



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

CRIMINAL APPEAL NO 38 OF 2014

**(Appeal against Conviction and Sentence in Kandara SPM Criminal Case No 319 OF 2012 – C
Kithinji, RM)**

DANIEL NJOROGE WANYOIKE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellant **Daniel Njoroge Wanyoike** was on 02/05/2012 convicted after trial of ***attempted defilement of a child*** contrary to **section 9(1) & (2)** of the ***Sexual Offences Act, No 3 of 2006***. He was sentenced to 10 years imprisonment. He appealed against both conviction and sentence.

2. The Appellant was unrepresented by counsel both at his trial and in this appeal. His complaints as appear in his petition of appeal filed on 30/04/2014 are as follows –

(a) That the evidence placed before the trial court by the prosecution was inconsistent and not trustworthy.

(b) That his defence was not properly considered by the trial court.

(c) That the charge against him was not proved beyond reasonable doubt as required by law.

At the hearing of the appeal the Appellant also added that the charge against him was false and trumped up on account of a previous grudge with the complainant.

3. Learned prosecution counsel Mr. Njeru supported the conviction and sentence. He submitted that the evidence adduced by the prosecution was consistent and unchallenged, and was in fact overwhelming.

4. I have carefully read the record of the trial court in order to assess the evidence placed before that court and arrive at my own decisions regarding the same. This is my duty as the first appellate court. I have borne in mind however that I neither saw nor heard the witnesses, and I have given due allowance for that fact.

5. PW2 (V W M) was the complainant's mother. The Appellant found her in her shamba on 12/04/2012 and asked her whether she would buy some potatoes from him. She said she wanted to inspect the potatoes first. The Appellant did not have the potatoes with him, so she told him to go and get them. The Appellant came back 30 minutes later and said that the potatoes were locked up and the person with the key had gone to work. He said he would bring the potatoes in the evening to her home which she pointed

out to him.

6. The Appellant then went and stood on the road for some time before walking in the direction of PW2's home where her children were and the house was open. PW2 decided to follow in order to go and lock up. When she got home she found the Appellant at a corner inside the kitchen where he was removing the trouser of the complainant. His own trouser was open and when PW2 saw his private parts she screamed in alarm and held on to him. Neighbours rushed to the scene and tied him up with ropes and then escorted him to the police station. In cross-examining PW2 he did not once question PW2's assertion that she found him with his trouser open while undressing the complainant. He also did not challenge her on any previous grudge.

7. PW3 (S N M) and PW4 (J N K) were some of the neighbours who responded to PW2's screams. They helped subdue the Appellant at PW2's home, tie him up with ropes and escort him to the police station. PW5 (PC Eric Omondi) was the officer who re-arrested the Appellant at **Githumu Police Station** and subsequently charged him with the offence.

8. The complainant herself, S W Vi (PW1) appeared to the trial court to be about 3 to 4 years old. The court found after a *voire dire* examination that she did not understand the nature of the oath but that she could understand and follow the proceedings. The trial court permitted her to give unsworn evidence and did not permit her to be cross-examined. Her testimony was that she was in the kitchen when the Appellant (whom she pointed out in court) came and opened her trouser and told her not to tell her mother; that he removed her other clothes and the trouser; that he also removed his trouser; and that he then urinated on her on her private parts which she indicated by touching with her left hand. She did not know him as he did not live with them. Just then her mother came and screamed.

9. The Appellant gave an unsworn statement in his defence and did not call any witness. He stated that indeed he had approached PW2 in her shamba where she was picking tea leaves and offered to sell to her potatoes, and that they agreed he would take the potatoes to her home in the evening. However, he further stated, he did not manage to go to PW2's home in the evening but went the following morning. The following morning he went to PW2's home but he did not find her there. Later he found her picking tea in her shamba and told her that he would bring the potatoes later.

10. The Appellant further stated in his unsworn defence that he felt thirsty and wanted water to drink. PW2 told him that she could not go home to give him water. In the adjacent home there was no one and so he proceeded to another home where he found some children playing. One of those children was the complainant and she was the biggest of the children. He asked her for water and she said she could not reach the water in the tank. So he proceeded to the kitchen which was unlocked to find himself water. In the meantime the children were holding his trouser playing around and after he had found water and drunk, PW2 came and accused him of defiling the complainant. However she checked the complainant and found that she had not been defiled. People then came and took him to the police station.

11. It is clear from his unsworn statement that the Appellant admitted having been in close contact with the complainant at one point. His statement however did not even attempt to explain why his trouser was open, or why he was undressing the complainant. He did not once deny in his statement that he was found by PW2 with his trouser open and his private parts visible or that he was in the process of removing the complainant's trouser. The complainant's testimony that he urinated upon her private parts however appears doubtful and may have been a suggestion put to her by the adults around her. It does not appear that the Appellant got the opportunity to try and penetrate the complainant's vagina with his penis; PW2 came too soon.

12. However attempt is defined as follows in **section 388** of the **Penal Code** –

“388. (1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.

(2) It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfilment of his intentions was prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.

(3) It is immaterial that by reason of circumstances not known to the offender it was impossible in fact to commit the offence.”

13. The Appellant was found by PW2 at a corner of a room alone with the complainant. That was a manifestation of his intention to defile the complainant. He was found with his trouser open and his private parts visible. He was in the process of undressing the complainant. These were overt acts adapted to fulfilment of the intention to defile the complainant. Happily he did not fulfil his intention to such an extent as to commit the defilement; PW2 came in the nick of time! He is therefore, by the evidence placed before the trial court, deemed to have attempted to defile the complainant.

14. Upon my own evaluation of the evidence placed before the trial court, I am satisfied that the Appellant was convicted upon good and sound evidence. The charge of attempted defilement of a child was proved beyond reasonable doubt. His conviction is safe.

15. As for the sentence, once the trial court decided that he deserved a custodial sentence, the minimum provided for by law was 10 years imprisonment. That is what he got, and he richly deserved it.

16. I find no merit at all in the Appellant’s appeal in its entirety. The same is dismissed.

DATED AND SIGNED AT MURANG’A THIS 13TH DAY OF OCTOBER 2016

H P G WAWERU

JUDGE

DELIVERED AT MURANG’A THIS 14TH DAY OF OCTOBER 2016