



COPY

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 147 OF 2011

ANTONY MWASHIGADI NYANGEAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From the Original Conviction and Sentence in the Criminal Case No. 29 of 2011 of the Senior Resident Magistrate's Court at Taveta **Hon. C.N. Ndegwa - SRM**)

JUDGMENT

The Appellant **ANTHONY MWASHIGADI NYANGE** was Convicted and Sentenced to fifteen (15) years imprisonment for the offence of 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.

The particulars are that on the 26th day of January, 2011 at around 5:00 pm at *[particulars withheld]* Village of Taita Taveta County attempted to defile S.W. A girl aged six years.

Brief facts of this case are that the Complainant was at her home with a younger sibling by the name O when the Appellant materialized and offered to take her to his house for some food. On the way to Makongeni he got hold of her, removed her pants, lowered his trouser and placed her on his laps while seated and was on the verge of inserting his penis into her vagina when she screamed in pain and a passerby went to her help. Upon seeing the man he bolted however he was chased and arrested by members of public who meted out some punishment on him before frog-marching him to police station.

The Complainants evidence was corroborated by PW 3 J.M a resident of *[particulars withheld]* Village who at about 5:00 pm was leaving his farm for home when he met the Appellant and the Complainant on the way at *[particulars withheld]* farm, he passed them but was suspicious. When he heard the Appellant tell the Complainant not to tell her mother anything. His curiosity was triggered the more when a young lady inquired of him as to whether he had seen a man with a small girl on the way. They decided to retrace his steps and sighted the appellant in the bushes. He had removed the girls pants and the girl was sitting on his laps with his penis erect. They managed to arrest him but on the way he managed to wrestle himself away and escaped briefly before he was chased and arrested by members of

public and beaten before being handed over to police.

When called upon to offer his defence, the Appellant had testified that on the 26th January, 2011 at 4:45pm he was at [particulars withheld] village doing shopping when he saw the Complainant who was known to him before. He decided to purchase chips for her. The chips were ready so he decided to go and buy meat first. The Complainant followed him to the butchery. On the way PW 3 J.M stopped him and demanded to know whether the Complainant was his daughter. He answered in the affirmative meanwhile the Complainants mother arrived and demanded to know where he was taking her child. She alleged that the appellants intention was to gouge her daughters eyes for trade and or financial gain. The Complainants mother had instructed PW 3 to beat him with a club he was holding. He decided to go to police station to make a report of having been assaulted but the Complainants mother beat him in the game as she arrived there first and he was subsequently arrested and charged with this offence.

The appellant does not deny having been found in the company of a nursery school girl who was not related to him at all. He alleges that his intention was to buy her chips and nothing more. The evidence of PW 3 and the Complainant herself places him in the bushes but not near any chips place. PW 3 did not know the appellant before nor did the Complainant. The allegation that the Complainants mother was his girlfriend was vehemently denied as she states that she was married to somebody else and had no sexual intercourse with him before.

I find the Conviction for attempted defilement was safe. The charge attracts an imprisonment term of not less than ten years. He was Sentenced to fifteen years imprisonment. He had been treated as a first offender. The Sentence of fifteen years is deemed as harsh. It is reduced to Ten years imprisonment from the date of Conviction.

To that extent only does this appeal succeed.

Judgment dated and delivered in open Court this **4th** day of **September, 2013**.

.....

M. MUYA

JUDGE

4TH SEPTEMBER, 2013

In the presence of:-

Learned State Counsel Mr. Ayodo

The appellant himself

Court clerk Musundi