



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

Criminal Appeal 128 of 2009

BENSON WAMBASI NYONGESA.....APPELLANT

~VRS~

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant Benson Wambasi Nyongesa was convicted by Bungoma Resident Magistrate of the offence of attempted defilement of a child contrary to section 9 (1) of the Sexual Offences Act no.3 of 2006. The appeal herein is in respect of the conviction and sentence.

The petition contains the following grounds:

- a) *That the language used during the plea was not indicated.*
- b) *That the age of the complainant was not ascertained.*
- c) *That the conviction was not supported by the evidence on record.*
- d) *That the prosecution failed to call important witnesses.*

The state did not oppose the appeal. Mrs. Leting conceded on grounds that the age of the complainant was not established. It was her plea that a retrial should be ordered since the witnesses are available.

I have perused the record of appeal. A Clinical Officer from Kapsokwony District Hospital, PW6 produced the P.3 form in court. It was in connection with the medical examination done on the girl to ascertain whether she was defiled or not. There was no doctor who testified to produce any report on age assessment. When the mother of the complainant PW2 testified, she did not produce a birth certificate to prove age of her daughter PW1. Under section 9 of the Act, the prosecution must prove the age of the complainant in order to ascertain whether the complainant was a child under 14 years or an adult. Such evidence will assist the court to know whether the offence was attempted rape or attempted defilement. The only way to prove age is through age assessment by a qualified doctor or by producing a birth certificate. This was not done by the prosecution. The trial court did not bother to call for such evidence. In the absence of age assessment, the conviction of the offence of attempted defilement can not be sustained. I find no need to evaluate the evidence and make a finding on the other grounds of appeal.

The Appellant was charged in court on 12/10/2007 which is about two and half (2½) years back. If retrial is ordered it will not prejudice the Appellant. The state says the witnesses are available. I find this a suitable case for a retrial.

In effect, the conviction and sentence herein are set aside. I order that a retrial be done within seven (7) days before the Chief Magistrate, Bungoma.

**F. N. MUCHEMI
JUDGE**

Judgment dated and delivered on the 13th day of July, 2010 in the presence of the Appellant and the State Counsel Mrs. Leting.

F. N. MUCHEMI
JUDGE