



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO 67 OF 2017**

**TOM NGEYWA WASABULE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the judgement (conviction and sentence) of Hon. C. Menya, RM, delivered on 23/06/2017 in the Senior Principal Magistrate's Court at Kimilili in Criminal Case No. 155 of 2014, R v. Tom Ngeywa Wasabule)*

**JUDGEMENT**

***[Pursuant to section 201 (2) as read with section 200(1) (a) CPC]***

1. The appellant has appealed against his conviction and sentence of ten years' imprisonment in respect of the offence of attempted defilement contrary to section 9 (1) (2) of the Sexual Offences Act No. 3 of 2006.
2. Ms. Koech, counsel for the respondent has conceded both the conviction and sentence and applied for a re-trial.
3. In this court the appellant has raised ten grounds in his petition of appeal.
4. In ground 1 the appellant has stated the unchallengeable fact that he did not plead guilty.
5. I have perused the record of the proceedings and the judgement, that is the subject of the instant appeal. It is clear that the outcome of the appeal depends solely on the final orders made by the trial court. I will therefore only consider those orders.
6. The first order made by the trial court is couched in the following terms: *"I am alive to the fact that the investigating officer stated that when he saw the doctor stated that the complainant had a perforated hymen he preferred a charge of defilement. But be as it may, the prosecution did not amend the charge sheet to enhance the same to defilement and in my opinion it would be too late in the day to do so. I therefore find that a case of **"attempted defilement"** was not adequately proved."* The next logical step was for the trial court to enter a formal order of acquittal, which was not done.
7. It therefore follows that the trial court having found that the offence of attempted defilement was not proved, it became *functus officio* and should have downed its tools and acquitted the appellant.
8. Furthermore, the trial court proceeded and now convicted and sentenced the appellant on a charge of attempted defilement. In doing so the court expressed itself in the following terms:

**"THE WAY FORWARD"**

9. Having made a finding that the prosecution did not prove a case of attempted defilement and that the main charge of defilement was actually brought out by the witnesses, I find that the accused cannot just go scot free especially looking at the nature of the offence and the seriousness. I have no option but to sentence the accused. I cannot however at this stage enhance the charges **suo motu**. In the event that the accused is to be sentenced, I shall proceed to sentence on attempted defilement as the charge sheet reads.
10. Having analyzed the above issues, I find that the prosecution has proved (sic) their case beyond reasonable doubt and I shall proceed to convict the accused under section 215 of the C.P.C."
11. The trial court having found that the offence of attempted defilement was not proved, it lacked jurisdiction to turn round and convict and sentence the appellant.

12. In this court Ms. Koech, applied for an order of a re-trial of the appellant on a charge of defilement. As the trial court rightly observed the prosecution all along was in possession of this evidence but decided to proceed with a charge of attempted defilement. The prosecution did not even attempt to amend the charge during the prosecution case in terms of section 214 of the Criminal Procedure Code (Cap. 75) Laws of Kenya. As it were the trial proceeded and was concluded regularly. An order of a re-trial may only be ordered where the original trial is fatally defective which is not the position in this case. Moreover, the appellant has been in custody for over two and half years.

13. In the circumstances of this case a re-trial will amount to a harassing and vexatious prosecution of the appellant.

14. The application for a re-trial fails with the result that conviction and sentence of the appellant are hereby quashed.

15. The appellant is hereby ordered released unless he is otherwise held on other lawful warrants.

**Judgement signed and dated at Narok this 19<sup>th</sup> day of December, 2019.**

**J. M. Bwonwong'a**

**Judge**

**And**

**Judgement signed, dated and delivered in open court at Bungoma this 13<sup>th</sup> of February, 2020.**

**S. N. Riechi**

**Judge**

**13/2/2020**