



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIAMNI LAW COURTS**

**Criminal Appeal 69 of 2008**

**WARSAME ADEN YARROW .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**(From the original conviction and sentence in Criminal Case No. 326 of 2007 of the Senior Resident Magistrate's Court at Wajir by A. Ingutya – Senior Resident Magistrate)**

**JUDGEMENT**

The appellant was charged and convicted with offence of attempted defilement of a girl contrary to section 9(1) of the new Sexual Offences Act. The particulars are that on the 1<sup>st</sup> day of September 2007 at around 12.00 noon at Habaswein District within North Eastern Province attempted to have carnal knowledge of N.Y H a girl under the age of 14 years. He was then sentenced to serve 10 years imprisonment. He is aggrieved by the decision of the lower court hence this appeal.

The complainant gave evidence as PW1 and stated that on the material day while in the bush herding her parent's goats, she was confronted by the appellant who threw her to the ground and covered her mouth with his palm so that she will not be able to scream. He tried to remove her pants and a struggle ensued and the complainant freed herself from the grip of the appellant and managed to run home. When she reached home she informed her mother and they started looking for the person who had attacked her. In her evidence she stated that the appellant was found lying under a tree and she immediately informed her mother as the person who had earlier attempted to defile her. She stated that her and other men came and arrested the appellant. She was later taken to Habaswein Police Station to record her statement and referred to Wajir District hospital.

PW2 B.A stated that on the material day at about 1.00 p.m. while at home, he was attracted to the screams of his neighbour's daughter and when he inquired, he was informed that she had been attacked by a man in the bush. He stated that he left together with the complainant up to the scene and followed the footprints of the assailant. At a short distance the appellant was arrested after he had been pointed out by the complainant.

PW3 the complainant's father stated that on the material day while at home his daughter came home crying that she had been assaulted and attacked by a man in the bush. He went together with PW2 and the complainant to the scene and thereafter followed the footprints of the attacker. Upon following the footprints, they found the appellant sleeping under a tree. The appellant was arrested and handed over to Habaswein Police Station.

PW4 Ibrahim Sheikh Mohamed a clinical officer at Wajir examined the complainant and confirmed that there were no injuries to the private parts of the complainant and that no spermatozoa was seen. He therefore produced the P3 form as exhibit No.1.

PW5 and 6 were police officers attached to Habaswein Police Station and who received the report and rearrested the appellant who was brought by PW2 and PW3.

The appellant in his evidence stated that he was arrested while walking on the road by persons who were looking for suspect who had allegedly tried to defile a young girl within the area. In short he denied the offence and stated that he was framed by the complainant and the other prosecution witnesses.

After considering the evidence tendered before court, the trial court was of the view that the case against appellant was proved beyond reasonable doubt and that there is sufficient evidence to link the appellant to the offence charged. I have considered the evidence on record and it is the duty of the prosecution to show that the case is consistent with the guilt of the appellant with no contradictions or inconsistencies with the evidence tendered. The law is that where the evidence tendered is contradictory or inconsistent then it should not be relied upon by the trial court. In short the law is that in criminal cases the charge against an accused person must be proved beyond any reasonable doubt. And if there may be degrees of proof that standard must be overwhelming and beyond doubt. In this case the complainant was attacked in the bush by a man who was not known to her and who immediately tried to wrestle her to the ground for purposes of sexually assaulting her. A struggle ensued and the complainant managed to release herself from the attacker who immediately vanished into the bush. The complainant on the other hand went to their home to seek help from her parents who immediately mounted a search in order to apprehend the culprit. The complainant took PW2 and PW3 to the scene of the attack and they immediately followed the footprints of the alleged attacker in order to apprehend him for attempting to defile the complainant. After a short while, the appellant was arrested while sleeping under a tree and it is the evidence of the complainant that the person arrested is the one who had earlier attacked her. The question is whether there is sufficient evidence to sustain the conviction of the appellant who was arrested allegedly sleeping under a tree. It is also important to appreciate that there is nothing to show that the footprints that were followed by PW2 and PW3 belongs to the appellant. In that regard a point of determination is whether is a man who attempted to defile a young girl would move a few metres from the scene and proceed to sleep under a tree without any fear that he may be followed and arrested.

The appellant in his defence stated that he was arrested while walking in a road and that he had nothing to do with the charges that were preferred against him. Consequently it is the duty of the prosecution to show that appellant is the one who attempted to defile the complainant and that there is no possibility of mistake or error to sustain a safe and proper conviction. In this case the possibility of error or mistake was not adequately and properly eliminated by the prosecution that the appellant had the opportunity to attack the complainant and that he was arrested immediately after the alleged attack. I do not think that assertion by the prosecution that PW2 and PW3 followed footprints from the scene and that the appellant was arrested sleeping under a tree can be a basis for sustaining the conviction of the appellant. The conduct of a criminal behaviour is that a person who commits an offence will leave no trace or evidence that would link to his arrest. I do not think a person who tried to commit a serious offence of attempted defilement would move a few metres from the scene and start to enjoy a sleep. That is not the conduct expected of a reasonable and prudent man who may have committed an offence as serious as the one in which the appellant was convicted for. I therefore think the possibility of mistaken identity was not eliminated by the prosecution and that the conviction entered by the trial court is not safe to be sustained by this court. In the premises the trial court misdirected itself by relying on the evidence of PW2 and PW3 in convicting the appellant for such a serious offence. I do not think the conviction is safe in that the benefit of doubt was not accorded to the appellant. I therefore think that the prosecution has not proved its case beyond reasonable doubt making this appeal to succeed. The appeal is allowed, conviction quashed and sentence set aside. I order the immediate release of the appellant unless lawfully held.

Dated, signed and delivered at Nairobi this 2<sup>nd</sup> day of November 2009.

**M. WARSAME**

**JUDGE**