



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

**CRIMINAL APPEAL NO. 239 OF 2011**

**PAUL NJUGUNA WAMOGGE ..... APPELLANT**

**VERSUS**

**REPUBLIC**

*(Being an appeal from the conviction and sentence of Hon. A.W. Mwangi Senior Resident Magistrate delivered on 19/7/2011 in Kithimani Magistrate Sexual Offence Case No. 24 of 2010)*

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*(Before Hon. B. Thurairaja J)*

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

1. The Appellant, **Paul Njuguna Wamuge**, 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 26<sup>th</sup> day of November 2010 at **Kakumini Sub-location at Yatta District** within **Machakos County**, intentionally attempted to commit an act which could have caused penetration with his genital organ (penis) into the genital organ (vagina) of **E N M**, a child aged 13 (thirteen) years.

2. When the Appellant was arraigned in court, he pleaded not guilty. The case proceeded to a full hearing.
3. The case for the prosecution was that on the 11/11/2010 at about 3.30 p.m., the complainant, PW1 **E N M**, a ten (10) year old Standard 5 girl had gone to fetch water. She met the Appellant on the way who asked her to accompany him to the bush. While in the bush the Appellant asked her to remove her underpants, then he unzipped his trousers and started having sex with her. The Appellant and the complainant were spotted by two boys who called the complainant's mother.
4. The complainant's mother rushed to the scene accompanied by some men. They found the Appellant on top of the complainant having sex. The Appellant was pulled away from the complainant, tied up with a rope and escorted to the police station. The complainant was issued with a P3 form and taken to hospital. After investigations the Appellant was charged.
5. In his defence, the Appellant stated that on the material day he went with his wife to buy maize. Thereafter the Appellant went to sell a banana stem to a neighbour then the Appellant went to a bar and took some alcoholic drinks. The Appellant thereafter went to the shops to buy sugar. On the way home, the complainant met his brother's wife. A quarrel ensued. The Appellant was then arrested, tied up with ropes and taken to the police station. He was later arraigned in court and charged with an offence that he had not committed.
6. The trial court was satisfied that the prosecution case was proved beyond reasonable doubts. The

Appellant was found guilty, convicted and sentenced to ten (10) years imprisonment. The Appellant was dissatisfied with both the conviction and sentence and appealed to this court on the following grounds:-

- v. **That there was a land dispute between the Appellant and the complainant's family.**
  - v. **That some crucial witnesses were not called by the prosecution to testify.**
  - v. **That the case was a frame up.**
  - v. **That the provisions of Section 169 (1) of the Criminal Procedure Code were not complied with.**
7. During the hearing of the appeal, the Appellant relied on his written submissions. The submissions essentially reiterate the grounds of appeal.
  8. The State was opposed to the appeal. Learned Counsel for the State submitted that the offence took place in broad daylight and that there were other witnesses who caught the Appellant red handed.
  9. This being a first appeal, this court is duty bound to re-evaluate the evidence and the record afresh and come to its own conclusions and inferences – *See Okeno –vs- Republic (1972) EA 32.*
  10. The complainant (PW1) gave sworn evidence after the court conducted a *voire dire* and found she understood the meaning of oath and the duty to tell the truth. The complainant narrated to the court how the Appellant took her to the bush, asked her to remove her underpants and promised to give her Kshs.10/=. It was the complainant's evidence that the Appellant unzipped his trousers then lay on top of her before he put his 'thing' in her vagina and she felt pain then he put his '**thing**' on her buttocks and she felt pain again.
  11. PW2 14 year old **M M M** and his brother 12 year old, PW3 **Be K M** gave evidence which establishes that they spotted the Appellant and the complainant in the bushes then called the complainant's mother. The complainant's mother, PW5 **P N** gave evidence that corroborated the evidence of the three minors (PW1, PW2 and PW3). It was the evidence of the mother that she rushed to the scene and found the Appellant on top of the complainant with the Appellant's trouser and innerwear lowered to knee level. That the complainant's underpants and skirt were also lowered to her knees.
  12. The evidence of PW6, **Ng'ang'a Githu** further corroborated the evidence of the other prosecution witnesses. According to PW6, he was one of the men who accompanied the complainant's mother to the scene. PW6 in his evidence also pointed out that they found the Appellant on top of the complainant with his trousers and innerwear having been lowered and the complainant's underpants removed. Although the complainant was said to be mentally retarded, the Appellant was caught red handed by not less than four witnesses who have testified herein. The case could have succeeded even without the complainant's evidence.
  13. The Appellant denied the offence and stated that he was arraigned in court for an offence he had not committed. Although the Appellant during cross-examination raised issues of being framed up due to a debt with the complainant's father and the existence of a land dispute between him and the father to the two boys who raised the alarm (PW2 and PW3), the trial magistrate had the benefit of observing the demeanor of the witnesses and believed the prosecution witnesses. There are no reasons that emerge from the record why PW6, **Ng'ang'a Githu** would frame up the Appellant.
  14. The investigations carried out by PW7 **P.C. Wellington Ngeno** confirmed that the matter was reported to the police station and investigations carried out. PW7 produced an age assessment report which reflected that the complainant was thirteen years old as of 7/6/2011.
  15. The medical evidence by PW4 **Benjamin Maingi** the Clinical Officer did not detect any defilement on the material date. According to the Clinical Officer the complainant had previous penetration and the hymen was not freshly torn. Indeed the complainant admitted she had been previously defiled. However, evidence of previous defilement does not negate the evidence of subsequent defilements.
  16. I have considered the charge and the particulars of the offence. I have seen no defects in the charge sheet or any variance between the evidence and the particulars of the offence. I am satisfied that the prosecution discharged their burden of proof. Being found on top of the complainant with a naked butt with the complainant's underwear removed can lead to no other

inference except that of defilement or an attempt to defile. The prosecution chose to proceed with the offence of attempted defilement and proved the same. As evaluated above, the defence case did not cast any reasonable doubts on the prosecution case. The Appellant was caught red handed in broad daylight.

17. The upshot is that the appeal has no merits and is dismissed. The conviction and sentence are upheld.

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**B. THURANIRA JADEN**

**JUDGE**

**Dated and delivered at Machakos this 18<sup>th</sup> day of February 2014.**

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**B. THURANIRA JADEN**

**JUDGE**