

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 231 OF 2012

JOSEPHAT MASAKWE APPELLANT

V E R S U S

REPUBLIC RESPONDENT

(Appeal arising from the original Criminal Case No.789 of 2009 in the Senior Resident Magistrate's Court at Butere against the Judgment of [B.O. OCHIENG, SRM] dated 26.2.20090

J U D G M E N T

The appellant 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 the appellant *on the 13.10.2009 at [particulars withheld] in Butere District within Western Province, unlawfully and intentionally attempted to cause his penis to penetrate eh vagina of L A a child aged 13 years.*

The appellant was also charged with an alternative count of committing an indecent act with a child contrary to **section 11(1)** of the Sexual Offences Act No. 3 of 2006. He was convicted and sentenced to serve **10** years imprisonment. His grounds of appeal are that he pleaded not guilty to the charge, his rights were violated, the case was not proved beyond reasonable doubt as there were numerous contradictions and that his defence was not considered. The appellant filed written submissions and contends that the evidence of PW1 was a frame up. PW2 and PW3 did not witness the incident. The evidence of PW3, a clinical officer exonerated him as it was proved that there was no penetration. PW1 alleged that she was staying with a guardian who was not called to testify.

Mr. Oroni, State Counsel, opposed the appeal and relied on the evidence of PW1 and PW2. He further submitted that the conviction was proper. Six witnesses testified for the prosecution. **PW1 L A** was the complainant. She stated that she was 13 years old and was a pupil in class five at [particulars withheld] Primary School. Her parents are deceased and all her other brothers are deceased except one. She was living with her brother at [particulars withheld]. On the 13.10.2009 at about 6.00 a.m. her sister in-law told her to go and look for jobs. She was given one way fair. She headed to Shianda and the money was enough for the fair up to Sabatia. She started walking to Lunza when she met the appellant who is a boda boda operator. She did not know him. The appellant offered to carry her to Shianda but he took her to Bukura claiming that he was taking short-cuts. On the way the appellant took her to a cane plantation and tried to defile her. He removed his trouser and pulled her pants. PW1 raised alarm and people went to her rescue. They went to one by the name O's house and she was told to get in so as to eat. She screamed and managed to run and found PW2. The appellant told PW2 that he was taking her to Sabatia on his bicycle. PW1 and PW2 got a lift and passed the appellant as they were heading towards Lunza. They met Administration Police officers at Lunza and informed them about the incident. They waylaid the appellant who approached Lunza and PW1 pointed him out to the police. The appellant was arrested while she was taken to hospital at Butere. She was issued with a P3 form and the same was filled at the hospital.

PW2, R N is a cook at [particulars withheld] Primary School. She knows the appellant as a boda boda taxi operator. On the 13.10.2009 at about 2.00 p.m. she was coming from work when she heard a child's voice calling her. The child was PW1 who told her that a boda boda operator took her to Bukura instead of taking her to Shianda and had defiled her. The appellant appeared from behind and told PW2 that he was with PW1 and wanted to take her for lunch. The appellant requested PW2 to leave him with the child. The child was disturbed and asked PW2 not to allow her to go with the appellant. PW2 took the

child to Lunza police and they met Administration Police officers. While there the appellant appeared and PW1 pointed him to the police. The appellant was arrested.

PW3 AGGREY MUNYAYA is a volunteer working in a firm which deals with children based at Lunza. On the 13.10.2009 at about 4.30 p.m. he was at the D.O's office when he met PW1 and PW2 and was informed about the incident. He took them to Butere police station. **PW4 ROBERT WANYONYI** is a clinical officer who was based at the Butere district hospital. His evidence is that he filled the P3 form for the complainant on 4.10.2009. The complainant was seen at the hospital on the 13.10.2009 at 7.47 p.m. on a case of attempted defilement on the same day at 1.00 p.m. Examination showed that the complainant had pain on the hands and both hip joints. She had a painful pubic bone. There was no spermatozoa. No penetration was noted and there was no sign of injury on the genitalia. He concluded that it was a case of attempted defilement. Age assessment was done and she was found to be between 12 and 15 years. The appellant was also taken to the hospital and examined. He had not physical injuries.

PW5 APC GLADYS WANJALA was based at Lunza Division D.O.'s office. On the 13.10.2009 the complainant was taken to her by PW2 and recorded her complaint. She informed her that the appellant took her to Bukura instead of taking her to Lunza and he bought her tea and mandazi. On the way he had tried to defile her but people intervened. PW5 notified police officers at Butere police station. **PW6, PC INVOLATA LUMBASI** was stationed at the Butere police station manning the children's desk. On the 13.10.2009 at about 5.00 p.m. she received the complainant PW1 who was in the company of PW2 and PW5. She investigated the matter and referred PW1 to hospital. PW1 was issued with a P3 form and the appellant was later charged with the offence.

The appellant was put on his defence. He testified that he works as a jua kali person. On the 14.10.2009 he went to Lunza where he works. He entered a hotel and took tea when askaris from Lunza arrested him. He was taken to Butere police station and later charged with the offence.

The main issue for determination is whether the appellant attempted to defile PW1. The evidence on record establishes that on the 13.10.2009 the complainant boarded the appellant's bicycle. She was heading to Lunza and she had no fare. The appellant volunteered to take her to Lunza and was using short-cuts. He passed through Bukura. The appellant's defence is that he never did all that and he was only arrested while he was at Lunza. From the evidence on record I am satisfied that PW1 was carried by the appellant on his bicycle. Although there was no eye witness to the attempted defilement, the medical evidence shows that there was an attempt to defile the complainant as the complainant sustained injuries. PW1 testified that she struggled with the appellant and raised alarm. She did not know the people who went for her rescue. PW2 found the complainant and explained to her the incident. The appellant appeared and PW1 was able to identify him. PW1 and PW2 went to Lunza and informed the Administration Police officers. The appellant appeared and PW1 was also able to identify him.

From the evidence on record, I do find that although there was no other eye witness to the incident, the evidence of PW1 is believable. Section 124 of the Evidence Act allows courts to convict those charged with sexual offences even if the evidence is that of the victim provided that the court is satisfied with that evidence. Given the sequence of events of the day, that is 13.10.2009, I am satisfied that the appellant tried to defile PW1. The age of the complainant does not matter as this was a case of attempted defilement. The contention by the appellant that the medical evidence showed that there was no penetration, does not assist him as it was a case of attempted defilement and not defilement. The sentence is the minimum sentence under **section 9** of the Sexual Offences Act. The sentence is proper.

In the end I do find that the appeal lacks merit and the same is disallowed.

Delivered, dated and signed at Kakamega this 18th day of February 2014

SAID J. CHITEMBWE

J U D G E