



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT GARISSA**  
**CRIMINAL APPEAL NO 38 OF 2013**

**ABDI KULOW ABDI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

From Original Conviction and Sentence in Criminal Case No 143 of 2009 in the Senior Resident Magistrate's Court at Mandera (Mr. R. Ondenyo)

**JUDGEMENT**

Abdi Kulow Abdi, the appellant filed two separate grounds of appeal. The first was filed on 2<sup>nd</sup> August 2012 and the second amended grounds of appeal were filed on 1<sup>st</sup> October 2013 with leave of this court. He relied on both sets of grounds of appeal. I have combined both sets which to my understanding raise the following issues:

- i. That the charge is defective**
- ii. That the prosecution case was based on contradictory and inconsistent evidence**
- iii. That the case was not proved beyond reasonable doubt**
- iv. That the appellant's defence was not considered**
- v. That the evidence supported a case of assault not defilement**
- vi. That some witnesses were left out**
- vii. That the sentence is harsh and excessive**

The appellant submitted that the charge as drawn did not meet the requirements of section 134 of the Criminal Procedure Code and that he ought not to have been charged with attempted defilement contrary to section a(1) instead of 9(1) of the Sexual Offences Act. Further that the doctor's evidence revealed that the complainant has been assaulted not defiled.

He submitted that the age of the complainant is not ascertained because there is contradicting evidence on her age and that it is not clear whether she was 14 or 17 years old; that some witnesses who were mentioned in evidence were not summoned to testify; that the evidence was contradictory and inconsistency and therefore there was need for corroboration and that the sentence is harsh and excessive.

The appeal has been opposed by the Respondent. The learned State Counsel has submitted that the appellant was charged under section 9(1) of the Sexual Offences Act and the charge is not defective as it discloses an offence known to law; that any defects in the charge are curable under section 382 of the Criminal Procedure Code; that offences under this section do not emphasize on the age of the victim like offences under section 8 of the same Act; that the complainant was a child under the law and therefore it

was immaterial that evidence on her age in the P3 form is indicated as 14 years while PW1 stated she was 17 years old; that the appellant understood the charges and participated in the trial, followed the proceedings and cross examined prosecution witnesses.

Learned State Counsel further submitted that the evidence of PW2 was corroborated by that of PW1 and by on the neck injuries; that there is no particular number of witnesses shall be required to prove any fact; that the sentence is not excessive given that the minimum sentence is 10 years.

The appellant had been charged with attempted defilement of a child contrary to section a(1) of the Sexual Offences Act. The offence is alleged to have been committed on 21<sup>st</sup> June 2009 at around 10.00pm at [particulars withheld] of Mandera East District within North Eastern Province. It is alleged that the appellant attempted to intentionally and unlawfully to commit an act which causes penetration of H M A's genital organs.

The appellant was also charged with a second count of indecent act with a child contrary to section 11(1) of the Sexual Offences Act.

After a full trial the appellant was found guilty, was convicted on count one and sentenced to fourteen years imprisonment. Count two was treated as the alternative count.

The facts of this case are simple. H M A, PW2, was herding goats on 21<sup>st</sup> June 2009 when she was attacked by the appellant who approached her from behind. He started assaulting her and held her throat. She screamed for help. The appellant knocked her down and tore her dress and started forcing her legs apart all the while PW2 was fighting back. Her screams attracted F M A, PW3, who was also herding goats nearby. F ran to the source of the screams and found a man she identified as the appellant on top of PW2 who was struggling. F raised alarm and the man left PW2 and ran off. F realized she knew the victim who narrated to her what had happened. PW3 noted that PW2's dress was torn and her neck was bleeding.

Both PW1 and PW3 went to report the matter to Abdirahim Ibrahim Hassan, PW4, Acting Chief of the [particulars withheld] Location who was at the time at his second home in [particulars withheld]. PW4 told the trial court that while at home with some elders he heard screams and he walked out of his home with some three elders. They met PW2, PW4 and another girl who looked distressed. PW2 was crying and was bleeding from her neck. Upon receiving the report they visited the scene where PW4 saw signs of a struggle on the ground, sandals and head dress belonging to PW2. They followed foot marks on the ground. The trail led them to a homestead to one of the houses. The appellant was found hiding under a bed and his mother told him to come out. He was identified as the attacker and was arrested.

The appellant denied the offence. He testified that he was arrested as he went to see his mother. He said he had never seen the complainant before and saw her for the first time in court.

I have read the proceedings and the judgement. I note that the trial court evaluated the evidence on identification well although he called it recognition. PW2 and PW3 had not known the appellant before. They saw him first on 21<sup>st</sup> June 2009 around 10.00am and later that same day after he had been arrested. This is not recognition.

I have noted that the appellant was charged with two counts, first count is attempted defilement under section a(1) of the Sexual Offences Act while count two is indecent act with a child under section 11(1) of the same Act. This was wrong. One ought to have been the main charge and the second one the alternative charge. The trial magistrate noted this error and commented on it during the judgement. He made a finding that attempted defilement was proved, convicted the appellant on it and sentenced him. He treated count two as an alternative. I fault the trial magistrate for not correcting that error before the trial ended but note that no prejudice was occasioned on the appellant.

I note that the trial magistrate did not address his mind to the section under which the appellant was charged. There is no section a(1) of the Sexual Offences Act. The trial magistrate mentions the section of

the law in his judgement but says absolutely nothing about it. Section 1 of that Act is the title section. Obviously the trial magistrate was not alive to this fact.

Attempted defilement is an offence under section 9(1) of the Sexual Offences Act. The offence is committed when a person attempts to commit an act that would cause penetration with a child. The particulars of the charge allege that the appellant attempted to commit an act which would cause penetration. The prosecution led evidence to demonstrate that the appellant attacked the complainant, assaulted her, knocked her down and tore her clothes. He was struggling to part the complainant's legs and was found by PW3 lying on top of the complainant. It is clear from evidence that the appellant intended to defile the complainant.

The appellant cross examined the complainant and it is clear from the cross examination that the appellant understood what the offence he was facing was.

The section of the Act cited for this offence is wrong. Since section 1(a) does not exist in the Act this seems to be a genuine error that can be cured by section 382 Criminal Procedure Code. After careful analysis of the evidence it is my finding that the appellant has not suffered prejudice as a result of that error.

On contradictory evidence, I have carefully examined all the evidence and my evaluation of the same leads me to conclude that this ground has no merit. PW2's evidence on the injuries sustained on the neck as a result of the attack is corroborated by that of PW1 who treated her and completed the P3 form. PW2's evidence on the attack and attempted defilement is also corroborated by that of PW3 who found the appellant on top of PW2 struggling with her. PW4 found signs of struggle at the scene. He also found PW2's sandals and head gear.

I have considered the contention that the case was not proved beyond reasonable doubt. I have analyzed all the evidence and I find that the appellant was positively identified as the person who attacked PW2. I have considered the evidence of PW4 who has no reason to implicate the appellant. He stated that he found the appellant hiding under the bed at the home where the trail of foot marks ended. PW4 said the appellant's mother called him to come out of under the bed.

The ground of appeal that some witnesses were left out has no merit. I find that the prosecution cannot be faulted to leaving out witnesses because the witnesses who have testified have adduced evidence that proves that the appellant committed this offence. In **Johnson Muhuthu Wanjohi v Republic [2013] eKLR (Criminal Appeal No 471 of 2007)** the Court of Appeal was confronted with similar issue that the prosecution failed to call some witnesses to testify. The Court was of the view that proof of a criminal case was not dependent on the number of witnesses called but rather on the weight and cogency of the evidence adduced no matter the number of witnesses.

The contention that the trial court did not consider his defence is not true. The court considered the defence and rejected it in light of the evidence of the prosecution which the trial court found was well corroborated.

The penalty for attempted defilement is found in section 9(2) of the Sexual Offences Act. The minimum sentence under this section is 10 years. The appellant was sentenced to 14 years imprisonment. This is not harsh or excessive.

In conclusion, I find that the charge of attempted defilement was proved beyond reasonable doubt. The appeal therefore has no merit. I hereby dismiss the same and uphold the conviction and sentence. I make orders accordingly.

**Dated, signed and delivered this 28<sup>th</sup> day of November 2013.**

**S.N MUTUKU**

**JUDGE**