REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Criminal Appeal 14 of 2007

JOSEPH NDAI MUSYOKA .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from a Judgment of the Senior Resident Magistrates Court at Kitui

(Hon. T.M. Mwangi RM) dated 9th January 2007)

in

(PM'S CR.C. No. 376 of 2006)

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JUDGMENT

1. Joseph Ndai Musyoki was the accused person in **Kitui SRM'S Case No. 376/2006** where he was charged with the offence of attempted defilement of a girl under the age of sixteen years Contrary to Section 145 (2) of the Penal Code. It was alleged that on 13/3/2006 he attempted to have carnal knowledge of T .M, a girl aged twelve (12) years. He also faced the alternative charge of indecent assault of a female Contrary to Section 144 (1) of the Penal Code. The allegation was that he touched the private parts of T.M aforesaid. He denied the charges and after trial was sentenced to serve eighteen (18) years in prison. His appeal is predicated on the issue that the charge was not proved beyond reasonable doubt and that his defence was ignored by the trial court.

2. The evidence before that court tendered was as follows;-

According to PW1, T.M, the minor, on 13/3/2006, she was sent home by her teacher to collect her book on the Science subject. She went home and the accused whom she named as Musyoki and who was their labourer was the only person at home. The reason for this was that her mother and father were both teachers a distance away. The accused allegedly called her to his quarters, locked the door and told her that it was pay back time as he had previously given her Kshs.20/=. The accused allegedly then proceeded to remove her underpants and "**had carnal knowledge of her"**. He used a knife to threaten her and when he finished, they both dressed up and she was unable to return to school. Her father arrived at 4. p.m. and beat her up for failing to go to school and she was unable to explain what had happened because she "**felt ashamed".**

On 14/3/2006 according to PW1, she went to school and when her teacher Mrs Musava asked her why she had failed to return to school, she told her what had happened and the teacher called PW1's grandmother who told her father what the accused had allegedly done. Later, she was taken to Kitui General Hospital for examination and treatment.

PW2, J MN, father of PW1 explained that when he returned home on 13/3/2006 he received information that PW1 had not returned to school that day after being sent home to collect a book and he spanked her although "**she looked miserable"** and "**did not look happy".**

Later, he received information of the incident involving PW1 and he took her to hospital on 21/3/2006, a week after the alleged incident and the Appellant was arrested on 23/3/2006 and then charged.

PW3, N M M, PW1's teacher explained the circumstances under which she was sent home on the material date and he was the one who informed PW1's grandmother of the incident.

PW4, P.C. Veronica Kavoko received the report of the alleged offence on 22/3/2006 at 12 p.m. and arrested the Appellant. It was her evidence that there was no evidence of penetration and so she charged the Appellant with the offence of attempted defilement.

3. The Appellant in his defence stated that he was grazing cows on the material date and only came to PW2's home at 1.00 p.m. and that he indeed met PW1 but left her at 2 p.m. At 4 p.m. when PW2 came home he was present when PW2 asked PW1 why she did not go to school. He was aware that on 14/3/2006, PW1, PW2 and PW1's mother went to Kitui Hospital and he was arrested on 16/3/2006 and later he was charged.

4. In his judgment, the learned trial magistrate found that the principal charge had been proved beyond reasonable doubt and he sentenced the Appellant to serve 18 years in prison.

5. I should say this from the outset; the Appellant was charged under Section 144 and Section 145 of the Penal Code which have both been repealed before the Sexual Offences Act, 2006 came into operation.

6. Secondly, it is obvious that no medical evidence of penetration of PW1's vagina was tendered and none was tendered regarding the Appellant. I say this because in his submissions, the Appellant stated as follows;

"**I was not examined by a doctor before arrest".**

7. No medical evidence was required in any event because it was not necessary to prove either of the offences set out above.

8. Thirdly, there is only the evidence of PW1 that the Appellant on 13/3/2006 had "**carnal Knowledge"** of her. The offence on record is one of attempted defilement and not one of defilement *per se*. In **Archbold: Criminal Pleading, Evidence and Practice 2008** at page 2716 the principle applied where the offence is one of attempt is to enquire whether the accused had an intention which was "**more than merely preparatory".** That "**attempt begins at the moment when the defendant embarks upon the crime proper, as opposed to taking steps rightly regarded as not merely preparatory"** – see **R vs Qadir and Khan (1998) Crim. L.R.**

9. In this case, the Appellant admitted that on the material day, he was with the complainant but PW1 stated that the Appellant then locked his house and went on to remove his underwear and her underwear and actually had carnal knowledge of PW1. It is the law as I understand it that there was no need for corroboration of PW1's evidence as is the law in Section 124 of the Evidence Act. I am convinced that PW1 and the Appellant had sexual contact and the Appellant had at the very least the intention which was not merely preparatory and in this case he may have gone further than merely preparing himself. There is evidence beyond reasonable doubt that he did so and the attempt was proved even if the actual may have been committed.

10. As for his defence, it was a bare denial which was properly disregarded.

11. Turning to sentence, the maximum sentence under Section 145 of the Penal Code was life in prison and so eighteen (18) years was more than lenient.

12. This Appeal has no merit and is dismissed.

13. Orders accordingly.

Dated and delivered at Machakos this **18th** day of **September** 200**9**.

ISAAC LENAOLA

JUDGE

In presence of: **Mr O'Mirera for Appellant**

Appellant: Present

ISAAC LENAOLA

JUDGE