



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CRIMINAL APPEAL CASE NO. 197 OF 2011

JOSEPH MAINA MUGO.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 3630 of 2010 Republic vs. Joseph Maina Mugo in the Chief Magistrate's Court at Thika by B. A. Owino Senior Resident Magistrate on 21st July 2011)

JUDGMENT

The Appellant was charged with the offence of defilement of a child contrary to **section 8(1)(2) of the Sexual Offences Act** and the particulars were that on 30th August 2010 (**particulars withheld**) Estate in Thika District within Central Province he committed an act which caused penetration with R N, a child aged 4 years. In the alternative, the Appellant was charged with the offence of committing an indecent act with a child contrary to **section 11(1) of the Sexual Offences Act** and the particulars were that on 30th August 2010 at (particulars withheld) Estate in Thika District within Central Province he committed an act with a child namely R N aged 4 years by touching her genital organs.

The Appellant pleaded not guilty to both offences and after a full trial, the trial magistrate acquitted the Appellant of the first offence of defilement as well as the offence of indecent act. The trial magistrate however proceeded to convict the Appellant of the offence of attempted defilement contrary to section 9 of the Sexual Offences Act and sentenced him to serve 10 years imprisonment.

Being aggrieved by both the conviction and the sentence, the Appellant filed his Petition of Appeal dated 29th July 2011 and filed on 3rd August 2011 in which he listed the following grounds of appeal:

1. That the trial magistrate erred in law by sending him to 10 years imprisonment yet lost sight of the Penal Code which states that the prescribed penalty for attempted defilement carried a sentence of not more than 7 years.
2. That there was no evidence to prove a charge of attempted defilement.
3. That there was no eye witness to the commission of the offence charged and therefore the subsequent conviction was unjustified.

4. That the prosecution's case was based on suspicion basis as there was no eye witness to the commission of the same.

The Appellant thereafter filed his Amended Supplementary Grounds of Appeal listing the following grounds:

1. That the entire trial process was a nullity as the trial proceeded on a defective charge sheet.
2. That the entire process was not fair to him as his fundamental rights to a fair and impartial trial as enshrined by **Article 25(c) of the Constitution** were violated in that the charges read to him on 1st September 2010 were read in a language he was not conversant with and he was not accorded the services of an interpreter as required under **Article 50(2)(m) of the Constitution**.
3. That the trial magistrate erred and grossly misdirected himself by convicting him of the offence of attempted defilement whereas the evidence fell too short of the certainty required in an attempted offence.

The Appellant chose to restrict his submissions to the amended supplementary grounds of appeal appearing above. The Appellant invited the court to consider the charges set out in the charge sheet and submitted that it was not stated by which part of the Appellant's body was penetration achieved. The Appellant made a similar submission as regards the alternative charge of indecent act. This matter is not important at this stage because the trial magistrate acquitted the Appellant of the offences of defilement and indecent act. However, the Appellant cited the provisions of **section 134 of the Criminal Procedure Code** which provides as follows:

“Every charge or information shall contain and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”

He further quoted the case of **Sigilai & Another v. Republic (2004) 2 KLR 480** where it was held as follows:

“The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defence to the charge.”

The Appellant submitted that it is not known what he could have pleaded if the charges had been properly framed. He further submitted that due to the defective charge, he was not able to prepare for his defence as the charges facing him were not disclosed in a sufficient accurate fashion to give him adequate notice of the charges facing him thereby prejudicing him. He contended that this led to a miscarriage of justice.

The Appellant also submitted that the evidence adduced fell short of proving the offence of attempted defilement which he was convicted of. He noted that the testimony of PW2 was that he was found holding the hand of the complainant. He submitted that the adduced evidence was based on suspicions, not on facts. He submitted that suspicion is a state of conjecture or surmise where proof is lacking. He lastly stated that his case was not proved to the required standard needed by law.

The State opposed this appeal. The State Counsel submitted that section 134 of the Criminal Procedure Code, which is cited above, was complied with in the charge sheet. She further defended the particulars of the offences given in the charge sheet as being sufficient. She submitted that the trial magistrate was entitled under **section 179(1) of the Criminal Procedure Code** to convict the Appellant of the offence of attempted defilement although he was not charged with that offence.

To my mind, two issues emerge which must be addressed in order to determine whether or not to allow this appeal. The first one is whether the charge sheet was or was not defective in terms of the laying out of the offences and the particulars thereof. The second issue is whether the prosecution was able to prove that the Appellant committed the offence of attempted defilement beyond reasonable doubt to warrant the

conviction of the Appellant.

1. On the first issue, I note the Appellant's argument that it was not indicated in the charge sheet the part of his body which he used to penetrate the complainant in the offence of defilement or touch the complainant's genital organs in the offence of indecent act. **Section 8(1) of the Sexual Offences Act** defines defilement as an act which causes penetration. It does not state with which part of the body. The definition of indecent act in the same Act is any contact between any part of the body of a person with the genital organs of another. On this point therefore, I disagree with the Appellant. I can see that the charge sheet did in fact give him sufficient information to understand the nature of the charges facing him to enable him to prepare his defence. **Section 179(1) of the Criminal Procedure Code** entitled the trial magistrate to convict the Appellant of the minor offence of attempted defilement as noted above.
2. The second issue for my determination is whether the evidence produced by the prosecution was sufficient to support the conviction of the Appellant of the offence of attempted defilement. To answer that question, I have to review all the testimonies of the prosecution witnesses who testified in this case. It is noteworthy that in this case, the complainant was a 4 year old girl who was not old enough to testify on her own behalf. The prosecution called her father (PW4) and mother (PW1), a neighbor (PW2), the Doctor representing the examining Doctor (PW3) and the investigating officer (PW5). Owing to the age of the complainant, she could not testify. The sequence of events was that on the material day, the complainant's parents left her in a neighbour's house (PW2) and they proceeded to work. PW2 testified that he had gone home for lunch on the material day when his 4 year old daughter informed him that her friend "R" who had been left in their custody had gone with an unknown man. He further testified that he alerted some neighbours and they began to search for complainant. He then said that he spotted the complainant in the company of a man near Mangu-Thika Road. He said that he gave chase after the man who is the Appellant and found him holding the complainant by hand. He testified that he asked the Appellant what he was doing with the complainant and that instead of answering the Appellant began to flee. He then stated that he raised alarm and the other people helping him with the search responded, gave chase and apprehended the Appellant and began to assault him. He then stated that his wife called the complainant's father on phone to alert him. The complainant's father (PW4) testified that he indeed was "flashed" on phone by Mama M (PW2's wife) as he was on his way home from work at about 1 pm and that he called her. He testified that Mama M informed him that the complainant was missing from her home. He said that he hurried home after informing his wife (PW1) and began searching for his missing child. He then said that someone called Richard called him to where they were and found a crowd of people. He further testified that he found his daughter and a man who was being beaten and being accused for attempting to defile the complainant. He stated further that he was assisted by members of the public to bring the Appellant to the police station. PW1, the complainant's mother also testified that after receiving her husband's alert by phone, she rushed to [particulars withheld] Church, Ngoigwa where she found a mob of people beating a man who was alleged to have been found defiling the complainant. The remaining witnesses being the Doctor and the investigating officer were not involved at this early stage. The reason why I set out in detail the sequence of events leading to the arrest of the Appellant was to enable me to narrow down on the identification of the Appellant as the person who attempted to defile the complainant. It emerges quite clearly that the first person to spot the Appellant with the complainant was the neighbor PW2 who stated that he spotted the Appellant holding the hand of the complainant. Nowhere does this witness state that the Appellant was caught attempting to defile the complainant. It is noteworthy that the mob had not yet descended on the Appellant at this time. It is only when the Appellant sought to run away that PW2 together with other members of the public gave chase after the Appellant, apprehended him and began assaulting him, claiming that he had tried to defile the complainant. No one testified to having caught the Appellant in the act. There is therefore a missing link between the Appellant and the evidence adduced of the complainant's attempted defilement. To that extent therefore, I am not convinced that the prosecution proved their case beyond reasonable doubt.

It is my finding therefore that the trial magistrate did not have sufficient evidence to convict the Appellant of the offence of attempted defilement. It is on that basis that I quash the conviction and sentence and

allow the appeal. The Appellant is to be released forthwith.

SIGNED AND DELIVERED AT NAIROBI THIS 15th DAY OF

November 2013

MARY M. GITUMBI

JUDGE