



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A
CRIMINAL APPEAL NO. 112 OF 2013

WILSON GACHURU MAINA.....APPELLANT

VERSUS

REPUBLICRESPONDENT

**(Being an appeal against conviction and sentence in Kangema Senior Resident Magistrate's Court
Criminal Case No. 274 of 2010 (Hon. D.Orimba) on 2nd November, 2010)**

JUDGMENT

The appellant was charged with the offence of attempted defilement contrary to **section 9(1)** as read with **section 9(2)** of the **Sexual Offences Act No.3 of 2006**

According to the particulars of the offence, on the 14th day of July 2010 at 6.30 a.m., at *[particulars withheld]*, in Mathioya District of the Central Province the appellant attempted to penetrate the vagina of JW a girl aged 13 years with his penis. The appellant also faced the alternative count of indecent act with a child contrary to **section 11(1)** of the **Sexual Offences Act**. In this alternative count, the appellant is said to have committed an indecent act with JW a girl of 13 years by rubbing his penis against JW's Vagina on the 14th day of July 2010 at 6.30 a.m. at *[particulars withheld]* in Mathioya District of the Central Province.

After taking the evidence of six prosecution witnesses and the unsworn statement of the appellant the learned magistrate came to the conclusion that the prosecution had proved beyond reasonable doubt that the appellant was guilty of the main count of attempted defilement and accordingly, convicted him of that offence. He sentenced the appellant to ten years imprisonment which is the minimum sentence provided for the offence of which the appellant was convicted.

As the first appellate court it is necessary to bring out the evidence at the trial and evaluate it afresh before coming to its own conclusions; as this court engages in this exercise it is minded that only the trial court had the advantage of hearing and seeing the witnesses and therefore there are aspects of the evidence at the trial for instance the witnesses disposition and their demeanour which this court cannot possibly appreciate.

The starting point is the complainant's evidence.

The complainant was a child of tender years and therefore the learned magistrate conducted a *voire dire* before taking her evidence on oath. She testified that she was 13 years old and in class 7 at *[particulars withheld]* primary school. On her way to school on 14th July, 2010 at about 6.30 am, so she testified, she encountered the appellant at the gate. She retreated and went back to the house; soon thereafter, she made

up her mind and decided to go to school. Somewhere on her way to school, the appellant held her bag and grabbed her; he had a “vuvuzela” which the complainant mistook for a gun. The appellant pulled the complainant aside, apparently from the road and warned her not to scream. He then removed his trouser and the complainant’s clothes and attempted to defile her. She complainant screamed and struggled out of the appellant’s grip. The appellant put on his clothes and ran away but not before he warned her not to tell anybody. The complainant went to school and while there, she related to her friend, **I N (PW2)**, what had happened to her. I in turn reported the incident their school teacher, **Miss Kimani (PW6)** who informed the head teacher. The head teacher reported the matter to the police who later arrested the appellant. The complainant confirmed that her statement was taken by the police and that she was also taken to the hospital and treated. She pointed out the appellant in the dock as the person who had attempted to defile her. The complainant told the court that the appellant was locally known as Bhuto although his official name was Wilson Gacheru Maina and that she knew him even before this incident.

The complainant’s friend, **I N (PW2)**, who was the first to hear of what the complainant had encountered while on her way to school testified that she was aged 15 and was also in class 7 at [*particulars withheld*] primary school. She recalled that on the material date, in the morning, the complainant came to school crying. She informed her that the appellant had attempted to defile her while on her way to school. She reported the matter to her teacher Kimani who interrogated the complainant.

The teacher referred to by both the complainant and the second prosecution witness **Jennifer Mukami Kimani (PW6)** who happened to have been the teacher on duty on 14th July, 2010 when this incident happened. She confirmed that the complainant was her pupil and also recalled that on 14th July, 2010 at about 7.45 am **I N (PW2)** came to her with the report that the complainant was crying because a certain boy had defiled her while on her way to school. She took the complainant to the school headmaster and together they interrogated her. She confirmed that the headmaster sent the complainant’s brother to call the girl’s parents.

The complainant’s father, **G W (PW3)** confirmed that the complainant was her daughter and that she 13 years old. He also confirmed that she was in class seven at [*particulars withheld*] primary school. On the material day in the morning, his son came from school with the information that the headmaster wanted him at school. When he went there he found the head teacher, the chairman of the school and two police officers. The witness testified that he talked with the complainant who told him that the appellant whom he not only knew before but that he was also his neighbour had defiled his daughter. This witness testified that he took the complainant to the hospital for treatment.

The investigating officer, police constable **Charles Kipkemoi (PW4)** was attached at Nyakianga police station at the time. In his evidence, this witness recalled that on 14th July, 2011 he was at the crime branch office when the appellant was brought to the station by the administration police from Gacharageini. The officers were accompanied by the appellant’s parents and the complainant. The appellant denied the allegations against him upon interrogation by this officer. When he interrogated the complainant, this witness was told that the appellant had ambushed the complainant while on her way to school; he pulled to the bush where he attempted to defile her but that the complainant managed to escape before he did the act. The complainant is said to have pointed out the appellant who was later arrested and brought to the station. This officer also referred the complainant to the hospital for treatment. The witness produced in court the instrument with which the appellant is said to have threatened the complainant.

The clinical officer Lucy Wanjiru, at Kangema sub-district hospital where the complainant was treated testified as the fifth prosecution witness. She produced in court the treatment notes. Upon examining the complainant, the clinical officer found that the complainant’s hymen was intact and that no injury whatsoever was noted; she concluded that there was an attempt to defile the complainant.

In his unsworn statement the appellant testified that on the material day, he woke up and proceeded to the road which he described as busy with school going children and business people. Apparently while he was on the road, he was arrested by the police who took him to the school where the complainant schooled. He was taken to the class where the complainant, her friend and teachers were waiting. The appellant said the exhibit that was produced in court as the instrument which was alleged to have been the

weapon that he used to threaten the complainant with was actually given to the police by the complainant's father. The appellant denied having committed the offence.

In the appellant's view, the prosecution evidence fell short of the required standard of proof and therefore it was erroneous on the part of the learned magistrate to convict and sentence the appellant as he did. In his grounds of appeal, the appellant faulted the learned magistrate for ignoring what the appellant termed as gross anomalies surrounding the conduct of the complainant after the alleged incident; that the learned magistrate should have considered that the complainant was allegedly accosted on a busy road yet there was no eye witness who witnessed the attack on the complainant. The appellant also faulted the learned magistrate for ignoring the fact that the appellant was subjected to torture and inhuman treatment. Finally, the appellant contended that the learned magistrate erred in law and in fact for failing to consider the appellant's defence and thereby contravened the provisions of **section 169(1)** of the **Criminal Procedure Code**.

Section 9(1) and (2) under which the appellant was charged reads as follows:

9.(1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.

(2) A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years.

The complainant was candid in her evidence that the appellant accosted her on her way to school. She only escaped from the appellant's grip when she screamed and the appellant let her go. She narrated how the appellant had removed his trouser and her clothes. I agree with the learned magistrate that there could not have been any other reason of the appellant's actions besides attempting to defile the complainant. The complainant's evidence was corroborated by her friend in school who testified as to what the complainant told her and also by the school teacher and the complainant's father. The evidence on record, in my view, is credible and consistent that the appellant is guilty of the charge for which he was convicted. There is nothing on record to suggest that the charges against the appellant were framed. I have not found any indication on the record that the learned magistrate did not consider the appellant's defence. The defence was duly considered but the learned magistrate did not find it believable.

On the whole I do not find any merit in the appellant's appeal and I do find that he was properly convicted and sentenced according to law. The appeal is dismissed.

Dated signed and delivered in open court this 21st March, 2014

Ngaah Jairus

JUDGE