



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**Criminal Appeal 99 of 2009**

**JACAN MAKAU MWENDA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

1. The Appellant was convicted after trial of **attempted defilement** contrary to **section 9(1)** of the **Sexual Offences Act, No. 3 of 2006** (the Act). He was sentenced to serve **10 years imprisonment**. He has appealed against both conviction and sentence.
2. The particulars of offence as charged were that on 7<sup>th</sup> August 2007 at {*particulars withheld*} in Makueni District within Eastern Province, he attempted to have unlawful carnal knowledge of **M.M.M**, a girl under the age of 16 years.
3. The complainant, **M.M.M (PW1)**, testified that on the 7<sup>th</sup> of August 2007 at about 9.00 a.m. while at her home, the Appellant came and told her to accompany him to his home. Although in her testimony-in-chief she stated that she had not known the Appellant before, in cross-examination she stated that she had known him as a good friend.
4. The complainant further testified that she went with the Appellant to his house and upon entering he locked the door. He then removed a magazine called ***Insyder*** and started reading it. He gave it to her but she returned it to him. He then removed his shoes, trouser and shirt and remained only in his under-pants. He asked her to remove her blouse and skirt, which she did, and he told her that he wanted to sleep with her but never touched her.
5. The complainant further testified that she and the Appellant sat on the bed but nothing else happened. The door was then kicked open and her mother and another lady entered. She and the Appellant were then taken to hospital.
6. They were subsequently referred to a police station where a report was made and the Appellant placed in custody.
7. The Appellant and the complainant had been seen by a friend of the complainant's mother proceeding to a house. That friend, **A.M.M**, testified as PW4. PW4 informed the complainant's mother, **C.M.N.**, who testified as PW3.
8. PW3 and PW4 together proceeded to the house where PW4 had observed the Appellant and the complainant enter. They forced the door and entered the house. They found the Appellant and the

complainant sitting on a bed. The Appellant was naked except for under-pants. The complainant was also naked except for *bikers*.

9. PW3 and PW4 ordered the Appellant and the complainant to dress up. They did so. They then escorted both to a hospital where the complainant was examined. After that, PW3 reported the matter to the police. The complainant was issued with a medical report form (P3) which she took to the hospital. The P3 was filled and signed a few days later. The Appellant was then arrested and charged.

10. In cross-examination PW3 stated that she did not know whether the complainant was wearing an under-pant or not. She further stated that she did not ask the complainant to remove her biker to see if she was wearing her under-pant.

11. Medical evidence, such as there was, was tendered by a clinical officer, **Redempta Mutei David** (PW2). She examined the complainant on the 7<sup>th</sup> of August 2007 at about 11.00 a.m. and found her to have been about 15 years old.

12. She found no blood-stains on the complainant, and her clothes were not torn. Her external genitalia were normal except for a whitish discharge on the *labia majora*. The *labia majora* themselves were intact. Her hymen was also intact and not even a finger could be inserted.

13. The complainant had not taken any bath since the incident. She had no bruises and all her systems were normal. She was tested for HIV. The result was negative. A pregnancy test also turned out negative.

14. A high vaginal swab disclosed few pus, but no yeast, cells. She was put on treatment for the bacterial infection. The clinical officer's opinion regarding the bacterial infection was that it could have been caused either by bad hygiene or by an attempted penetration if there had been such attempt.

15. A police officer testified as PW5. He was **PC David Masila**. He received a report of attempted defilement on 8<sup>th</sup> August 2007. He issued the complainant with a P3 form. He also re-arrested the Appellant who had been brought to the station by the complainant's parents. The officer also recorded witness statements and charged the Appellant.

16. In his defense, the Appellant gave an unsworn statement. He stated that on the 6<sup>th</sup> (not 7<sup>th</sup> as stated by the prosecution witnesses) August 2007 at about 9.30 a.m. he met the complainant who was known to him. She accompanied him to the house of his friend who had his magazines so that he could give one of them to the girl.

17. On entering the house, and upon sitting on the bed, the door was pushed open and the complainant's mother entered. She ordered them both to accompany her, and she led them to the hospital. However the examination room at the hospital was closed.

18. After about an hour she ordered them into a taxi, and she took them to Makueni Police Station where she reported that the Appellant had defiled the complainant. There he was put in the cells until about 5 p.m. when he was released. The following day he was arrested and locked up in the cells. He stated that he never committed the offence he was charged with.

19. The issue before the trial court was whether the actions of the Appellant amounted to **attempted defilement of the complainant**. Those actions were as follows:-

- (a) **Asking the complainant to accompany him to his friend's house, and leading her there.**
- (b) **Undressing in the complainant's presence and being left wearing only his underpants.**
- (c) **Asking the complainant to remove her clothes, which she did, being left only wearing her *bikers*.**

(c) **Sitting with the complainant on a bed in this state of undress.**

(d) **Telling the complainant that he wanted to sleep with her.**

20. There cannot be any doubt that the Appellant's intention was indeed to have sexual intercourse with the complainant.

21. Unfortunately, there is no definition of the term **attempt** in the Act. But we can derive assistance from the definition of the term to be found in **section 388** of the **Penal Code, Cap. 63**. That definition is as follows:-

**“388. (1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfillment, and manifests his intention by some overt act, but does not fulfill his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.**

**(2) It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfillment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.**

**(3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence.”**

22. It is now necessary for us to look at the offence of which the Appellant was convicted. That offence was attempted defilement contrary to section 9(1) of the Act which states as follows:-

**“A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed defilement.”**

23. **Child** has the meaning assigned thereto in **section 2** of the **Children's Act, No. 8 of 2001**. That meaning is that **any human being under the age of 18 years** is a child.

24. In the present case there is no dispute that the complainant was aged about 15 years, and therefore a child.

25. **Defilement** itself is defined in **section 8(1)** of the Act as follows:-

**“(1) A person who commits an act which causes penetration with a child is guilty of an offense termed as defilement.”**

Did the actions of the Appellant, as set out elsewhere above, amount to an attempt to commit an act with the complainant which would have caused penetration?

26. Let us refer, for guidance, to the definition of **attempt** as given in the Penal Code. As we have already seen, the intention of the Appellant was quite clear. That intention was to have sexual intercourse with the complainant. Had he fulfilled the intention, he would have committed the offence of defilement because the complainant was a child. But he did not fulfill the intention to such extent as to commit the offence.

27. The issue is whether he can be deemed to have attempted to commit the offence of defilement. Had the Appellant began to put his intention into execution by means adapted to its fulfillment, and did he manifest his intention by some overt act?

28. A young man asking a young girl to accompany him to a house, and actually proceeding there with her, may be innocent enough. But when the young man locks the door, then proceeds to undress, and then

asks the girl to similarly undress, this can no longer be innocent.

29. When the young man leads the girl to a bed and sits her on it, his intention has now obviously been clearly manifested. And when the young man tells the girl that he wants to have sexual intercourse with her, any lingering doubts as to his intention are removed.

30. The Appellant may not have formed the intention to have sexual intercourse with the complainant when he asked her to accompany him to his friend's house. But on finding the house empty, the Appellant must have thought that he now had the opportunity to fulfill his desire. He then formed the intention to have sexual intercourse with the girl.

31. He proceeded to put his intention into execution by means adapted to its fulfillment by locking the door. He then manifested his intention by undressing and asking the girl to undress as well. Any doubts remaining about his intention were removed by sitting the girl on the bed when they were both in a state of undress, and by telling her that he wanted to have sexual intercourse with her.

32. It was immaterial that his intention to have sexual intercourse with the complainant was prevented by circumstances independent of his will. Those circumstances were that two ladies, one of whom happened to be the complainant's mother, burst into the room and ordered them to dress up and then led them away to hospital and to the police station.

33. Upon examining the evidence placed before the trial court, I am satisfied that the Appellant was convicted upon good and sound evidence. His conviction is safe and I find no merit in the appeal against the same.

34. Regarding sentence, the Appellant was awarded 10 years imprisonment. **Section 9(2)** of the Act provides as follows:

**“(2) A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than 10 years.”**

Once the trial court decided on a custodial sentence, its hands were tied. It could not award less than 10 years imprisonment. There is thus no merit in the appeal against sentence.

35. In the result the appeal in its entirety is dismissed. It is so ordered.

36. Delay in preparation of this judgement is deeply regretted. It was caused by my poor state of health the last few years, but thank God I have now fully recovered.

**DATED AT NAIROBI THIS 21<sup>ST</sup> DAY OF AUGUST 2012.**

**H. P.G. WAWERU**  
**JUDGE**

**COUNTERSIGNED AND DELIVERED AT MACHAKOS THIS 28<sup>TH</sup> DAY OF SEPTEMBER 2012**

**ASIKE-MAKHANDIA**  
**JUDGE**