



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. E016 OF 2021

BETWEEN

EDWARD GIKUNDI NDEGE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence in Meru Chief Magistrate's Court S. O Criminal Case No. 01 of 2020 by Hon. S.N.Abuya (SPM) on 10th December, 2020)

JUDGMENT

The Trial

1. **EDWARD GIKUNDI NDEGE** (Appellant) was charged with the attempted defilement contrary to section 9(1) as read with section 9(2) of the Sexual Offences Act No. 3 of 2006 (*the Act*). The offence was allegedly committed on 13.01.2020 against **MK** a child aged 10 years.

Prosecution case

2. The prosecution called a total of five (5) witnesses in support of its case. **PW2 MK**, the complainant recalled that on the material date, Appellant whom she referred to as Mwalimu found her washing utensils at about 04.00pm, pulled her into his house, closed the door, undressed her, tore her skirt and defiled her. PW3 JK stated she saw complainant emerge from Appellant's house and upon questioning her she said that Appellant had defiled her. PW2 PR, complainant's father escorted complainant to hospital for examination and reported the matter to police. Appellant was arrested by PW4 PC Bernard Muchiri and charged.

Defence case

3. Appellant in his sworn defence denied the offence

4. In a judgment delivered on 10.12.2020, Appellant was convicted and sentenced to 10 years' imprisonment.

The Appeal

5. Aggrieved by the conviction and sentence, Appellant lodged the instant appeal. In his supplementary grounds of appeal filed on 30.04.2021, Appellant raised the following grounds:

1. Prosecution case was not proved

2. Defence was not given due consideration

Analysis and Determination

6. The duty of an appellate court is to re-evaluate, re-analyze and re-consider the whole evidence in a fresh and exhaustive way before arriving at its own independent decision. (See **Collins Akoyo Okemba & 2 Others vs Republic [2014] eKLR**).

7) I have considered the evidence on record, the appeal and submissions filed on behalf of both parties.

8) Section 9 of the Act under which Appellant was charged provides as follows:

1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.

2) A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years.

9. Section 2 of the Children Act, Chapter 141 of the Laws of Kenya defines a “child” as: -

“any human being under the age of eighteen years;”

12. In the case of Charles Nega v Republic [2016] KLR, the court stated as follows:

“In an attempted defilement charge, the prosecution only has to tender evidence that the victim was below the age of eighteen years and not necessarily the specific age. Needless to say if the specific age is availed to a trial court it equally has a bearing in sentencing upon conviction.”

13. The trial court rightly found that the complainant was born on 28.09.2009 as shown on her immunization card and was 10 years and 3 months when the offence was committed and therefore a child.

14. Whereas the complainant was the only witness to the commission of the offence, her evidence that she had been to Appellant’s house on the material day was confirmed by PW3 who saw her emerge therefrom. Although complainant stated that she had been defiled, the P3 form proved she wasn’t. Complainant clearly narrated how the Appellant pulled her into his house, closed it and undressed

15. Section 388 of the Penal Code defines “attempt” as follows: -

“388 (1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfillment, and manifests his intention by some overt act, but does not fulfill his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.

16. The above section brings out the two main ingredients of an attempted offence; the *mens rea* which constitutes the intention and the *actus reus* which constitutes the overt act towards the execution of the intention.

17. From the evidence on record, I am persuaded that the Appellant put his intention of defiling the complainant into execution by locking her in his house and undressing her and were it not for the fact that he heard PW3 talking outside his house, his intention to such an extent as to commit the offence would have been fulfilled.

18. I am therefore convinced that the defence was rightly rejected and the conviction well founded and the sentence lawful.

19. Appellant was sentenced to the mandatory minimum sentence under Section 9(2) of the Act. I have however considered the Supreme Court’s decision in Francis Kariuki Muruatetu & Another v Republic & 5 others [2016] eKLR and although Appellant is a first offender, the psychological effect of the offence on the 10-year-old complainant cannot be underestimated.

20. From the foregoing, the Appeal fails except on the issue of sentence. The 10-year sentence imposed on the Appellant is substituted with a sentence of 5 years from 13.01.2020 when he was sentenced.

DATED AT MERU THIS 20TH DAY MAY, 2021

T. W. CHERERE

JUDGE

Court Assistant - Mr. Kinoti

Appellant - Present in person

For the State - Ms. Mbithe