



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KISII**  
**CRIMINAL APPEAL NO. 29 OF 2013**  
**BETWEEN**

**EVANS OMWOYO MOSIORI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against conviction and sentence of Hon. L.M. Nafula, PM, dated and delivered on the 29<sup>th</sup> September, 2010, in the original Ogembo SPM's Criminal No.145 of 2010)*

**JUDGMENT**

1. The appellant herein **Evans Omwoyo Mosiori** 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 which were that on 22<sup>nd</sup> day of January 2010 at *[particulars withheld]* sub location in Nyamache District within Nyanza Province, intentionally and unlawfully attempted to cause his penis to penetrate to vagina of S.B.N. a girl aged nine and half years.

2. He faced an alternative charge of Indecent Act contrary to **Section 11(1)** of the **Sexual Offences Act NO.3 of 2006** the particulars of which were that on the 22<sup>nd</sup> day of January 2010 at *[particulars withheld]* sub location in Nyamache District within Nyanza Province did commit an indecent act with S.B.N. a girl aged nine and half years old by touching her vagina with his hands.

3. He pleaded not guilty to the said charges, was tried, convicted of the count of attempted defilement and sentenced to ten years imprisonment. Being aggrieved by the said conviction and sentence he filed this appeal and raised the following grounds of appeal:-

*1. The learned trial magistrate erred in law an din facts by failing to evaluate the evidence of prosecution witnesses which were insufficient, inconsistent and contradictory.*

*2. His defence was not considered.*

4. When the matter came up for hearing before me, Mr. Majale appeared for the state and opposed the appeal. While the appellant who was not represented filed a further document entitled petition of appeal but which should have been entitled written submissions.

5. It was submitted by the appellant that the complainant in her testimony before the trial court testified that she was laid down upward and a penis inserted in her vagina but when she reported the same matter to the investigating officer PW3, she said that somebody attempted to defile her and she screamed and the person fled. It was submitted that this contradicted the evidence of PW1 who testified that she checked the complainant's vagina and saw discharge.

6. It was submitted that PW4 the doctor who examined the complainant found no spermatozoa.

7. On behalf of the state, Mr. Majale submitted that appellant was not a stranger to the complainant and that the same was convicted on the evidence of recognition. It was submitted that all the prosecution witnesses gave a consistent line of evidence.

8. This being a first appeal the court is required to re-evaluate the evidence tendered before the trial court though taking into account the fact that I did not have the advantage of seeing or hearing the witnesses.

9. It was the prosecution case that PW1 H.N. Had sent the complainant to buy her panadol when she came back crying. Upon being asked the reason she told her that a certain man had defiled her near the appellant's home. She checked her and saw that she had some white discharge in her vagina and panty. She thereafter took the complainant to Nyacheki dispensary where she was treated and to Gucha District hospital where P3 form was filled.

10. Under cross examination, she stated that the complainant had told her that one Ondieki had defiled her in the road. PW2 S.B.N. evidence was that on her way back home she met the appellant who carried her to the nearby bush removed her panty and inserted his penis in her vagina. She screamed and the appellant ran away. In cross examination she stated that the appellant had not called her and told her not to spoil her blue gum trees and that she had seen the appellant before passing near their church.

11. PW3 PC Mohammed Bayo received the report that while the complainant was on her way home she met her neighbour who carried her to the nearby bush and removed her clothes but she screamed and he fled. PW4 a clinical officer at Gucha District Hospital testified that he examined the complainant on 25<sup>th</sup> January 2010 and that both her labia minor and majora were lacerated, bruised and hyperemic, no spermatozoa were seen and he concluded that the name of the offence was defilement without penetration.

12. At the close of the prosecution case and when put on his defence, the appellant opted to remain silent.

10. From the proceedings and submissions herein it is clear that the appellant was convicted solely on the evidence of PW1 and PW4 as in convicting him the trial court had this to say:-

**“PW4 J.M.N. the clinical officer who examined the minor after the alleged attempt, he stated that the minor's labia minora and labia majora were lacerated and bruised. That had the minor herein not screamed causing the aggressor to flee circumstances were such that the act of defilement would have been completed.....**

**..... Having so found the question that begs then is whether the complainant has singled out the accused person as the person who attempted to defile her, the accused herein was no stranger to the complainant.”**

13. It is further clear that the conviction was based on the trial court's assessment of the gravity of the testimony of PW2 and that the appellant's conviction was based on recognition.

14. From my own assessment of the evidence and in particular the cross examination of PW1 and PW2 by the appellant in respect of an allegation of the complainant climbing the appellant's blue gum trees which put the complainant and the appellant together in the scene, I have come to the conclusion that the appellant's conviction was safe and would therefore dismiss the appeal on conviction.

15. On the sentence, an offence under **Section 9 (1)** as read with **Section 9 (2)** provides for a minimum sentence of Ten (10) years which the court imposed. There is therefore no legal basis for interfering with the same and therefore would dismiss the appeal on sentence.

16. In the final analysis the appellant's appeal herein lacks merit and is therefore dismissed.

**Signed and dated on this 4<sup>th</sup> day of February, 2015.**

**J. WAKIAGA**

**JUDGE**

In the presence of:

In person for Appellant

Mr. Majale for Respondent