**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 451 OF 2009**

**A K W.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

***(From original conviction and sentence in criminal case Number 2917 of 2008 in the Chief Magistrate's Court at Thika – L. W. Gicheha (SRM) on 17th February 2009)***

**JUDGMENT**

1. The appellant was charged before Mrs. L. W. Gicheha Senior Resident Magistrate at Thika law courts as she then was, for the offence of attempted defilement under **Section 8(1)** as read with **sub-section (3)** of the **Sexual offences Act**, in **Cr. Case No. 2917 of 2008.** The learned trial magistrate found that the evidence supported the offence of attempted defilement and not actual defilement and convicted the appellant accordingly. On 16th October 2009, he was sentenced to 15 years imprisonment.

2. The appellant filed an appeal relying on nine grounds which he subsequently amended. The gist of his appeal as can be discerned from the supplementary grounds is that the prosecution did not discharge the burden of proof as required by law. This was in his view, especially because essential witnesses such as the Arresting Officer and the Investigating Officer did not testify.

3. The appellant also argued that the prosecution evidence was contradictory, inconsistent and uncorroborated, hence insufficient as a basis for a conviction. Further that the learned trial magistrate overlooked the existence of a land dispute which had resulted in bad blood between the appellant and **PW3** leading to this case. He also averred that his defence was rejected yet it cast doubt on the prosecution case.

4. The learned stated counsel M/s. Aluda did not want to tax herself too much by interrogating the evidence and took the easy way out by leaving it to the court to decide on the evidence on record.

5. I have looked at the evidence adduced before the trial court afresh. I have re-evaluated and re-assessed it to reach my own independent conclusion. I have also warned myself that I did not have the advantage of seeing the witnesses when they testified as the trial court did, and cannot therefore comment on their demeanor

6. From the submissions of the appellant and the evidence on record there was no dispute that the crime for which he was convicted was committed on the date and time in question, in the manner described by the complainant and that the crime was committed against her.

7. **PW2** the mother of the minor came upon her in the act of being sexually assaulted. **PW3** the Clinical Officer who filled a P3 Form in her regard noted that on her initial visit and examination at the hospital she was found to have bruises on her labia majora, a whitish discharge from her genitals and an infection, although the hymen was intact. Her clothes too were soiled. In his view the minor had been defiled.

8. The question for determination is therefore the identity of the person who attempted to defile the complainant as was the finding of the trial court. The complainant, who was aged 13 years at the time of tendering her evidence, testified on oath after being subjected to voire dire examination, and found to be intelligent enough to understand the meaning of an oath and the necessity to speak the truth.

9. In her testimony, she stated that the appellant who had first given her mother some money to go and buy maize meal, followed the minor into the bushes where she had been sent to collect firewood. He held her by the hand and told her he wanted to do to her what he usually did to her mother. He threatened to beat her if she resisted or screamed. He went ahead to put her on the ground, remove her panties and put his penis in her **"place of urinating".** On cross-examination she stated as follows:

> **"You told me you would beat me if I scream** (sic). **You slept on me and removed my panty. You then put your penis in my place of urinating. I was injured. I could not even walk. The clothes I removed at Gituamba. You defiled me at 6 p.m. You are the brother of my mother. You were living in our house. You were sleeping in the same bed with my mother."**

10. The time of the offence was therefore 6 p.m. when there was still day light and the assailant was a person well known to the minor and who lived with her in the same household. The minor stated that he was a brother to her mother, but the mother and the appellant himself clarified later that he was a brother to her father. The important thing was that he is an uncle who lived in the same house as the minor and slept in the same bed as her mother and continued to do so even after the assault. She therefore knew him well.

11. **PW2** was honest enough to state that the appellant remained in her house and slept in her house for the next five days until he was arrested. She stated that this was because she was afraid of him due to his bad personality. I examined the entire evidence on record in view of the averments from the prosecution, that the appellant was the culprit while he himself contended that this case was fabricated by **PW2** his sister-in-law, to compel him to desist from marrying a wife of his own and building a house for her in the family land. Hitherto the appellant had lived with his sister-in-law as husband and wife, in order to sire children for his brother who became mentally afflicted and that he provided for **PW2** and her children. He confirmed that he and **PW2** had four children between them.

12. From the evidence, this is a couple which had lived together for a considerable period of time judging from the four children they had sired together. There is no evidence that there was pre-existing acrimony between them. It is also clear that the extended family held a meeting at which it was agreed that the appellant should erect his own house in one corner of the family shamba and also that he should wait for **PW2**'s crop of peas to mature and be harvested before he moved into

the portion of the shamba.

13. This being a criminal trial the burden of proof rests unshiftingly upon the prosecution, and the appellant was under no burden whatsoever to prove his innocence. I have however considered all the evidence on record and find that to believe the appellant's version of events would leave the injuries and discharge found in the minor's genitalia unexplained. **PW1** and **PW2** corroborated each other on the fact that **PW2** found the appellant in the act of defiling the minor, and that the appellant apologised and asked for forgiveness. Both withstood cross-examination beautifully and contrary to the appellant's grounds of appeal in which he asserted that the evidence was contradictory and inconsistent, I found that their evidence flowed well and was in consonance with each other.

14. In this case the learned trial magistrate appears to have found the appellant guilty under **Section 9(1)** of the **Sexual Offences Act** instead of **Section 8(3)** of the **Sexual Offences Act** under which he was charged because the minor's hymen was not breached. There was however evidence of attempting to penetrate her vagina as evinced by the bruises on her labia mojora. It was therefore right for the learned trial magistrate to find the appellant guilty of the offence which was proved.

15. **Section 9(2)** of the **Sexual Offences Act** which provides for the punishment for attempted defilement states as follows:

> **"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 appellant was sentenced to 15 years imprisonment which falls within the provisions of **Section 9(2)** of the **Sexual Offences Act**.

16. There was no dispute as to the fact that the appellant was arrested and charged subsequent to the report that **PW2** made to the police. The Arresting Officer and the Investigating Officer were therefore, not essential or critical witnesses in the circumstances of this case whose absence can be deemed to be fatal to the prosecution's case. The prosecutions case was proved through the evidence of other witnesses who testified.

17. All in all I have anxiously scrutinized the evidence on record in its entirety, together with the submissions of the appellant which were incisive and well thought out and those of the respondent. I find that the prosecution's evidence against the appellant was overwhelming and no reasonable doubt was created as to whether the offence was committed, and who committed it.

18. For the foregoing reasons I find that the appeal is lacking in merit and is therefore dismissed.

**SIGNED DATED** and **DELIVERED** in open court this **13th** of **June 2013.**

**L. A. ACHODE**

**JUDGE**