



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. 348 OF 2010**

**FAUSTINE MGHANGA .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**(From the Original Conviction and Sentence in Criminal Case No. 480 of 2007 of the Resident Magistrate's Court - F.K. MUNYI – R.M)**

**JUDGMENT**

**FAUSTINE MGHANGA** herein referred to as “**the Appellant**” was charged with the offences of:

**Attempted defilement of a girl contrary to section 9(2) of the sexual offences Act No. 3 of 2006.**

In the main count.

The particulars thereof states that:

**“On the 10<sup>th</sup> day of September, 2007 in Taita Taveta District within Coast Province, attempted to have unlawful carnal knowledge of K. M a girl of the age of seven (7) years”.**

In the alternative count, he was charged with the offence of

**“Indecent assault on a female Contrary to Section 11 (1) of the sexual Offences Act No. 3 of 2006.**

The particulars thereof reads that:

**“On the 10<sup>th</sup> September, 2007 at in Taita Taveta District within Coast province, unlawfully and indecently assaulted K.M by touching her private parts namely Vagina”.**

The Appellant being dissatisfied with the Conviction and Sentence, has appealed against both.

The brief facts of the case are that on the **10<sup>th</sup> September, 2007**, the complainant **K.M.** ( herein referred to as (PW 1) aged 8 years old, was at her grandmother’s home. That the Appellant called her. She was outside the house. He then told her that, he wanted to send her to the shop and showed her Kshs. 20/=. He then carried her in his arms to his house, removed her pants by force and opened his trouser’s zip and belt then attempted to insert **“it”** into her vagina. That he ejaculated on her thighs, then took his T-shirt and wiped it off. That he threatened her, that, if she screamed or report the matter he would kill her.

However the complaint brother saw her when the Appellant was sexually assaulting her and reported to the mother. That, the members of the public and the complainant’s mother were led by the complainant to where the Appellant had taken her and where she slept later. She was taken to Wesu District hospital, and examined. The matter was reported at Wundanyi Police Station. The Appellant was arrested the following day and charged after the investigations.

In his defence, the Appellant told the trial Court that he was at his residence when **(PW2)** the complainant’s brother went to ask for an axe. He took the axe and left. At 6:00 p.m. the Appellant went for the axe from the house of **(PW 3)** the mother of the complainant. At 7:30 p.m., he learnt that he was being sought for by his uncle Nicholas. He went to his uncle’s house where he found **(PW 3)** the complainant’s mother and other people, about 8 people. He learnt of the allegation of defilement, and denied the same. Later, the police officer’s arrested him and charged him.

I now turn to the Appeal In his amended grounds of appeal, he states that:

**1. That the learned trial Magistrate erred in law and fact by basing my Conviction and Sentence without seeing that she had no power to impose a sentence exceeding seven years as required by law.**

**2. That the Learned Hon. Trial Magistrate erred in law and fact by basing Conviction and Sentence without seeing that the preferred charge was fatal and in curably defective, given that,**

**(i) The date shown on the OB contradicts with the one shown in the charge sheet.**

**(ii) The section shown does not disclose an offence of attempted defilement..**

**3. That the learned Hon. Trial magistrate erred in law and fact by convicting me without seeing that no age assessment report was produced before Court to prove that the complainant was 7 years old.**

**4. That the learned Hon. Trial Magistrate erred in law and fact by convicting me on contradictory evidence without seeing the same was not proper in law.**

**5. That the learned trial Magistrate erred in law and fact by dismissing my defence which remained firm and strong.**

The 1<sup>st</sup> ground relates to the charge sheet. He states that it is defective, namely, that the date shown on the OB, contradicted that on the charge sheet and the Section of the Law under which he is charged does not disclose an offence of attempted defilement.

In response to this ground, the State represented by the learned State Counsel, Mr. Jamii submitted that, what was material for proof was the date of the offence. That the charge sheet shows the date of offence as **10<sup>th</sup> September, 2007**, and the OB entry was **22<sup>nd</sup> September, 2007** and the date of arrest as **19<sup>th</sup> September, 2009** as such there is no error, and therefore the charge sheet is proper.

I have looked at the charge sheet and it reveals as follows.

**(i) Date of offence - 10<sup>th</sup> September, 2007.**

**(ii) Date of arrest - 19<sup>th</sup> September, 2007.**

(iii) Date apprehension report to Court - **24<sup>th</sup> September, 2007.**

In this regard (**PW 6**) **PC GUYO GALGALO** testified that while at Wundanyi Police Station, he received a report of the incident herein on **12<sup>th</sup> September, 2007.** Logically that must be the date the matter was booked in the OB. When cross examined, the witness told the court, the offence was on **10<sup>th</sup> September, 2007.** So my understanding of the events is that, the offence took place on **10<sup>th</sup> September, 2007,** the Appellant was arrested on **19<sup>th</sup> September, 2007** and arraigned in court on **24<sup>th</sup> September, 2007.** I therefore don't see the difficulties the Appellant has. All the same that cannot have caused him prejudice. He faults the Section of the Law under which he was charged. Yes, the Section cited that **Section 9(2) of the Sexual Offences Act.** And not the deals with the sentence for attempted defilement. I shall address that issue later.

I now turn to the issue of age of the complainant herein. The complainant told the court she was **8 years** old. The charge sheet states she

was **7 years** old. She testified on **6<sup>th</sup> February, 2008.** The offence was allegedly on **10<sup>th</sup> September, 2007,** that clearly explains, the difference of one year. Her mother, testified that she was 8 years.

I do appreciate the importance of age assessment in such cases. But honestly, who can know the age of a child better than the mother of a child and or the child (if of age?). I personally take judicial notice of the fact that most people in rural area (and even urban areas) would not purpose to have a birth certificate unless required for a specific purpose. If the Courts are going to insist of birth certificates as the scientific methods of proof of age there may be no successful matters especially under Sexual Offences Act. What kind of justice then shall we be giving, if we released all the suspects, not based on the totality of the evidence but on technicalities of failure to prove one single **issue of age.** I note that Article 159 of the Constitution of Kenya has impressed upon the courts to do justice by avoiding **“technicalities”.** What justice will be done if victim are left without redress simply because they are helpless in the hands of **“careless, unconcerned or intentional default on the part of investigating officer who fail to demand, during investigation or prosecution? establish and or prove age of a victim beyond reasonable doubt?”** For how long shall the Courts lament in their Judgment that age was not proved and set free all suspects? Isn't it injustice? In deed no justice will be done, nor seem to be done. And the society will continue to lose confidence in the Judiciary. Is there anything like **“social justice?”.** Does the society understand the Court's language of **“proof of age?”** Is the Judiciary rife to the fact that justice is done when seen to be done? I find no difficulties in relying on the evidence of the witnesses herein, as to the age of the complainant and believe she was 7 years at the time off the offence.

In the case of **Mangunyu vs Republic** Hon. Justice W. Ouko, quoting reference from I.E. Collingwood's Criminal Law of East and Central Africa (London: Sweet and Maxwell) 1967 Ed of page 123, observed

**“Age may be proved by a birth certificate, or particularly in the case of Africans, by the evidence of a person present at the birth”.**

Who can be better person present at birth, than, the mother of the child?

Similarly in the case of **Kenneth Kiplagat Rono Vs Republic CRA No. 66 of 1999** it was held that age can be proved by evidence other than documentary evidence. I am therefore convinced that the applicant herein was a minor at age **7 years** at the time of the commission of the offence. Even, though I have spent quite an amount of time dealing with the issue of age. It is important to note that the Appellant has been charged with the offence of **“Attempted”** defilement. Under this section, what is important to establish is that, the complainant is a **child**. As I have already observed the victim herein was a child.

The Learned trial Magistrate who had the opportunity to see the complainant (PW1) and who observed her, believed that she was a child (for the purposes of Section in 9(1) of the sexual offences Act). In her Judgment, the trial Magistrate refers to PW1 – as **“the girl”** which is a term generally used for a young person as opposed to a lady (– a grown up female). I therefore believe (**PW 1**) was a child for the purpose of the sexual offences Act.

Under Section 2 of the Sexual Offences Act, a child is defined as:-

**“as a child has the meaning assigned thereto in the children Act”.**

Under the Children Act, a child means.

**“Any human being under the age of eighteen years”.**

Therefore for the purpose of section 9 (1) (2) of the Sexual offences Act, the relevant age is **“under 18 years”**.

I now turn to the 3<sup>rd</sup> ground consolidated with the 4<sup>th</sup> ground. In ground three the Appellant submits that the prosecution case had contradictions and in ground four, he submits that, his defence was dismissed, yet it remained firm and strong.

I shall re- evaluate the evidence adduced by both the prosecution and the defence and establish whether it was adequate for a conviction and whether, the defence was considered.

I find that (**PW 1**) K.M. was well known to the Appellant. She gave a detailed account of the events of the day. (**PW 2**) Vincent Wanyige corroborated her evidence that he found the complainant (**PW 1**) in the Appellant’s house. He (**PW2**) saw her (**PW 1**) rush out from the Appellant’s house. That he noticed the

Appellant's trouser zip open. I find that corroborates the complainant's evidence that the Appellant carried her, removed her pant and opened his (Appellant's) zip and belt and also confirms the fact that when (PW 2) asked her (PW1) what she was doing in the Appellants house, she told him (PW2) that, the appellant had carried her from the grandmother's compound and taken her to his (Appellant's) house and attempted to defilement her. That ties up perfect well with what (PW 1) told the Court. I therefore believe that in deed the Appellant took (PW 1) from the grandmother's home to his house.

The question is this, did the Appellant attempt to defile her ?

PW4 - Dr. Andrea Mwikamba who examined the complainant (PW1) found that, **she had bruises on the labia majora and was tender to touch**. The Dr. indicated in the P3 form, there was no evidence of penetration as the hymen was intact.

At the close of the prosecution case, the prosecutor submitted that:

**“The P3 form (exhibit 1) is our crucial document that we are relying on.**

So does this P3 form support the charge of attempted defilement? I shall deal with that issue later.

I now turn to the defence. The Appellant denied knowledge of the incident. He details out the events of the day. However, in cross examination, he admits PW 2 went to his house for an axe. He also admits the Complainant was about 7 ½ years. He denied brushing his penis on her thighs. In the judgment the Learned Trial Magistrate analysed both prosecution and the defence case.

Upon re-evaluation of the evidence as above stated I find there is sufficient evidence that the Appellant took the complainant to his house with ill or ulterior motive. I am however disturbed by two issues normally, (i) the Section of the Law under which the Appellant was charged in the main count. Section 9 (2) of the sexual offences Act, does **NOT** create an offence of defilement. It deals with the **“Sentence”** thereof. It's disheartening that such a mistake can pass through the hands of both the prosecutor and the Trial Magistrate. It's very unfortunate. It serves no justice to acquit suspects on such **“unnecessary mistakes”**. I think all stake holders in the Criminal justice system ought to **“get serious”**. Although the Trial Magistrate convicted the Appellant on that main count. I am unable to confirm that conviction because that Section 9 (2) of the Sexual offences Act, does not create an offence.

(ii) Similarly the evidence of the Doctor is disturbing. He alleges in the P3 form that the victim had bruises on the labia majora. He then states **“there was no penetration”**. But fails to explain the **“probable”** cause of the bruises.

In the Judgment, the trial magistrate observed.

**“I find that though there was no evidence of penetration, the girls private parts were bruised and the area was tender on touch. He even ejaculated and wiped a liquid substance that dropped on PW 1’S thighs. This shows that the accused did not merely touch her private parts but had the intention to defile her. I therefore find he accused guilty of attempted defilement as charged and is convicted accordingly under section 215 of the Criminal procedure Code”.**

With due respect to the Learned Magistrate, **“not even the denial noweth the mind of a man”**. Intention must be proved.

After re-evaluating and analyzing the evidence I find is that from the evidences of PW 1 and PW 2, the Appellant carried her **(PW 1)** all the way from her grandmother’s home, to his house, and unzipped his trouser. That is clear evidence of indecent assault upon **(PW 1)** – a young child of **7 ½ years**. She testified that the Appellant wrapped his private parts on her thighs. Otherwise isn’t this indecent assault? (how else can you explain what the Appellant was doing with her in his house? PW 2 confirmed PW1 was in appellant’s house and the Appellant even gave him (PW 2) an axe when the Appellant zip was still open. Again, the subsequent behavior of the child after the incident namely that, **“she ran away, hid, fearing to be beaten, and later found having dozed off sucking her fingers”** showed she was traumatized.

She felt physically, and emotionally assaulted, I believe I find no reason for her to lie against the Appellant having considered the Appellant’s defence. I find it’s a mere denial. I dismiss it as lacking in substance. I however find the evidence adduced supports the alternative Count of indecent assault on a female contrary to Section 11(1) of the sexual offences Act, than a charge of Attempted defilement.

I therefore set aside the Appellant’s conviction on the main count and substitute with a conviction on the alternative count. The sentence on both the main and alternative counts herein is a minimum sentence of 10 years. He was sentenced to serve Fourteen (14) years imprisonment.

In passing the sentence, trial magistrate found that the offence of this kind are prevalent and **“they are beastly”** and requires a deterrent sentence. I don’t find the sentence imposed herein to be excessive. It was lawful and reasonable, save for the fact that being a first offender may be a minimum of **TEN years** would have been appropriate. I therefore set aside the sentence of **FOURTEEN years** herein and substitute it with a sentence of **TEN years** imprisonment with effect from the date of sentence.

Orders accordingly.

**G.L. NZIOKA**

**JUDGE**

**05/03/2012**