



REPUBLIC OF KENYA



**DWW v Republic (Criminal Appeal E019 of 2021)
[2022] KEHC 11316 (KLR) (31 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 11316 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL E019 OF 2021**

**GMA DULU, J
MAY 31, 2022**

BETWEEN

DWW APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original judgment of Hon. C.A Mayamba in Kilungu Principal Magistrate's Court PM (S.O) Case No.18 of 2020 pronounced on 19th November, 2020)

JUDGMENT

1. The appellant was charged in the magistrate's court with attempted defilement contrary to section 9(1) (2) of the *Sexual Offences Act* No. 3 of 2006. The particulars of offence were that on 20th April 2020 in Mavinye Sub-Location Mukaa Sub-County intentionally attempted to cause his penis to penetrate the vagina of MMP (name withheld) a child aged 12 years.
2. He denied the charge. After a full trial, he was convicted of the offence and sentenced to serve 10 years imprisonment.
3. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal and relied on the following grounds -
 - 1) That the case was a total fabrication on him by his uncle and the mother of Pw1.
 - 2) That he was sentenced when no plea of guilty was entered by the magistrate.
 - 3) That the statement of Pw1 and Pw2 contradicted each other.
 - 4) That the doctor's examination record showed no defilement.
 - 5) That Dw1 was bacterial infected, why not both pw1 and Dw1.



- 6) That if found guilty he prays for leniency in judgment because of his age.
4. The appeal was canvassed through the filing of written submissions. In this regard, I have perused and considered the submissions filed by the appellant and those filed by the Director of Public Prosecutions.
5. This being a first appeal, I have to start by reminding myself that as a first appellate court, I am duty bound 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.
6. In proving their case, the prosecution called five (5) witnesses. The appellant in his defence tendered unsworn defence testimony and did not call any other defence witness.
7. Pw1 was the alleged victim (MMP) whose evidence was that on 20/04/2020 as she tried to tie a goat, the appellant who was a cousin grabbed her by the waist, knocked her down and tried to remove her clothes. Because she screamed, her mother came to the scene and removed the appellant from her. It was her evidence that when they went home the appellant removed his shirt and said that he could grab the alleged victim again in the presence of her parents.
8. Pw2 was ENP the mother of the alleged victim whose evidence was that on 20/04/2020 while at home, she heard screams from the alleged victim and on proceeding there found D (the appellant) holding the alleged victim, after he had already removed her trouser and pant. When he pushed the appellant away, he followed them to the house where he removed his shirt and threatened to hold the alleged victim again in the presence of her parents. According to this witness, they reported the incident to Mavivye Police Post, and were escorted to Kilungu hospital for the alleged victim’s medical examination and treatment.
9. Pw3 was Julius King’oo Muia who stated that on 20/04/2020 he heard screams around noon, and when he proceeded to check found D holding the alleged victim. By the time he arrived at the scene, D had already removed the trouser and pant of the alleged victim. He knew both the alleged victim and D.
10. Pw4 was PC Isaac Kuria the Investigating Officer whose evidence was that on 20/04/2020 while at Mavivye Police Post, the appellant was brought by members of the public accompanied by the alleged victim and her mother. They received an attempted rape report, and sent the alleged victim for medical treatment and examination.
11. Pw5 was Erick Kasiamani a Clinical Officer at Kilungu hospital. He produced medical examination and treatment notes, as well as birth certificate of the alleged victim. According to him nothing unusual was found on medically examining the alleged victim and the appellant. However, the appellant had a minor urinal infection.
12. In his defence, the appellant tendered unsworn testimony. He said that they lived in the same home with the alleged victim, ate and played together, and that the offence is a mere fabrication.
13. Attempted defilement is essentially an attempt to have sexual intercourse with a minor (person aged below 18 years).
14. The first element of the offence to be proved beyond reasonable doubt was whether the victim was 12 years as alleged. In this regard, both the alleged victim (Pw1) and the mother (Pw2) stated that the alleged victim was 12 years old. The mother (Pw2) relied on a birth certificate which was produced as an exhibit by Pw5 the Clinical Officer Erick Kasiamani without any objection.



15. I find and hold that indeed, the prosecution proved beyond any reasonable doubt that the alleged victim was aged 12 years.
16. Was there an attempt to defile the alleged victim? It is obvious that the medical evidence did not establish anything to show that there was an attempt to defile. However, the evidence from eye witnesses Pw1, Pw2 and Pw3 was that the trouser and pant of the alleged victim was removed by a person who was also holding her and had actually knocked her down.
17. Section 388(1) of the *Penal Code* (Cap.63) defines attempt to commit offences as follows-

“When a person intending to commit an offence, begins to put his intentions into execution by means adopted to its fulfillment,, and manifest his intention by an overt act, but does not fulfill his intention to such an act as to commit the offence, he is deemed to attempt to commit the offence.
18. In the present case, with the evidence on removing the trouser and pants of the alleged victim and knocking her down, in my view the person who did so could have no other reason than an intention to have sexual intercourse, which in the present case was only thwarted by the screaming of the alleged victim which attracted Pw2, and Pw3 to the scene thus the defilement was prevented from occurring, otherwise same would actually have occurred. I find that the prosecution proved beyond reasonable doubt that there was an attempt to defile the alleged victim.
19. Has the prosecution proved that the appellant was the culprit? In my view they have done so. Even though the appellant claims that there was a fabrication from Pw1, and Pw2, in my view that was an afterthought as he did not put questions to any of the eye witnesses and the police. He only put a few questions in cross examination to the Clinical Officer Pw5. Again, even though he says that the medical evidence did not establish sexual penetration or transmission of his urinal infection to the alleged victim that does not help him as there is no evidence that he penetrated the victim. The evidence herein against him is merely that he undressed her by removing her trouser and pant.
20. From the totality of the evidence on record, and bearing in mind that the incident occurred in broad day light, and all eye witnesses knew the appellant before, I find that the prosecution proved beyond any reasonable doubt that the appellant was the culprit. I will thus uphold the conviction.
21. As for the sentence, I am of the view that the sentence imposed is within the law and thus lawful.
22. Consequently and for the above reasons, I find no merits in the appeal. I dismiss the appeal and uphold both the conviction and sentence of the trial court.

Right of appeal explained.

DELIVERED, SIGNED & DATED THIS 31ST DAY OF MAY 2022, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE

