



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

**CRIMINAL APPEAL NO. 199 OF 2013**

**BENARD OMBUNA ..... APPELLANT**

**VERSUS**

**REPUBLIC**

*(Being an appeal from the conviction and sentence of Hon. J. Karanja Principal Magistrate delivered on 6/12/2012 in Makueni Principal Magistrate Criminal Case No. 84 of 2012)*

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*(Before Hon. B. Thurairaja J)*

**J U D G M E N T**

1. The Appellant, **Bernard Ombuna** was charged with the offence of attempted defilement contrary to **section 9 (1) (2)** of the **Sexual Offences Act No. 3 of 2006**.

The particulars of the offence were that “on the 2<sup>nd</sup> day of February 2013 within **Kajiado County** intentionally and unlawfully caused his male genital organ (penis) to penetrate the female genital organ (vagina) of one **N N A** a child aged 12 years.”

2. In the alternative, the Appellant was charged with the offence of indecent act with a child contrary to **section 11(1)** of the **Sexual Offences act No.3 of 2006**.

The particulars of the offence were that “on the 2<sup>nd</sup> day of February 2011 within **Kajiado County** intentionally and unlawfully caused his male genital organ (penis) to penetrate the female genital organ (vagina) of one **N N A** a child aged 12 years”.

3. When the Appellant was arraigned before court, he pleaded guilty. The case proceeded to a full trial.
4. The prosecution case was that on the material day at about 7.00 p.m., the complainant, PW1 **N N A**, a twelve year old standard 5 girl was in her brother’s house babysitting her brother’s child. The complainant’s brother was not in and the brother’s wife had gone out to buy vegetables. That the Appellant who was a friend to the complainant’s brother came to the house and inquired if anybody else was in the house. The complainant replied in the negative. That the Appellant then asked the complainant to place the baby down and removed her pants and lie down on the seat. That the Appellant then lay on top of her and defiled her.
5. Just then, the brother’s wife, PW4 **P M** returned from the market where she had gone to buy vegetables. As she approached the house, she heard the baby crying. She found the Appellant

- who she knew as her husband's friend seated inside the house. That the Appellant's zip was open and he had no innerwear and his exposed penis had an erection. Meanwhile, the complainant was dressing. When the Appellant left PW4 questioned the complainant who demonstrated to her what had happened. PW4 telephoned her husband PW2 **D M** and informed him of the matter. A report was made to the police. The complainant was escorted to hospital for examination and treatment. The Appellant was subsequently arrested and charged.
6. In his defence the Appellant gave unsworn evidence. No witnesses were called. The Appellant testified that on the material date, he had gone to the house of a friend (PW2) to demand for Kshs.4,500/= that he had lent out to him. That he found the complainant (PW1) and the aunt (PW4) and the baby in the house but PW2 was not in. The Appellant went back to his house. On 5/2/2013 at about 12.00 noon, the Appellant was in his house when he was arrested by the police officers who were in the company of PW2. The Appellant was beaten then escorted to **Kitengela Police Station**. He was then brought to court on fabricated charges. The Appellant blamed this case on a land dispute and business rivalry, the debt with the complainant's brother and corrupt police officers who had demanded a bribe from him.
  7. At the conclusion of the case, the Appellant was convicted in the main count of attempted defilement and sentenced to ten (10) years imprisonment.
  8. The Appellant was aggrieved by both the conviction and sentence and appealed to this court on grounds that can be summarized as follows:-
    - a. **That the charge sheet was defective.**
    - b. **That the particulars of the offence and the evidence adduced were at variance.**
    - c. **That the prosecution evidence was adduced in a manner that violated the Appellant's Constitutional rights contrary to Article 50 (4) of the Constitution.**
    - d. **That the prosecution case was not proved beyond reasonable doubts.**
    - e. **That the defence case not considered.**
  9. During the hearing of the appeal, the Appellant relied on written submissions which I have duly considered.
  10. The appeal was opposed by the State. The learned counsel for the State submitted on the sufficiency of the prosecution evidence.
  11. The complainant (PW1) gave evidence that she was defiled by the Appellant. The complainant's evidence was that, she removed her pants and the Appellant slept on her and did what she described as "*tabia mbaya*". According to the complainant's sister in-law (PW4), she found the Appellant and the complainant in a compromising position with the Appellant erect penis exposed and the complainant dressing up. A trembling complainant later demonstrated to her what the Appellant had done to her.
  12. The evidence of the doctor, PW5 **Geoffrey Wagura**, who examined the complainant, found there was inflammation and lacerations on the vaginal wall. That the investigations on the Appellant revealed that he had **Syphilis** and was **HIV positive**. The doctor produced both the complainant's and the Appellant's P3 forms. The doctor assessed the complainant's age as twelve (12) years. The doctor's evidence was that there was no penetration. The P3 form reflects that the complainant's hymen was open but not broken.
  13. The evidence of the complainant's brother (PW2) and that of PW3 **J G** established that the Appellant was arrested in **Kawagware area of Nairobi** and escorted to **Kitengela Police Station**. Investigations carried out by PW6 **P.C. Leah Wanjiru** confirmed the complainant's report and the Appellant was subsequently charged.
  14. The defence by the Appellant places him at the scene at the material time. However, his assertion that he had gone to collect Kshs.4,500/= that the complainant's brother owed him and did not commit any offence is not believable in view of the strong prosecution evidence against him. The complainant's evidence was corroborated by that of her sister in-law (PW2) who found that them in a compromising position. The complainant's evidence was further corroborated by that of the doctor as analyzed above. It is clear from the evidence from both the prosecution witnesses and the Appellant that the parties knew each other. The complainant's evidence and that of PW2 is that of recognition. The time of the offence was between 6.00 p.m. and 7.00 p.m. according to the evidence of the complainant (PW1) and her sister in-law (PW4). It was not dark. Indeed even the Appellant's evidence was that he left the house when he saw "it was getting dark".

15.The trial magistrate who had the benefit of seeing the witnesses testify and observed their demeanour believed the complainant. I have no reasons to differ with the findings of the trial magistrate. The complainant was 12 years old. It was therefore superfluous to hold a *voire dire*.

16.**Section 19** of the **Statutory Oaths and Declarations Act Cap 15 Laws of Kenya** provides that:

**“Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code, shall be deemed to be a deposition within the meaning of that section.”**

17.Under **Section 2** of the **Children’s Act Cap 141 Laws of Kenya**, a child of tender years is a child of ten years of age and below. (See also **Samson Oginga Ayieyo –vs- Republic – Criminal Appeal 165 of 2006**).

18.On whether the charge sheet was defective, in Count I, the charge is that of attempted defilement while the particulars of the offence reflect that there was penetration. The medical evidence on the other hand reflected that there was no penetration. The complainant’s evidence was that she was defiled but fell short of stating whether there was penetration or not. I therefore agree with the submissions by the Appellant that the charge in the main count is defective. The charge is that of attempted defilement while the particulars of the offence reflect actual defilement.

19.The Appellant was in the alternative charged with the offence of committing an indecent act with a child. The complainant’s and the doctor’s evidence establish that there was contact between the complainant’s and the Appellant’s genital organs. The alternative count was therefore proved. Consequently, the Appellant ought to have been convicted in the alternative count. The sentence of ten (10) years is within the law for the offence of indecent act with a child.

20.With the foregoing, I substitute the conviction for attempted defilement to that of indecent act with a child. The sentence remains the same. Orders accordingly.

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**B. THURANIRA JADEN**

**JUDGE**

**Dated and delivered at Machakos this 18<sup>th</sup> day of March 2015.**

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**B. THURANIRA JADEN**

**JUDGE**