



REPUBLIC OF KENYA

High Court at Embu

Criminal Appeal 85 of 2009

MARK KARIUKI NTHIA.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

*(Being an Appeal from the Conviction and Sentence by D.O. ONYANGO Senior Resident Magistrate Runyenjes in Criminal Case No. 757 of 2008 on 29<sup>th</sup> April 2009)*

### J U D G M E N T

MARK KARIUKI NTHIA was charged with the offence attempted defilement contrary to Section 9(1) as read with Section 9(2) of the Sexual Offences Act No. 3/2006. He also faced an alternative count of Indecent assault of a girl aged 18 years contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.

From the evidence it is indicated that PW1 was aged 15 years but there is nothing to confirm that. No medical or documentary evidence was adduced to confirm the age of the complainant. Both offences the appellant was charged with have a key element of age.

There are many ways of proving age. The Prosecution did not employ any of them. So the court made assumptions. Age is what distinguishes defilement from rape. This was not done. Would it be a suitable case for retrial? In the case of *EKIMAT VS REPUBLIC [2005] 1 KLR*, it was held that each case was to be considered on its own circumstances.

In this case the appellant has been in Prison since 29/10/2008 as he was never released on bond. He has served 3 years 7 months in jail. Considering remission he may have a period of about 3 years left to serve. The appellant was convicted of the offence of attempted defilement.

The complainant is over 18 years now and has probably undergone counseling. It is not known if she would be ready to come and face the appellant in Court again. I find that a retrial in the circumstances would be prejudicial to both the appellant and PW1.

I therefore allow the appeal and quash the conviction and set aside the sentence of 10 years imprisonment.

The appellant to be released unless otherwise lawfully held under a separate warrant.

**DATED AND DELIVERED AT EMBU THIS 14<sup>TH</sup> DAY OF FEBRUARY 2013.**

**H.I. ONG'UDI  
JUDGE**

**In the presence of:-  
Ms. Macharia for State  
Appellant  
Njue CC**