



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CRIMINAL APPEAL NO. 189 of 2011**

*(An appeal against both conviction and sentence of the Senior Resident Magistrate's Court at Mumias in Criminal*

*Case No. 1120 of 2010 [H. WANDERE, SRM])*

**MAURICE ORATA MOMBO ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

The appellant was charged with attempted defilement contrary to Section 9 (1) and (2) of the Sexual offences Act No. 3 of 2006. The particulars of the charge were that on 20th November, 2010 at 7.30 p.m. at [particulars withheld] in Mumias District within Kakamega County intentionally attempted to cause his penis to penetrate in the vagina of S O O a child aged 17 years. In the alternative, he was charged with indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006. The particulars were that on the same day and place, he intentionally touched the vagina of S O O, a child aged 17 years with his penis. In count II, he was charged with causing actual bodily harm contrary to **Section 251** of the Penal Code. The particulars were that on the same day and place, unlawfully assaulted S O O thereby occasioning her actual bodily harm. He denied all the charges. After a full trial, he was convicted of the main count I and II. He was acquitted of the alternative charge. He was sentenced to serve 10 years imprisonment for count I, and 1 year imprisonment for count II. The sentences were ordered to run concurrently. Being aggrieved by the decision of the trial court he has appealed to this court.

His grounds of appeal were that he was not given relevant prosecution witness statements contrary to **Article 50** of the Constitution of Kenya; that the learned magistrate failed to evaluate the evidence of the Medical officer; that the learned magistrate failed to appreciate that the prosecution case was merely speculative, inconsistent and lacked probative value; that the learned magistrate misdirected himself by rejecting his alibi defence. The appellant also filed written submissions, which I have perused.

At the hearing of the appeal, the appellant submitted that the birth certificate of the complainant was not produced by the prosecution. Secondly, the learned magistrate wrongly assumed that he was not a first offender.

Ms Opiyo, the learned prosecution counsel submitted that conviction and sentence were proper. Counsel stated that the appellant did not ask for witness's statements or materials from the prosecution.

Counsel argued that there was adequate evidence to sustain the conviction and that the alibi defence was correctly rejected. Finally, counsel argued that the trial court had jurisdiction to hear the matter.

Briefly, the prosecution evidence is that PW1 S O O was walking home on 20/11/2010 at about 7.30 p.m. At a sugarcane plantation near her home, a man stood by the footpath. That man whom she stated was the appellant approached and grabbed her, threw her down covering her mouth. The complainant however screamed and her grandmother PW3 C A O heard the screams and came along to assist. She found the complainant struggling with the appellant. By that time, the appellant had torn the clothes of the complainant and was touching her breasts and private parts. Due to the screams, a step-brother of the complainant G O, PW4 also came out to assist the complainant. PW3 and PW4 struggled with the appellant. He kicked them and then ran away. By then, the complainant had suffered some injuries. She was taken to hospital and the incident reported to the police. PW2 Wycliff Westakhole, a Clinical officer filled a P3 form. According to him, the complainant had suffered injuries classified as harm. The P3 form was filled after complainant had been treated at Makunga Health Centre.

The appellant was arrested and charged for the offence.

When put on his defence, the appellant gave sworn testimony. He stated that on 17/12/2010 at about 10.00 p.m., he heard a knock on the door of his house. When he opened the door, he was arrested by the police and taken to Mumias Police Station. According to him, the charges were false. His uncle had leased his land to the family of the complainant. That was the reason why he was arrested.

Faced with this evidence, the learned magistrate found that the prosecution had proved its case against the appellant on the charge of defilement and the charge of assault causing actual bodily harm. He convicted the appellant, sentenced him to serve 10 years imprisonment for attempted defilement and 1 year imprisonment for causing actual bodily harm. Therefrom arose this appeal.

This being a first appeal, I am duty bound to re-evaluate all the evidence on record afresh and come to my conclusions and inferences. See **Okeno vs Republic [1972] EA 32.**

The appellant has complained that he was not provided with the prosecution witness statements. The record does not indicate that he asked for the same. Though it could be his Constitutional right to be given a copy of the same if he requested, since he did not request for the same, my view is that that fact alone cannot vitiate the conviction herein.

This is an appeal from the conviction in a sexual offence where the age of the complainant was very crucial. A conviction was recorded for defilement. Initially the complainant was said to be above 18 years. Therefore, a charge of attempted rape was preferred. During the trial, the complainant stated that she was 17 years of age. A charge of defilement was then preferred. In a case of defilement, the prosecution is required to prove beyond reasonable doubt the age of the complainant especially where the age is just around the age of majority. From the facts and evidence placed before the magistrate, I am not satisfied that the age of the alleged minor was proved. The complainant could have been 18 years or above. That means that the offence of attempted defilement was not proved.

Assuming that it was attempted rape, the intention of the culprit to have sexual intercourse with the complainant had to be proved. In my view, the mere fact that a man is struggling with a woman does not perse prove attempted rape. Some evidence has to be tendered that would establish that the culprit intended to have sexual intercourse with the complainant. In the present case, the prosecution evidence did not, in my view, establish that intention.

The appellant has argued in his defence that this case was a frame-up. He stated that there was an existing grudge from the family of the complainant. However, he did not give any particulars on how that grudge arose. The mere fact that his uncle had leased land to the family of the complainant, does not give rise to a grudge or misunderstanding.

This is a case that is predicated on identification. The incident occurred at night. The three eye

witnesses claimed to have known the appellant before. From his own defence evidence of a grudge, he suggested that he was known to and knew family of the complainant before. The evidence of the three witnesses who saw him at the scene cannot be doubted. He was indeed seen to be struggling with the complainant. There is evidence that he injured her in the struggle. He ran away when he was confronted by the grandmother and the step-brother of the complainant. In my view, the evidence on record shows that the complainant and the other two eye witnesses were truthful in as far as the occurrence of the incident of the struggle is concerned. Though it was slightly after 7.00 p.m., there was no possibility of mistaken identity. In my view, the identification of the appellant at the scene was free from the possibility of error. It is not evidence of mere suspicion. Even after cautioning myself, I find that the appellant was identified as the person who struggled and injured the complainant. *See case of **Nzaro - vs- Republic [1991] KLR 70.***

Having evaluated all the evidence on record, I am of the view that the prosecution did not prove the charge of attempted defilement. However, the charge of assault causing actual bodily harm was proved. The sentence for assault was lawful.

Consequently, I quash the conviction for the offence of attempted defilement and set aside the sentence thereby imposed. I uphold both the conviction and sentence for the offence of assault causing actual bodily harm.

***Dated at Kakamega this 28th day of November, 2013***

**George Dulu**

**JUDGE**