



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO.162 OF 2010**

**WILSON KIPKURUI LANGAT.....APPELLANT**

**VERSUS**

**REPUBLIC.....PROSECUTOR**

**[An Appeal from original conviction and sentence in Nakuru C.M.A/CR.C.NO.126 OF 2008 by Hon H. Baraza, Resident Magistrate, dated 30<sup>th</sup> April, 2010]**

**JUDGMENT**

The appellant, **Wilson Kipkurui Langat**, was charged and tried for **attempted defilement** contrary to **section 9(1)(2)** of the **Sexual Offences Act No. 3 of 2006**. In the alternative, he was charged with **committing an indecent act with a child** contrary to **section 11(1)** of the **Sexual Offences Act**.

According to the charge sheet, it is alleged that on 15<sup>th</sup> July, 2008 at N[...] Estate, Nakuru, the appellant unlawfully attempted to commit an act which would cause penetration with MW, (the complainant) a child aged 7 years.

It was the prosecution evidence that on the evening in question, at about 7.3p.m., the complainant went to a communal toilet located away from their house. As she entered, she saw the appellant standing outside smoking. As she came out, the appellant pushed her back and began to touch her.

Because she took long, the complainant's mother P.W.2, D.M. went to look for her at the toilet. She called out the complainant but the latter did not respond. When she did, she told the mother that she was with a school mate – Godi – who was in standard 4 (while she was in standard 1).

In the process, it was alleged, the appellant escaped through the window. Later, the complainant told her parents that she was with the appellant in the toilet and that it was the appellant who told her to tell the mother she was with Godi. She also explained that she could not scream as the appellant had gagged her. The matter was reported to the police three days later and the appellant arrested. The complainant was also examined by a clinical officer, **P.W.5, Jacob Chelimo** who noted that she had not been defiled. She had no injuries or discharge on the genitalia.

In his sworn defence, the appellant recalled that in the evening in question, after watching the 7p.m. news, he left for the shops to buy eggs and vegetables. On his way home, he met the complainant's father who did not greet him. On the sixth (6<sup>th</sup>) day, he was arrested on allegations that he had attempted to defile the complainant. He attributed his arrest and the events that followed to the ethnic tension of elections.

The learned trial magistrate found that the prosecution evidence proved the charge of attempted defilement beyond any reasonable doubt and upon conviction sentenced the appellant to fifteen (15) years imprisonment.

Being aggrieved, the appellant preferred this appeal through the firm of Gordon Ogola and Associates, relying on 7 grounds which I hereby summarize:

- i) the case against the appellant was not proved beyond any reasonable doubt;
- ii) the evidence of the complainant was not corroborated ;
- iii) the prosecution evidence was contradictory;
- iv) the charges were defective and did not disclose an offence;
- v) the sentence was excessive;

Learned counsel for the respondent, quite correctly conceded the appeal on the grounds that the incident was reported to the police three days after its alleged occurrence; the offence charged was not proved and; that the sentence was excessive.

I have considered the grounds advanced in this appeal and hold the following view of the matter. There is no doubt that the complainant was, at the time of the alleged offence, a child of tender years as defined in **section 2** of the **Children Act** as she was under ten (10 ) years of age.

Upon her examination by way of *voir dire*, the learned magistrate was satisfied as to her intelligence and she proceeded to testify on oath. The main issue for determination is whether the charge was proved.

The appellant was charged with the offence of attempted defilement which is committed when:

**“9(1) A person attempts to commit an act which would cause penetration with a child.....”**

How was the attempted defilement committed? The complainant explained that:

**“As I was closing the door to the toilet that man came and started touching me on the belly and abdomen..... I did not ask him why he was touching me all over..... He did not do anything else to me other than touching me.”**

In cross examination, she went on to say:

**“He started touching me all over (the witness touches the region between her waist and the chest). He did that for a short time.”**

What the complainant described in the foregoing testimony cannot, by any standard amount to an attempt that would cause penetration. Penetration is defined in **section 2** as the partial or complete insertion of the genital organs of a person into the genital organs of another person.

There was no mention of genital organs of either the attacker or the complainant. Touching of the belly, abdomen or “*all over*” cannot constitute an offence of attempted defilement.

Secondly, it is not particularly clear what exactly the assailant did to the complainant. She explained to her mother that the appellant had tried to remove her trousers; that he had actually removed the trousers but stopped when the complainant’s mother intervened. To her father, the complainant said that the appellant had tried to remove her pants but was interrupted.

The clinical officer was told that the complainant had infact been defiled by someone known to her. The learned magistrate concluded that the appellant attempted to defile the complainant merely because the appellant followed the former into the toilet. He asked;

**“Why would a man follow a girl child into the toilet, close the door and start touching her all over the body? He may not have removed her pant and clothes but the circumstances of this case clearly show that the accused intended to defile the minor herein.”**

With respect, the learned magistrate missed the point and therefore erred in finding that the offence was proved beyond any reasonable doubt. Having myself found, after re-evaluation of the evidence, that the acts in question did not amount to an attempted defilement, I find that the appeal has merit. It is allowed, the conviction is quashed and sentence set aside. The appellant will be and is hereby set at liberty unless otherwise lawfully held.

**Dated, Delivered and Signed at Nakuru this 1<sup>st</sup> day of March, 2011.**

**W. OUKO  
JUDGE**