REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO.95 OF 2010

FAUSTINO KITHUMBI NYAGA…….....APPELLANT

VERSUS

REPUBLIC…….....…..…..RESPONDENT

From original conviction and sentence in Cr. Case No. 150 of 2009 at the Magistrate's Court at Siakago by HON. S.M. MOKUA – SRM on 24th June 2010

J U D G M E N T

FAUSTINO KITHUMBI NYAGA was charged and convicted of the offence of;

Attempted defilement contrary to section 9(1) (2) of the Sexual Offences Act No.3 of 2006.

The particulars of the charge being that;

> **FAUSTINO KITHUMBU NYAGA: On the 11th day of February 2009, in Mbeere District of the Eastern Province, attempted to defile TIM a child aged twelve years.**

Upon conviction he was sentenced to ten (10) years imprisonment and has appealed against both conviction and sentence raising the following grounds;

1. ***That the trial Magistrate erred in both points of law and fact by sentencing the Appellant on evidence of a single witness which was uncorroborated.***
2. ***That the learned trial Magistrate erred in both points of law and fact by convicting the Appellant without considering that the Prosecution case was surrounded by contradictions.***
3. ***That the learned trial Magistrate erred in law and fact by rejecting the Appellant's defence without sufficient reasons.***
4. ***That the learned Magistrate erred in law and fact by convicting the Appellant without considering that the Prosecution did not produce the dirty clothes as exhibits before the Court.***

The Prosecution called a total of seven (7) witnesses. The gist of their evidence is that PW1 then aged twelve (12) years was on her way to school on 11/2/2009 at 6am. She was followed from behind by the Appellant who greeted M with whom she was. He then came after her asking to hold her breasts. She shielded herself with her hands. He then ran after her and knocked her on the ground as she screamed. He covered her mouth as he knelt down. She screamed as he held her and this attracted the attention of PW2 – PW5. She screamed because she realized what the Appellant's intention was. Those who responded to her screams followed the Appellant into the bush as he had disappeared on seeing them. He was apprehended and the matter reported to the police. It is PW1's evidence that the Appellant was not

able to accomplish his ill intended mission because of her rescuers.

Both the Appellant and PW1 were examined by PW4 who found nothing abnormal/unusual on either of them. (EXB3 & 4). The Appellant was then charged. In his unsworn statement of defence the Appellant denied the charge. He stated that on 13/2/2009 he was sick and was unable to walk and he lay by the roadside. This was in the morning and children were headed to school. PW2 then came and said he was waiting for the school children. She was with a young girl who on seeing him screamed. PW2 then alleged he had wanted to defile the young girl. Several people came and he was arrested.

When the appeal came for hearing the Appellant presented the Court with his written submissions. He raises the following issues;

i. That both him and PW1 when examined had no injuries

i. The pupils who were with PW1 ran away and were not called as witnesses.

ii. The evidence of the witnesses differed on the time the incident occurred
iii. His defence was not considered.

The learned State Counsel Mr. Wanyonyi opposed the appeal. He submitted that the evidence of PW1 was corroborated by that of PW2 – PW5. And that the chain of events linked the Appellant to the offence. The defence did not dislodge the evidence of the Prosecution.

This being a 1st appeal this Court is enjoined to re-evaluate the evidence and come to its own conclusion. It should also bear in mind that it did not see nor hear the witnesses. I am guided by the case ***of AJODE –V- REPUBLIC [2004]2 KLR 81*** where the Court of Appeal held;

> "***It is trite law that before such a parade is conducted, and for it to be properly conducted, a witness should be asked to give the description of the accused and the police should then conduct a fair identification parade".***

I have considered the submissions, the grounds of appeal and the evidence on record. The grounds raised by the Appellant relate to the evidence that was adduced before the trial Court. I will therefore merge all the grounds and address them together.

The offence facing the Appellant was ***attempted defilement*** and not ***defilement.*** The learned trial Magistrate was satisfied that the victim (PW1) was a child. That is why he conducted a *voire dire* examination for her. Unlike defilement offences under section 8 of the Sexual Offences Act where age must be proved, for attempted defilement all that the Prosecution must prove is that the complainant was a child. A child is defined under the Children's Act as a person under the age of 18 years. The learned trial Magistrate was therefore satisfied that PW1 was a child. PW1 was with M a pupil and not PW5. The other pupils who came along ran away when they saw the Appellant. They could not be called to testify because they did not witness anything. PW1 was a single identifying witness. What she did was to scream. Her screams attracted PW2-PW5 who rushed to the scene. They checked around and found the Appellant lying in a bush and PW1 was with them. She told them he was the culprit. The Appellant has admitted having been at the *locus quo*. His explanation is that he was too sick to walk and lay there. He denied trying to defile PW1. After his arrest both PW1 and Appellant were taken for treatment and later on P3 forms were filled. There is no evidence that when the Appellant was taken to Mbeere District Hospital for examination there was any illness detected in his body. Had there been any serious illness as he alleges it could have been noted. The learned trial Magistrate considered this defence of the Appellant and found that it did not challenge the Prosecution case in any way. PW1 explained that on his first approach the Appellant told her he wanted to touch her breasts. She repulsed him. Why would he have wanted to touch her breasts if it was not for gratifying himself sexually? He then ran after her, trapped her and knocked her down. He then went on his knees and struggled with her. All this goes to show that he was out to have sexual intercourse with her. It is only the screams of PW1 that saved her.

The Appellant was found at the *locus quo* not because he was too ill but because of his ill intentions. The evidence was so overwhelming even without the production of her soiled clothes. My finding therefore is that the appeal lacks merit. The sentence is the minimum provided for under section 9(2) of the Sexual Offences Act.

I dismiss the appeal.

Right of appeal explained.

DATED AND DELIVERED AT EMBU IN OPEN COURT THIS 13TH DAY OF FEBRUARY 2014

H.I. ONG'UDI

J U D G E

In the presence of;

M/s Ing'ahizu for State

Appellant

Njue – C/c