



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 71 OF 2013

MORRIS KRESI MUGUYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

**(From original Conviction and Sentence in Criminal Case No. 571 of 2012 of the
Principal Magistrate's Court at Kwale – Hon. Usui - Ag SPM)**

JUDGMENT

The Appellant herein was convicted and sentenced to thirty (30) years imprisonment for the offence of defilement contrary to section 8(1) as read with Section 8(3) of the Sexual offences Act No. 3 of 2006.

The particulars of the charge were that:-

“On the 21st day of April, 2012 at [particulars withheld] Village – Kwale County he intentionally attempted to cause his penis to penetrate the vagina of M A a child aged eleven (11) years”.

A perusal of the Judgment of the learned trial magistrate shows that although the appellant was charged with attempted defilement of a girl contrary to section 9(1) as read with section 9(2) of the Sexual offences Act No. 3 of 2006, she was satisfied that the offence of defilement was proved and invoked the provisions of section 186 of the Criminal Procedure Code which provides,

“When a person is charged with the defilement of a girl under the age of fourteen (14) years and the Court is of the opinion that he is not guilty of that offence, but that he is guilty of an offence under the sexual offences Act, he maybe Convicted of that offence although he was not charged with it”.

Section 186 of the Criminal Procedure Code which the learned trial magistrate invoked has to be read in conjunction with Section 191 of the Criminal Procedure Code which provides,

“The provisions of section 179 to 190, both inclusive, shall be construed in addition to, and not in derogation of the provisions of any other Act and the other provisions of sections 180 to 190 both inclusive shall be construed as being without prejudice to the generality of the provisions of section 179 of the Criminal Procedure Code”.

That section provides,

“When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it”.

In the present case the Appellant was charged with attempted defilement of a girl contrary to section 9(1) as read with section 9(2) of the Sexual Act No. 3 of 2006.

Section 186 of the Criminal Procedure Code provides,

“When a person is charged with the defilement of a girl under the age of fourteen (14) years and the Court is of the opinion that he is not guilty of that offence but that he is guilty of an offence under the sexual offences Act he may be convicted of that offence although he was not charged with it”.

The appellant was not charged with defilement of a girl under fourteen (14) years but with attempted defilement of a girl.

The learned trial magistrate invoked the provisions of section 186 of the Criminal Procedure code erroneously. The charge of defilement of a girl under fourteen (14) years is distinct and different from that of attempted defilement of a girl and the two carry different prescribed Sentences.

The import of section 179 of the Criminal Procedure Code is that it contemplates instances where one is charged with a substantive (main) offence but the evidence adduced satisfies the Conviction of a minor or lesser offence.

On the issue of Conviction, upon perusal of the evidence on record and upon careful analysis I am satisfied its overwhelming and the charge of attempted defilement was proved beyond reasonable doubt. The Conviction under section 8(2) as read with Section 8(3) of the Sexual offences Act is substituted with that under section 9(1) as read with section 9(2) of the sexual offence act.

The Sentence of thirty (30) years imprisonment is reduced to ten years imprisonment from the time of conviction. The appeal succeeds to that extent only.

Judgment delivered dated and assigned this **16th** day of **September, 2014**.

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M. MUYA

JUDGE

16TH SEPTEMBER, 2014

In open Court in the presence of:-

Learned Counsel for the State Mr. Jami

The Appellant present

Court clerk Musundi