



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**CRIMINAL APPEAL NO. 16 OF 2017**

**JAPHET GITONGA NJIRU.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(Being an Appeal from original conviction and sentence in Criminal Case No.1848 of 2009 of the Chief Magistrate's Court at Embu)*

**JUDGMENT**

The appellant was charged with the offence of attempted defilement of a girl contrary to section 9 (1) (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence are that the appellant on the 16<sup>th</sup> day of September 2007 at [particulars withheld] village Karurumo Location of Embu East District within Eastern Province attempted to have unlawfully carnal knowledge of NMN a girl under the age of eleven years.

The appellant also faced another count of indecent act with a child contrary to section 11(1) of the sexual offences Act. The particulars for the second count are that the appellant on the 16<sup>th</sup> day of September, 2007 at [particulars withheld] village Karurumo Location of Embu East Province, willfully and unlawfully indecently assaulted NMN by touching her Private parts namely vagina.

The trial court convicted the appellant on both counts and sentenced him to ten (10) years imprisonment.

The grounds of appeal are:-

- 1) That the learned Magistrate erred in law and fact in convicting and sentencing the appellant when the prosecution did not prove its case beyond reasonable doubt.**
- 2) That the trial Magistrate erred in law and fact in failing to give the appellant the benefit of doubt which the appellant was clearly entitled to.**
- 3) That the trial Magistrate erred in law and fact in convicting and sentencing the appellant when there was completely no evidence to support the charges.**
- 4) That the learned Magistrate erred in law and fact by relying on evidence which was contradictory.**

Mr Mogusu, counsel for appellant was to file submissions. The state was to reply to those submissions. No submissions were filed by both parties.

Before the trial court PW1 was the complainant. She gave unsworn evidence. On 27/7/2010 when she testified she was in class 7. On 16/9/2007 at about 3.30p.m she was sent to the shop to buy bread. She passed by the appellant's house. The appellant dragged her and took her to his house. He then closed the door. The appellant pushed her to the bed, removed her panty and tried to penetrate her. She struggled with him and he was not able to penetrate her. She managed to open the door and left. She met her father and her brother and she told them what had happened. She took them to the appellant's house. The appellant ran away. The matter was reported at Karurumo Police Post. She was taken to the Karurumo Health center and a P3 form was filled. She did not know the appellant.

**PW2 NN** is PW1's father. On 16/9/2009 at about 3.30 P.M he sent PW1 to buy bread. PW1 took too long. He went to look for her. He met her and she told him that the appellant had tried to defile her. PW1 was crying. PW1 led him to the appellant's house. The matter was reported to the police. He did not want to pursue the matter with the police since PW1 was not defiled. The chief directed that the matter be taken to court. He went to the police station when the appellant was arrested. He took PW1 to Karurumo Health center. He was told that

PW1 had not been defiled.

**PW4 JOHN NJOGU KITHINJI** was at his home on 16/9/2007. He learnt that Gitonga had attempted to defile Nyaga's daughter. People were chasing the appellant. He joined the chase and caught up with the appellant. Members of the public joined him and arrested the appellant. The appellant was arrested and taken to Karurumo police post.

**PW3 PETER MUTWIRI** was stationed at Karurumo Health Centre. He is a clinical officer. He examined PW1 and found that there was no penetration into her vagina. He filled the P3 form. PW1's hymen was intact.

**PW4 Dr. PHYLIS MUHONJA** was stationed at the Embu Level 5 Hospital. She produced the P3 form which indicate that PW1 had no injuries on the genitalia. PW1's hymen was intact.

**PW5 PC MESHACK MEME** was based at Runyenjes police station. He took over the investigations from the original investigator who was on transfer. He was not fully conversant with the case.

In his sworn defence, the appellant testified that on the material day he went about his business. At around 4.00 p.m he went home. He met a crowd. He was stopped and told that he had attempted to defile a child. He denied committing the offence. He did not know PW1 and PW2 before. He had quarreled with PW2 as he had blocked water in a seasonal river.

The record of the trial court present its own peculiar features. The suit was heard a fresh three times. It is only in the fourth instance when the matter was heard to its conclusion. On 27/7/2010, Hon L.K Mutai recused himself after hearing two witnesses, the complainant and her father. The complainant testified on that day and she was 13 years old. The case was heard de novo by the same magistrate on 31/5/2011 when the complainant was 14 years old. Once again on 11/9/2012 the suit proceeded de novo before Hon L. Mbugua (SRM). The complainant told the court that she was 15 years old. Five witnesses testified before that magistrate. The case was heard de novo yet again before another magistrate Hon S.K. Mutai (SRM) on 17/2/2016. By then the complainant was 19 years. That background does not present a good picture. However, all along the appellant participated in the proceedings and he was not prejudiced in any way.

The record shows that there was attempt to settle the matter out of court. PW2 told the court that he did not want to pursue the case since his daughter was not defiled. This is his evidence when he testified for the first time. Similarly, the complainant testified in the first instance that it was not the appellant who tried to defile her. When the case was heard de novo, PW1 and her father testified on what transpired and PW1 knew the appellant.

The issue for determination is whether the prosecution proved its case beyond reasonable doubt. The case involved an attempt to defile PW1. The incident occurred at about 3.30pm during the day. PW1 had been sent to buy bread and she took long. There was a meeting of some women at her home. PW2 got concerned and decided to follow PW1. He met his daughter on the way crying. PW1 told him that the appellant had tried to defile her. PW1's evidence is that she was pulled inside the appellant's house. He removed her underwear and tried to defile her. He tried to penetrate her but all in vain. The appellant had closed her mouth. When PW1 was told about the incident he screamed and people went to the scene. PW3 is one of those who responded to the screams. He chased the appellant and caught up with him. The appellant was arrested and taken to Karurumo AP Post.

The defence evidence was that the appellant did not know PW1. In his evidence in Chief he told the court he did not know PW2, the father to PW1. During cross examination the appellant testified that he had a dispute involving a seasonal stream with the complainant's father. I do find that the appellant's defence does not raise any doubt on the prosecution case.

From the evidence on record, I do find that the prosecution proved its case beyond reasonable doubt. The evidence of PW1 is corroborated by that of PW2 and PW3. PW2 met his daughter soon after the incident and started screaming. He thought that his daughter had been defiled. He was relieved when the medical evidence indicated that there was no penetration. PW3 rushed to the scene and assisted in arresting the appellant. The conviction is proper and I do agree with the findings of the trial court. The trial was fair and no prejudice was suffered by the appellant.

The upshot is that the appeal lacks merit and is hereby disallowed.

**Dated and signed at Marsabit this..... Day of June 2018.**

**S. J. CHITEMBWE**

**JUDGE**

**Dated, Signed and Delivered at Embu this 9<sup>th</sup> day of July, 2018.**

**F.MUCHEMI**

**JUDGE**