



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MAKUENI**

**HCCRA NO. E056 OF 2021**

**MAURICE KYALO MANG'OKA.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

(Being an appeal from the original judgment of Hon. E. Muiru in Kilungu

Principal Magistrate's Court PMCR Case No.76 of 2019

pronounced on 28<sup>th</sup> February, 2020).

**JUDGMENT**

1. The appellant was charged in the magistrates' court with 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 the offence were that on 28<sup>th</sup> November 2019 at Sultan Hamud township in Mukaa Sub-County within Makueni County intentionally attempted to cause his penis to penetrate the vagina of DK a child aged 13 years.
2. In the alternative he was charged with committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act, the particulars of which being that on the same date and at the same place intentionally touched the vagina of DKM a child aged 13 with his penis.
3. He denied both charges. After a full trial, he was convicted of the main count of attempted defilement and sentenced to serve 10 years imprisonment.
4. Dissatisfied with the conviction and sentence the appellant has come to this court on appeal on the following grounds –
  1. That the case was totally fabricated against him.
  2. That he was sentenced to serve imprisonment when there was no plea of guilty entered by the magistrate.
  3. That the statement of the complainant and her mother are irrelevant to each other and also the Investigating Officer.
  4. That there was another minor in the room who should have recorded statement as a witness.
  5. The doctor's medical examination record bears no proof of attempted rape.
  6. That he is an aged first offender, and prays for leniency or a non-custodial sentence if proved guilty by the law.
5. The appeal proceeded by filing of written submissions and I have perused and considered the written submissions of the appellant and those of the Director of Public Prosecutions.
6. This being a first appeal, I am required to evaluate all the evidence on record afresh, and come to my own independent conclusions and inferences – see **Okeno –vs- Republic (1972) E.A 32**.
7. In proving their case the prosecution called four (4) witnesses.

8. Pw1 was the alleged victim of the crime who testified on oath that she was almost 13 years, and in standard 6 pupil, and that the appellant is her stepfather. It was her evidence that she was in the room in which they share with appellant and a cousin Joseph Musembi when during that night after 9pm the appellant told her to wake up, then pulled her and inserted his penis in her and that she later told her mother about the incident in the morning when she came back. It was her evidence that the appellant did that to her on two occasions.
9. Pw2 was Veronica Mueni Mutuku the mother of Pw1, whose evidence was that the alleged victim was her daughter aged 13 and that on 28/11/2019 she left for work at 6:30 pm leaving her husband (the appellant), in the house, and went with Doris and Joseph Mutuku. Thereafter, the appellant called her on phone and sent her Kshs.60/= for buying chapatti and she bought the chapatti and told Doris and Mutuku to take the chapatti home at 7pm. She was however called on phone twice by Doris, and on the second time which was after 9pm, she wondered why Doris should phone at that time while she had instructed the children that they should be sleeping by then. She thus then proceeded home and to her surprise the house was locked from inside. She however went back to the kiosk only for the appellant to come at 6am and say he was leaving. It was then that she urged Doris to disclose to her what happened and Doris then disclosed to her what had happened and she thus reported the incidence to the police.
10. Pw3 was PC Mwanaidid Hussein from Sultan Hamud Police Station to whom the incident was reported, and conducted investigations and charged the appellant.
11. Pw4 was Eric Kasiamani a Clinical Officer at Kilungu Sub-County Hospital who testified on the medical reports filled by Jackson Nzivo of Sultan Hamud hospital. The medical report findings were that the hymen was not perforated but the labia minora was bruised and hyper red meaning that there was friction. It was his evidence that such reddening was caused by rubbing which could be penile or by hand.
12. When put on his defence, the appellant tendered unsworn defence testimony. He denied committing the offence and said that it was a frame up because his wife pw2 had borrowed Kshs.10,500/= from a merry go round and had asked him to pay the money and, when he refused to do so, there was a bitter exchange and then Pw2 told him that she would do something that the appellant would remember in his live.
13. This being a case of attempted defilement, the age of the victim was an important ingredient which was to be proved by the prosecution beyond any reasonable doubt. I note that the victim Pw1 said that she was almost 13. The mother Pw2 Veronica Mueni stated in evidence that the victim was 13. There was also produced a medical age assessment report which indicated her age as 12 years. The appellant does not challenge the age of the victim.
14. In my view, with the evidence on record, the prosecution proved beyond any reasonable doubt that the alleged victim was 13 years old at the time of the alleged incident.
15. The second element to be proved by the prosecution was whether there was an attempt to defile the alleged victim. On this, the prosecution relied on the medical report of the reddening of the labia majora. The medical evidence was that this reddening could have been caused by rubbing, that is penile or by hand.
16. The prosecution also relied on the evidence of Pw1 the victim who testified that the appellant had sexual activity with her, which was later reported to Pw2. In my view, the evidence of Pw1 on the incident was not believable, and thus not saved by the proviso to section 124 of the Evidence Act.
17. The first reason why it was not believable is that the victim said that the appellant had sexual intercourse with her twice, but the medical evidence found her hymen intact. Thus the complainant was in that regard not truthful. Secondly, there is clear evidence on record that there were issues between the appellant and Pw2 Veronica Mueni. One will ask why Pw2 would be surprised that a house was locked from inside when people are sleeping. Even if it was so locked in my view, locking the door was the most sensible thing to do when people go to sleep. On the totality of the evidence, I find that the prosecution did not prove that the reddening in the genitals of the victim was caused by a sexual attempt.
18. Additionally, the question begs, why the prosecution did not call Mutuku as a witness, or give a reason for not so calling him. He was a crucial witness who could explain what happened in that room or what the appellant did to the victim.
- This default by the prosecution seriously weakened the prosecution evidence's weight.
19. In my view, the allegation of the attempted defilement herein could as well be due to the domestic disagreement between the appellant and his wife Pw2, and that Pw1 (a daughter) who is the alleged victim is just being used to further the settling of scores between Pw2 Veronica Mueni and the appellant, thus I find that the prosecution did not prove that there was any attempt to defile the victim, as what was noted as reddening in vagina of the victim could as well have been deliberately caused by somebody's finger.
20. With regard to the culprit, as I have found that there was no attempt to defile as alleged, I also find that if there was indeed a culprit, the appellant was not the culprit.
21. Consequently, and for the above reasons, I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.

**DELIVERED, SIGNED & DATED THIS 27<sup>TH</sup> DAY OF JANUARY, 2022, IN OPEN COURT AT MAKUENI.**

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**GEORGE DULU**

**JUDGE**