



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.97 OF 2014**

*(An Appeal arising out of the conviction and sentence of HON. OPANDE - SRM delivered on 13<sup>th</sup> February 2014 in Kibera CM. CR. Case No.146 of 2012)*

**JAMES NYABUTO OMOKE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, James Nyabuto Omoke was charged with **attempted defilement** contrary to **Section 9(1)** as read with **Section 9(2)** of the **Sexual Offences Act**. The particulars of the offence were that on 6<sup>th</sup> January 2012 at Kibera Kianda in Nairobi County, the Appellant unlawfully and intentionally attempted to commit an act which would cause penetration of his male genital organ (penis) into the female genital organ (vagina) of K A, a child aged 6 years. He was alternatively charged with **committing an indecent act with a child** contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars of the offence were that on the same day and in the same place, the Appellant intentionally and unlawfully committed an indecent act by touching the genital organ of a girl aged 6 years, namely, K A. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was found guilty of the main count of **attempted defilement**. He was sentenced to serve ten (10) years imprisonment. He was aggrieved by his conviction and sentence. He has appealed to this court challenging his conviction and sentence.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted for the offence against the weight of evidence. He faulted the trial magistrate for convicting him on the basis of contradictory and uncorroborated evidence. He took issue with the fact that the testimony adduced by prosecution witnesses was pure hearsay and opinion. He was finally aggrieved that he had been convicted after the court had disbelieved his *alibi* defence and shifted the burden of proof on him. The Appellant was of the view that the evidence adduced by the prosecution witnesses failed to establish his guilt to the required standard of proof beyond any reasonable doubt. In the premises therefore, the Appellant urged the court to allow the appeal, quash his

conviction and set aside the sentence that was imposed on him.

In the hearing of the appeal, the Appellant presented to the court written submission in support of his appeal. He urged the court to re-evaluate the evidence and make an appropriate finding exonerating him from the crime. On her part, Ms. Atina for the State opposed the appeal. She submitted that the prosecution had adduced evidence which had established the Appellant's guilt to the required standard of proof beyond any reasonable doubt. She urged the court to disallow the appeal.

Before giving reasons for its decision, this court will set out the facts of this case according to the prosecution witnesses. The complainant in this case, K A was at the material time a girl aged 6 years. The Clinic Card was produced in court which indicated that the complainant was born on 10<sup>th</sup> April 2005. She gave evidence under oath after the trial magistrate, through *voire dire*, had established that the complainant was possessed of sufficient intelligence to understand the nature of the oath and the duty to tell the truth. She testified that on unknown date, the Appellant, who was their neighbour and whom she referred to as **"Baba Wicky"** requested her to take vegetables to his house. The vegetables were **"?2 mboga and tomatoes"**. Her mother was not at home at the time. According to her testimony, at the time, the Appellant was standing outside his house. When she entered the house, the Appellant followed her into the house and then closed the door. She said the incident took place at daytime but did not say what time it was. She testified that the Appellant then asked her to sleep with him or else he was going to beat her. He carried her onto the bed, removed her clothes then beat her on her thighs with his hands. He then removed his trousers and t-shirt. He then removed her pants. He then inserted his penis into her vagina. She used the sheng word **"alinidinya"** to describe the sexual act. She testified that she felt pain. After the Appellant was through, she put on her clothes. The Appellant promised to buy her sweets. He also told her not to tell anyone what had taken place. The complainant testified that when she left the Appellant's house, she screamed and cried but no one came to her rescue. When her mother returned, she told her that **"Baba Wicky raped me"**. The mother took her to the police and later to Nairobi Women Hospital where she was examined by a doctor.

The complainant's testimony in regard to what transpired on the material day was contradicted in material respects by the testimony of her mother PW2 L A and a neighbour PW3 Margaret Mmbone. The mother of the complainant testified that on 7<sup>th</sup> January 2012 at 10.30 a.m. she went to Gikomba market to do some shopping. She left the complainant at home with other children. The complainant is her 3<sup>rd</sup> born. She had four (4) children at the time. She testified that when she returned home she wanted to bathe the complainant. The complainant requested to go for a short call before being bathed. She took long to return to where she had placed the water. She fetched her and inquired from her why she had taken too long. The complainant told her that she felt pain in her vagina. PW2 called PW3. She also called a lady by the name Judy. The three women checked the vagina of the complainant. Whereas PW2 testified that she saw the complainant's vagina as being abnormal with male sperms oozing out of it, PW3 testified that there was a heavy discharge which she did not identify. The three women interrogated the complainant with a view to establishing if anyone had sexually assaulted her. According to PW2 and PW3, at first the complainant was reluctant to give the information. However, after she had been assured that she would not be punished, she told PW2 and PW3 that she had been sexually assaulted by the Appellant.

Immediately after the complainant made this disclosure, PW2 took the complainant to Kilimani Police Station. After a report had been recorded at the said police station, the complainant was referred to Nairobi Women Hospital for medical examination. The complainant was examined by Dr. Thuo. According to Dr. Thuo, the complainant was calm, well kempt and had normal vital signs. Vaginal examination revealed normal external genitalia. There was a whitish foul vaginal discharge which the doctor attributed to an infection. The hymen was widened. Laboratory test revealed no sexual transmitted disease. No semen was detected. The doctor noted that the widening of the hymen could have been caused by anything inserted to the vagina. There were no bruises in the vagina. With these observations, the doctor however noted that the complainant had been defiled. The medical report was produced on behalf of Dr. Thuo by Dr. Chebet Boit who testified as PW4.

The case was investigated by PW5 PC Susan Ndungu. After conclusion of her investigations, she formed the opinion that a case had been made for the Appellant to be charged with the offence of **attempted**

**defilement.** The Appellant was so charged.

When he was put on his defence, the Appellant attacked the prosecution's case on two fronts: he testified that on 6<sup>th</sup> January 2012, he had gone to visit his relative who was living at Riruta Satellite. He stayed with his relative until late that evening. In essence, the Appellant was saying he was not within the vicinity of his residential house at the time it was alleged that he had defiled the complainant. In that regard, his testimony was corroborated by DW2 Joash Omambi. Secondly, the Appellant testified that the mother of the complainant had approached him for a relationship. The Appellant rebuffed the approach. The Appellant testified that this rejection of the complainant's mother approach for a love relationship is what motivated her to lodge the complaint against him.

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 adduced sufficient evidence to secure the conviction of the Appellant on the charge of **attempted defilement** contrary to **Section 9(1) of Sexual Offences Act**.

This court has carefully re-evaluated the evidence adduced before the trial magistrate's court. It was clear from the said evidence that the prosecution solely relied on the evidence of the complainant in regard to what allegedly transpired on the material day. Whereas proviso of **Section 124** of the **Evidence Act** allows the court to admit such evidence without corroboration in sexual offences, nevertheless, the court should be cautious in considering such evidence because the section requires that the court ***"is satisfied that the alleged victim is telling the truth"***. In the present appeal, the complainant's evidence contained material discrepancies which were contradicted by the testimony of PW2 and PW3. From the testimony of the complainant, it is not clear when the incident is said to have taken place. *Was it 6<sup>th</sup> January 2012 or 7<sup>th</sup> January 2012?* The charge sheet mentions the date 6<sup>th</sup> January 2012. However, the testimony of PW2 implies that the incident took place on 7<sup>th</sup> January 2012 when she was not at home. She did not tell the court her whereabouts on 6<sup>th</sup> January 2012. She did not tell the court whom she left the complainant with when she went to Gikomba market on the 7<sup>th</sup> January 2012. Assuming that the incident took place on 6<sup>th</sup> January 2012, *was the complainant not bathed on that day until the following day when the mother returned from the market?* If that is the case, *could it be possible that PW2 could have seen semen oozing out of the vagina of the complainant?* The answer is not clear from the testimony of the prosecution witnesses.

Secondly, the complainant was categorical that she had been sexually assaulted. Infact from her evidence, one can reach the conclusion that she was penetrated. PW2 and PW3's testimony was to the effect that upon physical examination of the complainant's vagina, they saw that it was abnormal. However, medical evidence clearly contradicted this position. The medical evidence established that the appearance of the complainant's vagina was normal. There was no penetration. The hymen had not been broken though the doctor noted that the hymen ***"had widened"***. From the testimony of the complainant, it was not possible that the Appellant used his penis in the act and not penetrated the complainant. The doctor noted that the vaginal discharge was as a result of an infection that was not sexually transmitted. No semen was seen in her vagina. There was therefore material discrepancy between the testimony of the complainant, PW2 and PW3 and that of the medical examination.

Further, as correctly observed by the trial court, the evidence of a child ought to be treated with caution because of several factors. The trial court cited the case of **FAPPYTON MUTUKU NGUI –VS- REPUBLIC – CRIMINAL APPEAL NO.296 OF 2010** where the court held thus:

***"Indeed courts should be cautious before convicting on the uncorroborated evidence of minors. There are many reasons for this. In J Heydon Evidence: Cases and material 2<sup>nd</sup> ed Butterworths London 1984, 84, the reasons were put this:***

*First, a child's power of observation and memory are less reliable than on adult's. Secondly, children are prone to live in a make-believe world, so that they magnify incidents which happen to them or invent them completely. Thirdly, they are also very egocentric, so that details seemingly unrelated to their own world are quickly forgotten by them. Fourthly, because of their immaturity they are very suggestible and can easily be influenced by adults and other children."*

This court agrees with the holding of the court in this decision. In the present appeal, it was clear that if it was not for the pressure put on the complainant, she would not have made the claim that she had been defiled by the Appellant. On examining of the complainant, the mother of the complainant jumped into the conclusion that the complainant had been defiled while in all probability the complainant was suffering from a vaginal infection. When the complainant was confronted by three women who were making suggestion to her as to what may have transpired, the complainant succumbed to the pressure and mentioned the closest neighbour who happened to be the Appellant as the person who defiled her. She testified that she screamed and cried when she emerged from the house of the Appellant. She lives in an informal settlement where the population is dense. *How come no one saw her scream or cry? Why didn't anybody come to her rescue?* This court is not convinced that the complainant was telling the truth. The only conclusion that this court can reach is that the material discrepancies revealed in the evidence adduced by the prosecution witnesses leads this court to finding that there is reasonable doubt that the Appellant attempted to defile the complainant.

The evidence adduced by the Appellant in his defence may well be true. It may well be that the mother of the complainant fabricated the charge against the Appellant after her love overtures were rebuffed. Or it may well be that the Appellant was at Riruta Satellite at the time the crime is alleged to have taken place. In any event, it is not the Appellant's duty to establish his innocence. His duty is restricted to raising reasonable doubt on the prosecution's case. In this case he has succeeded.

Enough said. The upshot of the above reasons is that the appeal lodged by the Appellant is hereby allowed. His conviction on the charge of **attempted defilement** is quashed. The Appellant is ordered set at liberty and released from prison forthwith unless otherwise lawfully held. It is so ordered.

**DATED AT NAIROBI THIS 3<sup>RD</sup> DAY OF MARCH 2016.**

**L. KIMARU**

**JUDGE**