



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CRIMINAL APPEAL CASE NO. 139 OF 2019**

**JAMES EKALE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(An Appeal from the Judgment of the Senior Resident Magistrate Honourable N.C***

***Adalo in Iten Principal Magistrate's court Criminal Case No. 20 of 2018 dated 29<sup>th</sup> October, 2018)***

**JUDGMENT**

*JAMES AKALE* was charged in the lower court with a main court of attempted defilement, contrary to *Section 9(1)* of the *Sexual Offences Act No. 3 of 2006* as read with *Section 9(2)* of the said Act.

The particulars of this offence are that on the 6<sup>th</sup> day of May 2018 at around 4.00 p.m at [particulars withheld] Village, Chebiemit location within Elgeyo Marakwet County, the appellant intentionally and unlawfully attempted to cause his genital organs namely penis to penetrate into the genital organ namely vagina of NL, a girl aged 16 years.

In the alternative, the appellant was charged with the offence of Indecent act with a girl child with mental disabilities, contrary to *Section 7* of the *Sexual Offences Act No. 3 of 2006 Laws of Kenya*.

The particulars of this offence being that on the 6<sup>th</sup> day of May 2018 at 4.00 p.m at [particulars withheld] village, Chebiemit location, within Elgeyo-Marakwet County, the appellant intentionally and unlawfully touched private parts namely vagina of NL, a girl child aged 16 years.

The prosecution case is that PW-2 who is the mother to the complainant in this case, works with the appellant at [particulars withheld] village where they both work for the same employer. The appellant's work was to look after cows. The complainant herein was aged about 16 years by the time of the alleged offence, as was revealed by PW-5, the doctor who assessed her age. She is mentally retarded in accordance to PW-2 and PW-6 who examined her. She could not talk and had psychiatric features like abnormal perception and intellectual disability.

On 6/5/2018 at about 5.00 p.m PW-2 sent the complainant to go and fetch firewood. She left to do so. PW-1 who is her brother, who at the time was aged 12 years left house for the river to clean his clothes. While on the way, in the bush he saw the appellant lying on top of the complainant. The complainant was facing upward and the appellant downward. The appellant was wearing a sweater and a trouser, and had his trouser lowered to the ankles level. The complainant was in a skirt and pant which had been lowered to the knees level. On top she was in a blouse. When the appellant saw PW-1 he rose and pulled back his trousers. The complainant also pulled up her skirt and pant. PW-1 asked them what they were doing and the appellant answered that he had just stopped him from urinating. The two left and headed towards home. PW-1 proceeded with his mission.

The appellant and the complainant got to complainant's home. They met PW-2. The appellant asked PW-2 whether she had sent the complainant for firewood and she said she had. The appellant then said PW-1 passed by and when they saw him they hid in a bush. PW-2 asked him what prompted them to hide and he said he wanted to see whether PW-1 was mature enough to find them. PW-2 told him if he had done anything wrong he would be answerable. The complainant did not even fetch firewood.

PW-1 later returned home and told PW-2 what he had witnessed. It was late and they decided to sleep. The following day they reported the matter to PW-3 who is the "Nyumba-Kumi" chairman. PW-3 advised them to go to the hospital. PW-2 took her to Chebiemit District Hospital. PW-3 called the village elder. They arrested the appellant and took him to Chebiemit police station.

PW-5 examined the complainant on 8/5/2018. She noted that she had no tears on labia minora and labia majora. There was however some bruises and a whitish discharge. The P3 was thus filled. After the investigations were completed the appellant was charged with the offences

in the charge sheet.

The appellant's defence is that he is a herdsman. On the material day the complainant went and found him herding the cattle. PW-1 found her while collecting firewood. They both collected firewood. He never defiled the girl. PW-1 lied.

The trial court evaluated the evidence and was of the opinion that the medical examination evidence revealed that there was penetration and so the offence committed was of defilement, but since the court could not convict of a more serious offence disclosed if the accused is not charged with the same, convicted him of the offence in count 1. He was sentenced to serve 10 years imprisonment.

The appellant dissatisfied with the said conviction and sentence appealed to this court on the grounds that:-

- (1) He was not accorded a fair trial.
- (2) The age of the girl was not conclusively proved.
- (3) Identification was not proper.
- (4) Doctor's evidence does not establish that there is attempted defilement.
- (5) The entire evidence does not establish the offence beyond reasonable doubt.
- (6) The burden of proof was shifted to him.
- (7) The prosecution case is inconsistent and contradictory.
- (8) The evidence did not warrant a conviction.

I have considered the charges, evidence adduced by both sides, judgment passed by the trial court, sentence meted, previous grounds of appeal and supplementary grounds of appeal, and submissions by both sides.

The prosecution case flows naturally and is not inconsistent in anyway which would lender it doubtful. The witnesses had no cause to fix the appellant and there is indication he had accepted the allegation before the elders of which appears to be the case when one looks at the original grounds of appeal where he is not challenging the conviction at all. There is reliable evidence by PW5 that the girl was 16 years old. PW-6 indicated she had a mental challenge. The facts shows she was incapable of giving consent to sexual activities. The appellant was caught in the act by PW-1. What he told PW-2 thereafter was an attempt to hide the truth of what he had done, but PW-1 revealed it. What PW-5 observed on the girl shows that the appellant had attempted to defile her and was only cut short of completing the act by abrupt presence of PW-1. I would however disagree with the trial court that the bruise on labia minora and labia majora, together with presence of a discharge, is adequate evidence of penetration. Evidence on the cause of bruises, and whether they were on the inner or outer side of labias would have been necessary in making such a conclusion. Penetration connotes insertion, and there's need for evidence of even slightest insertion of a genital organ into another for the offence to subsist. Touching can cause a bruise and is not equivalent to penetration. The offence in count one is the offence that was established against the appellant beyond reasonable doubt. He was well known to the eye witness, PW-1 and the two even deliberated. What he told PW-2 shows he had the opportunity to commit the offence and committed it. His grounds of appeal have no merit. The 10 years sentence was lenient given the circumstances of the complainant. The appellant took advantage of her condition.

The appeal lacks merit and is hereby dismissed.

**S. M GITHINJI**

**JUDGE**

**DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET THIS 29TH DAY OF APRIL, 2020.**

In the presence of:-

- (1) Appellant in person
- (2) Mrs. Hellen Githaiga for State
- (3) Mr. Gregory - Court assistant