



REPUBLIC OF KENYA



KENYA LAW
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M v Republic (Criminal Appeal 334 of 2008)
[2010] KEHC 4175 (KLR) (Crim) (30 December 2010) (Judgment)

Ben Wambua Makau v Republic[2010] eKLR

Neutral citation: [2010] KEHC 4175 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL 334 OF 2008

MA WARSAME, J

DECEMBER 30, 2010

BETWEEN

BWM APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in Criminal Case No. 119 of 2008 of the Senior Resident Magistrate's Court at Yatta by A. W. Mwangi - Ag. Senior Resident Magistrate)

JUDGMENT

1. The appellant was charged and convicted for the offence of attempted defilement contrary to section 9(1) (2) of the *Sexual Offences Act* No.3 of 2006. It is alleged that appellant attempted to defile one M.M a child aged 9 years. He was sentenced to 10 years imprisonment hence this appeal.
1. In convicting the appellant the trial court relied on the evidence of the complainant (PW1) and her mother (PW2). The complainant gave evidence on how the appellant attempted to defile her. She stated that the appellant forced her to lie down and then removed his private organ so that he could defile her. She screamed and her mother went to her rescue.
3. The mother to the complainant stated that she found the complainant lying on the ground while the appellant was lying on her. She then struck the appellant with a stick and he immediately ran away. The appellant was arrested a few days after the incident and charged with attempted defilement.
4. PW4 Cpl. Gabriel Cherono arrested the appellant on allegation of attempting to defile the complainant. He stated that he interviewed the girl, her mother and members of the public and formed the opinion that the appellant had committed the offence.



5. The question for my determination is whether the prosecution proved its case beyond reasonable doubt. It is not the duty of the court to stage-manage cases for the prosecution. It is also not the duty of the court to endeavour to make a case where there is none. The duty of the court is to hold the scale and determine justice according to the law and the weight of the evidence before it. It is also clear in my mind that in criminal cases the charge must be proved beyond any reasonable doubts and it is the duty of the prosecution to do so.
6. In this case there are three fundamental issues which were not established to the required standards. The first is that the age of the child was not established by the prosecution. It is uncontested that the appellant was charged to have attempted to defile a child aged 9 years. In such circumstances it is mandatory to establish the age of the child through documentary or factual evidence. There was no P3 form produced by a medical doctor or any other document showing the age of the complainant. That was fundamental error on the part of the prosecution which goes to the root of the conviction entered by the trial court.
7. The second issue is that there is no evidence from an independent person showing that there was an attempt to defile the complainant. No p3 form was produced before court in order to establish whether or not the complainant suffered any injuries during the time of the alleged defilement. There is also no indication that the complainant was seen by a doctor to assess whether there were any injuries whether superficial or otherwise suffered during the time of the alleged defilement. The absence of a medical evidence and/or P3 form is a fundamental omission committed by the prosecution in establishing their case against the appellant.
8. The last issue is the glaring contradiction between the evidence of the complainant and her mother. The appellant was charged with attempted defilement. The complainant was categorical that she had been defiled by the appellant. On the other hand PW2, the complainant's mother, talked of attempted defilement. She confirmed that there was no blood on the private parts of the complainant and that she did not take the complainant to hospital because she had not been defiled. The contradiction in the evidence of the complainant and her mother was not resolved by the prosecution. There is no medical evidence to corroborate as to whether there was defilement or attempted defilement. Consequently it is my finding that the conviction entered by the trial court is against the weight of the evidence on record. It is clear, in my mind that the prosecution did not prove its case beyond reasonable doubt and that the material doubts and discrepancies were not resolved in favour of the appellant. The appellant is entitled to the benefits of doubt. That is the situation that prevails in this case. Conviction quashed and sentence set aside. I order for the immediate release of the appellant unless lawfully held.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF DECEMBER 2010.

M. WARSAME

JUDGE

