



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 248 OF 2011

BENJAMIN MUTHOKA KATUMO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Machakos Chief Magistrate's Court Criminal Case (S.O.) No. 31 of 2010 by Hon. S. Gacheru S P M on 14/12/11)

J U D G M E N T

1. **Benjamin Muthoka Katumo**, “the appellant” was charged with the offence of **Attempted Defilement** contrary to **Section 9(1)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on the **9th** day of **July, 2010** at *[particulars withheld]* **Village, Kalama Location** in **Machakos District** within **Eastern Province**, intentionally and unlawfully attempted to commit an act which causes penetration with **F M M** a child aged **5 years**.
2. In the alternative, he was charged with the offence of **Committing an Indecent Act with a Child** contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence being that on the **9th** day of **July, 2010** at *[particulars withheld]* **Village, Kalama Location** in **Machakos District** within **Eastern Province**, intentionally and indecently assaulted **F M M** a child aged **5 years** by touching her vagina with his penis.
3. Facts of the case were that **PW4 M M**, a **10 years old** child was grazing goats in company of **PW3 F M M**, the Complainant. The Appellant went to where they were with an excuse of intending to send the Complainant to purchase for him airtime. He then held her neck and wrestled her. She fell down facing upwards and the Appellant lay on her. **PW4** screamed attracting the attention of **PW2 R W M**, their grandmother, who reached the scene of the incident while the Appellant was lying on the Complainant and on seeing her he ran away leaving a shoe behind. People gathered. They went in search of the Appellant at his home but did not find him. The following day his father took him to the home of **PW2** where the matter was discussed.
4. **PW2** reported the matter to the police. The Complainant was subjected to medical examination by **PW1, Dr. Edwin Mochama** who found her not having sustained any injuries on her genital organs. There was no discharge or spermatozoa but she had an infection.
5. In his defence, the Appellant stated that on the material date at about **5.00 p.m.** while on the farm he saw goats that had trespassed onto his neighbour, **Matheka's** farm. He chased them away and asked children who were tending them why they were letting the goats graze on the peas. He went back home. At about **7.00 p.m.** he saw **PW2's** husband and he explained what transpired. He advised him to go to his home with his father. They complied and he demanded for **Kshs. 10,000/=** for reconciliation. He tied him with a rope. The following morning he was taken to the police station and consequently charged for an offence he did not commit.
6. The trial court considered evidence adduced and reached a finding that the case of **Attempted Defilement** was proved beyond any reasonable doubt hence convicting the Appellant who was

- sentenced to **ten (10) years imprisonment.**
7. Being dissatisfied with the conviction and sentence thereof the Appellant appealed on grounds that:
 - There was a possibility of mistaken identity in view of the prevailing circumstances at the scene of crime.
 - The trial was a nullity as it was conducted by an incompetent Prosecutor.
 - The charge was defective and **Section 214** of the **Criminal Procedure Code** was flouted.
 - Evidence was contradictory and uncorroborated.
 - The defence put up was erroneously dismissed and the onus of proof was shifted to the Appellant.
 8. At the hearing, the Appellant relied upon his written submissions. In a response thereto the state through **Mrs. Abuga**, opposed the appeal. She submitted that the act of **Attempted Defilement** was witnessed by PW2 and PW4. When the Appellant saw PW2 he ran away leaving behind a shoe. The incident having occurred at **5.00 p.m.** the Appellant was positively identified.
 9. With regard to the ground of the Prosecutor being incompetent she stated that **P C Muye** who prosecuted the case was gazetted per **Gazette No. 1078 – per Legal Notice 172**. She prayed for dismissal of the appeal.
 10. This being the first appeal, I am duty bound to re-evaluate evidence adduced at trial and come up with my own inferences and conclusions bearing in mind that I neither saw nor heard witnesses who testified. **(See Okeno V. Republic (1972) EA 32).**
 11. The Appellant has alleged that there was mistaken identity which called upon the learned magistrate to warn himself of the need to be cautious prior to convicting him. **(See R. V. Turnbull (1976) EA 3 All ER 549).**

He emphasized the fact that the witnesses could have been mistaken.

12. PW2, PW3 and PW4 were persons who knew the Appellant before. It was a case of recognition. PW2 stated that after the Appellant ran away from the scene of the incident they went looking for him at his home but he was not there. In his defence he stated that PW2's husband went looking for him. He explained what transpired according to his version and later on his father took him to their home. These were persons who knew each other and throughout the proceedings, the Appellant did not raise the issue of mistaken identity. The Prosecution depended on visual identification and the Appellant admitted having encountered PW3 and PW4 on the fateful evening. Credibility of the identifying witnesses could not be challenged. Therefore the warning was unnecessary.
13. The competence of the Prosecutor who conducted the Prosecution has been questioned. As I stated in the case of **John Mutua Munyoki v. Republic (2015) eKLR**, the issue of competency of Prosecutors has been considered in a myriad of cases and put to rest. In the case of **Laban Nyaga Njue v. Republic (2015) eKLR** the Court of Appeal stated thus:

“Act No. 7 of 2007, which came after that line of cases invalidating prosecutions by junior police officers addressed the incongruity by deleting the qualification in section 85(2) that only police officers of rank of Assistant Inspector and above could be appointed as prosecutors.....”

P C Muye conducted part of the Prosecution in the matter. He was a duly gazetted Prosecutor therefore he was a qualified Prosecutor.

14. This court has the duty of considering whether the charge was proved beyond any reasonable doubt. The charge is **Attempted Defilement**. The child stated thus:

“...As we were grazing the goats Muthama (accused) came and he held me on my neck and he wrestled me on my back to the ground. Accused then sat on my knees. He did nothing to me. I did not scream then. Nobody came to rescue me. The accused left me alone after he saw Rose (my grandmother).”

PW4 on the other hand stated thus:

“.....I was with PW3 grazing goats near our home. Then Muthama (accused) before court came there and he called PW3 and he told her that he wanted to send her to buy him a credit card. Accused then went to where PW3 was and held PW3 and wrestled her down. While she was facing upwards. Accused then laid (sic) on PW3. Accused held PW3 on the neck. I screamed and my grandmother came.”

- 15.PW2 stated that on her arrival she found the Appellant lying on the Complainant holding her neck.
- 16.In his defence the Appellant claimed on seeing children grazing goats on peas he asked them why they let goats graze on peas.
- 17.According to the particulars of the offence the Appellant attempted to commit an act which causes penetration with the Complainant. penetration is defined by **Section 2** of the **Sexual Offences Act** as:

“.....the partial or complete insertion of the genital organ of a person into the genital organ of another.”

- 18.Wrestling the Complainant, holding her neck and eventually sitting on her knees cannot amount to an attempt to penetrate her. It has not been alleged that the Appellant attempted to act in a manner to suggest that he intended to remove his genital organ in order to insert it into the Complainant's genital organ.
- 19.In the alternative count it is alleged that he touched the Complainant's vagina with his penis. Evidence adduced was contrary to the allegation. The act of the Appellant could have amounted to a simple assault.
- 20.In the premises, I find the conviction for the offence of **Attempted Defilement** to have been unsafe. The appeal is allowed. The conviction is quashed and sentence set aside. The Appellant shall be released forthwith unless otherwise lawfully held.
- 21.It is so ordered.

Dated, Signed and Delivered at Kitui this 2nd day of February, 2016.

L. N. MUTENDE

JUDGE