



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.59 OF 2015**

*(An Appeal arising out of the conviction and sentence of Hon. Adwera Ong'injo - CM delivered on 18<sup>th</sup> March 2015 in Kibera CM. CR. Case No.6180 of 2012)*

**HARUN MULABU MAHUGU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Harun Mulabu Mahugu was charged with the offence of **defilement** contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act**. The particulars of the offence were that on the 21<sup>st</sup> November 2012 at [particulars withheld] in Nairobi within Nairobi County, the Appellant unlawfully and intentionally committed a sexual offence by inserting a male genital organ (penis) which caused penetration into the female genital organ (vagina) of T T, a child aged ten (10) years. He was alternatively charged with **committing an indecent act with a child** contrary to **Section 11(1)** of the same **Act**. The particulars of the offence were that on the same day and in the same place, the Appellant committed an indecent act by touching the female genital organ (vagina) of T T, a child aged ten (10) years. When the Appellant was arraigned before the trial court, he pleaded not guilty to the charges. At the close of the prosecution's case, the trial court made a ruling of a no case to answer on the charge of defilement and called the Appellant to defend himself on the lesser charge of attempted defilement. After a full trial, the Appellant was convicted on the charge of **attempted defilement**. He was sentenced to serve ten (10) years imprisonment. The Appellant was aggrieved by his conviction and sentence and has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. The Appellant faulted the trial court for convicting him on the basis of a defective charge sheet. He complained that he was convicted for an offence which he was not charged with. He faulted the trial court for failing to find that the complainant's evidence was not corroborated. He further faulted the trial court for failing to find that the prosecution carried out shoddy investigations before reaching the decision to charge him with the offence. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, the Appellant presented to the court written submission in support of his appeal. A response to the Appellant's submission was made by the learned State Counsel, Ms. Sigei. In his written submission, the Appellant submitted that the trial court erred in failing to take into account that he was a frail man of advanced age when it imposed the sentence on him. He argued that whereas the charge sheet purported to prefer a charge of defilement against him, the evidence adduced did not prove such an offence hence he ought to have been acquitted. He submitted that no independent evidence was adduced by the prosecution to corroborate the complainant's evidence. The Appellant further contended that PW3, the investigation officer conducted shoddy investigations on the case as she only relied on the evidence of the complainant to prefer the charge against him. He also submitted that the trial court did not consider his defence and failed to give reasons for its decision to convict him contrary to **Section 169** of the **Criminal Procedure Code**. For these reasons, the Appellant prayed that the appeal be allowed.

The learned State Counsel Ms. Sigei opposed the Appeal. She submitted that the trial court invoked the provisions of **Section 179** of the **Criminal Procedure Code** to convict the Appellant with the offence of attempted defilement. She was however of the view that the evidence upon which the Appellant had been convicted by the trial court was sufficient to support a conviction on the charge of defilement. She argued that the prosecution was not required to prove that there was complete penetration into the complainant's vagina as a slight penetration into the vagina warranted a conviction. She submitted that the medical examination carried on the complainant found evidence of injuries on the complainant's genitalia thereby corroborating the complainant's evidence. She further submitted that the age of the complainant was confirmed by PW2 and PW4. On the identity of the person who defiled the complainant, it was the learned State Counsel's submission that the complainant pin-pointed the Appellant as her assailant. She knew him very well prior to the incident. She also submitted that the complainant was able to recognize and identify the Appellant as there was moonlight when he accosted her on the material night. She further submitted that the complainant also identified the Appellant in his house from the light from a lamp inside the Appellant's house. It is on the basis of the above facts that the State urged the court to find the appeal without merit and dismiss it.

The facts of the case as narrated by the prosecution witnesses are as follows. PW1, T T is the complainant in this case. Although no documentary evidence was tendered in evidence as proof of her age, the complainant was said to be aged ten (10) years at the time of the incident and was a pupil at St. [particulars withheld] Primary School. The complainant testified that on the day of the incident at around 7.00p.m, somebody accosted her as she was coming from an outside toilet within their compound in [particulars withheld]. She testified that there was moonlight at the time and she was able to recognize and identify the Appellant. The Appellant was her neighbour. The complainant testified that the Appellant grabbed her by her hands and took her to his house. He placed her on his bed and undressed her. He then made her to sleep on her back and tied up both her hands and legs with a rope. He also stuffed clothes into her mouth to prevent her from raising an alarm. The Appellant then undressed himself and had sexual intercourse with her by inserting his penis into her vagina. When he finished, he untied the complainant's hands. The complainant then untied her legs and dressed herself up before the Appellant let her out of the house. The complainant testified that she was forced to reveal the defilement to her mother when she returned home after her mother threatened to beat her up if she did not disclose where she had been.

After disclosing the incident to her mother, the complainant was taken for medical examination at Medicin San Frontiers Olympic Center, a medical clinic where she was examined by Dr. Stella Matinde on 22<sup>nd</sup> November 2012. The doctor examined the complainant and filled her findings in a Post Rape Care Form which she signed and stamped. The report was produced into evidence by PW4 Dr. Irene Onyango as **Prosecution's Exhibit No. 3**. According to the report, the complainant presented herself at the clinic with a history of having been defiled by a person known to her. On examination it was found that her hymen was still intact. She however had injuries on her labia minora which was hyperemic and showed signs of inflammation. Because of the history given by the complainant, the doctor concluded that the injuries sustained by the complainant were as a result of the sexual assault. The matter was thereafter reported to Kabete Police Station.

The police referred the complainant to Kinoo Medical Clinic for another medical examination. At the clinic, the complainant was examined by PW2 Dr. George Kung'u Mwaura, a medical practitioner on 26<sup>th</sup> November 2012. The doctor examined her genitals and noted nothing remarkable save that her vaginal wall appeared red in colour. He formed the view that the redness on the vaginal wall could have been as a result on an attempted penetration into the vagina as the hymen was intact. PW2 also examined the Appellant who was brought to the clinic by the police. He testified that he found nothing remarkable on the Appellant. PW2 filled his findings in respect of both the complainant and the Appellant in P3 Forms which he produced into evidence as **Prosecution Exhibits Nos.1 and 2**. The Appellant was subsequently arrested and charged with the offence of defilement. When he was put on his defence, he denied committing the offence. Other than explaining the circumstances of his arrest, the Appellant did not at all touch on the evidence that was adduced against him by the prosecution witnesses.

This being a first appeal, it is the duty of this court to re-evaluate and to reconsider the evidence adduced before the trial court before reaching its own independent determination whether or not to uphold the

decision of the said court. In doing so, this court is required to always keep in mind that it neither saw nor heard the witnesses as they testified and therefore give due regard in that respect. (See **Njoroge –vs- Republic [1987] KLR 19**). The issue for determination by this court is whether the prosecution proved its case on the charge of **attempted defilement** to the required standard of proof beyond any reasonable doubt.

This court has re-evaluated the evidence adduced before the trial court. It has also considered the grounds of appeal presented by the Appellant and the submissions made by the Appellant and the State. The Appellant was charged with the offence of **defilement** contrary to **Section 8 (1)** as read with **Section 8(2)** of the **Sexual Offences Act** but was convicted of the lesser but cognate charge of **attempted defilement**. In the present appeal, the complainant testified that the Appellant accosted her as she was returning to her home after answering a call of nature in an outside pit latrine. She told the court that the Appellant forced her into his house, gagged her mouth and tied her limbs before removing her cloths and sexually assaulting her. She told the court that the Appellant had sexual intercourse with her before untying her and letting her go. When she returned home, she was reluctant to tell her mother what had transpired. Her mother threatened to beat her if she did not tell the truth. It was then that the complainant told her mother that she had been sexually assaulted by the Appellant. The Appellant lived in the same neighbourhood with the complainant's family. He was known to the complainant prior to the alleged sexual assault.

Two medical professionals testified in the case. PW4 Irene Onyango working with Medicin San Frontiers and PW2 Dr. George Kungu Mwaura. Both testified that the complainant's hymen was intact. There was no evidence of penetration. That was the reason why the trial court reached the verdict that the prosecution had not established penetration to the required standard of proof beyond any reasonable doubt. The finding by the trial court that the Appellant was guilty of the lesser but cognate offence of attempted defilement, in the considered view of this court, was not supported by evidence. The testimony of the complainant to the effect that she had been sexually assaulted by the Appellant was contradicted by medical evidence. It was clear to this court that the complainant, when confronted by her mother to tell where she had been, pointed to the Appellant with a view to escaping punishment. She was categorical that she had been sexually assaulted. The medical examination established otherwise. The circumstances of this case, in the absence of any other cogent evidence, this court is unable to reach the same finding that the trial court reached to the effect that the Appellant was guilty of the lesser but cognate offence of attempted defilement. The explanation offered by the Appellant to the effect that he was a victim of tramped up charges may well be true.

In the premises therefore, the appeal lodged by the Appellant has merit and is hereby allowed. His conviction is quashed. He is acquitted of the charge. The custodial sentence imposed on him is set aside and substituted by an order of this court setting him at liberty forthwith and releasing him from prison unless otherwise lawfully held. It is so ordered.

**DATED AT NAIROBI THIS 1<sup>ST</sup> DAY OF MARCH 2017**

**L. KIMARU**

**JUDGE**