



REPUBLIC OF KENYA

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

CRIMINAL APPEAL NO. 36 'B' OF 2009

**MAKOKHA WAFULA MULONGO.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT**

[From the conviction and sentence of E.H. Keago, R.M in Busia CR.Case No.290 of 2008]

J U D G E M E N T

The appellant Makokha Wafula Mulongo was convicted of attempted defilement contrary to section 9(1) of the Sexual Offence Act No. 3 of 2006 by Busia Resident Magistrate and sentenced to ten (10) years imprisonment. This appeal is against both conviction and sentence.

In his petition, the appellant states that there was no medical evidence to support the charge the evidence was contradictory; that he was impotent and incapable of committing the offence; that the case was fabricated against him due to a domestic dispute; that his defence was not considered and that the sentence was harsh and excessive.

The appeal was opposed by the state which was represented by Mr. Okeyo. He argued that the conviction which was based on the evidence of PW1, PW2, PW3 and PW6 was safe. The age of the complainant was established according to the state and that the sentence was within the law.

The facts of the case are that the complainant (PW1) J.A.O was staying with her sister one A while her parents stayed at Narok. At the time of the offence the complainant was aged eleven years and was in class IV. The appellant visited the home of PW1's sister and spent the night there in the same house with the complainant and other children. It was at night that when he sexually molested the girls and the complainant became a victim. PW1 was taken for medical treatment and examination the following day and the accused arrested.

It was the evidence of PW1 that on the 17th March, 2008 she went to sleep with two other young girls. The three children including PW3 slept on the floor. The appellant who was a visitor to A's mother - in - law one N slept on a mat in the same room. That night around 2.00 a.m. the appellant moved to where PW3 was sleeping the girl screamed complaining that the appellant was touching her buttocks. N came to the room to find what was happening. The appellant had returned to his sleeping place and denied the allegation on being confronted. The old lady returned to her room to sleep at around 4.00 a.m. the appellant went to where PW1 was sleeping. She moved to another place in the room and later fell asleep. A short while later, she woke up to find the appellant lying on top of her. He had removed her under pants, pulled her skirt upwards and did not have his pants on. PW1 tried in vain to push the appellant away. Within no time, the appellant had succeeded in sexually assaulting the girl. The matter

was reported at Nambale police patrol base and the appellant was arrested. PW1 was taken to Nambale Health Centre where she was treated and examined by PW6.

The evidence of PW1 was corroborated by PW3 E.A who was a class V pupil at the time of the offence. She testified that on the material night she slept on the floor at the same place with PW1 and another girl. The appellant visited her grandmother that evening slept on a mat in the same room. She woke up in the night to find the appellant sleeping beside her and holding her by the back. She screamed and her grandmother came to her rescue. She fell asleep and was woken up later in the night by PW1 crying and accusing the appellant of sexually assaulting her. The appellant was quick to deny that he had done nothing to the girl when again confronted by PW3's grandmother.

PW2 the mother of PW1 did not witness the incident. PW4 the grandmother of PW3 testified that she was in her house with the appellant that evening. The appellant requested to be given a place to sleep for the night. She granted his request and showed him a place in the room where PW1 and PW3 were sleeping. Around 2.00 a.m., she was woken up by PW3 calling for help that the appellant had come to where she lay and touched her private parts. The appellant denied the allegation and PW4 went back to sleep. Around 5.00 a.m. PW1 screamed accusing the appellant of defiling her. PW4 took the girl and reported the matter to the village elder and later to the police who apprehended the appellant.

PW5 P.C Patrick Ndirangu received the report of PW1 and PW4 at Nambale police post. He re-arrested the appellant from members of the public who had arrested him at the scene. The assistant chief of the area accompanied the members of public. PW5 issued PW1 with a P3 form.

It was PW6 the clinical officer who examined the complainant on examination, he found bruises on her genitalia and whitish discharge on the thighs. The hymen was intact and PW6 concluded that penetration had not taken place.

In defence, the appellant said that he did not commit the offence.

The trial court found that there was no-evidence of defilement and convicted the appellant with attempted defilement.

PW6 testified that he examined PW1 and found her to be eleven years old. The complainant herself testified that she was born in 1996 and was aged 11 years at the time of the offence. The prosecution by producing the P3 form to support the oral evidence of PW1 and PW6 had no doubt established the age of the complainant. The complainant's evidence was candid on what the appellant did to her. He sneaked to where she was sleeping in the night and removed her underwear. At the time she woke up, the appellant was already struggling to penetrate her. There was medical evidence of bruises on her private parts and PW6 was clear that penetration did not take place. PW3 was a key witness. She was the first one to be indecently molested by the appellant. When she woke up, she found PW1 crying and complaining that the appellant had sexually assaulted her. PW4 went to the room where the girls were sleeping twice that night in answer to the screams by PW3 and PW1. It is PW4 who reported the matter to hospital and reported to the village elder and the police. The appellant gave a one sentence defence:

"I did not commit the alleged offence."

The appellant did not raise any defence concerning where he was that night and even on how he came to be arrested. The defence was just a mere denial and did not shake the overwhelming evidence of the prosecution. The magistrate was right to reach a finding that the appellant was guilty or attempted defilement. There was the overt act in the process of trying to penetrate the complainant which resulted in bruises in the genitalia. Section 179 of the Criminal Procedure Code gives the court the mandate to convict on a lesser offence where there is sufficient evidence to that effect.

The accused alleged fabrication due to domestic dispute. In his defence the appellant did not even explain his relationship with PW4's or PW1's family neither did he say there was any grudge against him by any member of PW4's family. I find that this allegation has no basis.

I find no contradiction in the evidence of the key witnesses as alleged by the appellant. The particulars of the contradiction were not pointed out during the hearing of the appeal.

The accused alleged he was impotent as a result of an accident but produced no medical evidence to that effect. Such evidence ought to have been adduced in his defence if any. It is too late to bring it out in this appeal.

It is my finding that the conviction was safe and was based on overwhelming evidence of the prosecution. The sentence provided for by section 9(1) of the Sexual Offences Act is ten years imprisonment. The sentence imposed was therefore within the law.

I find no merit in this appeal and I dismiss it accordingly.

F. N. MUCHEMI
JUDGE

Judgment dated and delivered on the 13th day of February, 2012 in the presence of the appellant and the state counsel Mr. Okeyo.

F. N. MUCHEMI
JUDGE