



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CRIMINAL APPEAL NO. 12 OF 2011**

**SAMUEL CHENGO WANJE ..... APPELLANT**

**VERSU**

**REPUBLIC ..... RESPONDENT**

(From the Original Conviction and Sentence in Sexual Offence Case No. 55 of 2010 of the Chief Magistrate's Court at Malindi – G. Sagero, RM)

**JUDGEMENT**

The appellant was charged with the offence of attempted defilement contrary to section 9 (1) as read with section 9 (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that the appellant on the diverse dates of 11<sup>th</sup> and 12<sup>th</sup> December, 2010 in Magarini District of the Kilifi County, attempted to commit an act which would cause penetration of his male genital organ into the genital organ of S K, a girl aged 13 years.

The trial court convicted the appellant and sentenced him to serve ten (10) years imprisonment. The main ground of appeal is that the sentence is excessive as the appellant has now reformed and he is a first offender. The appellant relies on the case of THOMAS GILBERT CHOLMONDELEY VS REP. Nairobi Criminal Case No. 55 of 2006. The appellant submit that he has served almost five (5) years of the sentence and would like to be released to the community since he has reformed.

The state opposed the appeal. Mr. Fedha prosecution counsel, submit that the attempt was made on a minor. The appellant went to the complainant's room while naked and touched her. He then ran away. The following day he went again at night and touched her. The complainant saw the appellant who was also naked. He went under the bed. The complainant's mother went there and found the appellant under the bed. He was arrested and taken to the police.

The complainant, S K, testified as PW1. She gave unsworn evidence and informed the court that she was nine (9) years old and a class two pupil. On the 11<sup>th</sup> December, 2010 at about 4.00 am she was asleep with her clothes on with her two sisters when someone went to their room and touched her legs. She did not see that person and he ran away. She informed her brother and her mother. The following day 12<sup>th</sup> December, 2010 she was also sleeping at night when someone went there and held her leg. She asked who that person was but he kept quiet and went under the bed. PW1 screamed and called her mother. Her mother went there and found the appellant wearing an underpant under the bed. PW1 used to see the

appellant but did not know where he was working. The appellant was taken to the police station.

PW2 K K B is the mother of PW1. She testified that there are two houses at her compound which are twenty metres apart. PW1 sleeps in the other house. On the 11<sup>th</sup> December, 2010 at about 4.00 am her children screamed saying someone had entered into their house naked and he had ran away. On the 12<sup>th</sup> December, 2010 at about 3.00 am she heard PW1 screaming saying that the person had gone there again. PW2 went to her children's house with a torch and found the appellant under the bed naked. He asked for his name and he said he was called Kamango. PW2's husband went to the house and they called the village elder. The appellant was taken to the AP Camp. The appellant's clothes were found in the bush.

PW3 APC GEOFREY WEKESA NICHOLAS was based at the Kanagoni AP camp in Magarini district. On the 12<sup>th</sup> December, 2010 at about 6.00 am he was at the camp when the village elder and members of the public went with the appellant who was naked. They informed him that the appellant had on two occasions gone to PW2's house and touched PW1. He asked the appellant where his clothes were and he explained to him. PW3 sent someone on a motor bike to collect the appellant's clothes. The appellant dressed up and was taken to Malindi police station. PW4 P.C. ROBERT KINUTHIA was based at the Malindi police station. The appellant was taken to him in the morning of 12<sup>th</sup> December, 2012 by members of the public and PW3. He investigated the case and charged him with the offence.

The appellant was put on his defence and he opted to remain silent.

The main issue for consideration is whether the prosecution proved its case beyond reasonable doubt. The main contention by the appellant revolves around the issue of sentence. However, this court has to re-examine the evidence afresh and make its own conclusion.

According to PW1, someone entered into their room on the night of 11<sup>th</sup> December, 2010. That person tried to separate her legs. On the following night of 12<sup>th</sup> December, 2010, once again someone tried to separate her legs. She noted that the intruder had gone under the bed. PW2 heard PW1's screams and went to the room. She found the appellant under the bed. The appellant was arrested and taken to PW3 while naked. PW3 sent for the appellant's clothes and they were brought.

It is clear from the evidence that the appellant was arrested from the room where PW1 was sleeping. To make matters worse, the appellant was naked only wearing an underpant. The appellant was taken to PW3 in that condition. According to PW1, the other children she was sleeping with in the room are her younger sisters. It is evident that he went to the room and tried to separate PW1's legs. The incident was repeated on 12<sup>th</sup> December, 2010. The only logical conclusion is that the appellant attempted to defile PW1. There was no complaint from the other children.

I note that PW1 testified that she was nine years old while the charge sheet indicate that she was thirteen years old. The complainant was not taken to hospital for check up as there was no defilement. It was an attempt. Whether PW1 was 13 or 9 years does not change the status of the charge and the sentence. The sentence for attempted defilement of a charge under section 9 (2) is ten (10) years imprisonment. Under section 2 of the Children Act No. 8 of 2001, a child is any human being under the age of eighteen (18) years.

The appellant did not offer any explanation in his defence. He was arrested red-handed under the bed. There can be no other logical conclusion to the incident other than an attempt to defile PW1. I do find that the prosecution proved its case beyond reasonable doubt.

With regard to the issue of sentence, section 9 (2) of the Sexual Offences Act states that anyone convicted under that section should be sentenced to a term of not less than ten (10) years imprisonment. That is the minimum sentence. The court convicted the appellant to serve the minimum sentence. I do find that even if the appellant is a first offender who has reformed, the law only provides for the very minimum sentence. The discretion of the court to impose an alternative sentence is watered down by the statutory imposition of the minimum sentence. The conviction and the sentence are quite proper and within the

law.

In the end, I do find that the appeal lacks merit and is hereby disallowed.

**Dated and delivered in Malindi this 15<sup>th</sup> day of September, 2016.**

**S.J. CHITEMBWE**

**JUDGE**