence that could have reasonably led her to this conclusion!

9. The complainant’s mother (PW3) stated in cross-examination that the complainant had some sperms on her clothes. Why were these clothes not subjected to forensic examination and produced in evidence?

10. The bottom line is that the trial court, in effect, convicted the Appellant only upon the uncorroborated testimony of the complainant. It could do so only under the *proviso* to **section 124** of the **Evidence Act, Cap 80**. That *proviso* states –

“Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

12. The trial court made no reference to this provision of the law and did not record any reasons for believing the complainant’s story that she was defiled, or that the Appellant attempted to defile her. The conviction is unsafe and cannot stand.

13. In the event I will allow this appeal in its entirety. The conviction is quashed and the sentence imposed upon the Appellant set aside. He shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AND SIGNED AT MURANG’A THIS 25TH DAY OF FEBRUARY 2016

H.P.G. WAWERU

JUDGE

DELIVERED AT MURANG’A THIS 26TH DAY OF FEBRUARY 2016