



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO.38 OF 2017

ROBINSON KIPNGETICH YEGON.....APPELLANT

- V E R S U S -

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence by Hon. S. Ngetich, (SRM) in CMCC. No.69 of 2016 delivered on 3rd day of November, 2017)

J U D G M E N T

1. The Appellant was convicted with the offence of attempted Defilement contrary to Section 9 (1) as read with Section 9(2) of the Sexual Offences Act No.3 of 2006 and he was sentenced to Ten (10) years imprisonment.
2. The particulars of the charge were that on 2/9/2016 **JAMES FINLAYS** in **KERICHO** District within **KERICHO** County the Appellant intentionally and unlawfully attempted to cause his Penis to penetrate the Vagina of **XX**, a child aged 3 ½ years.
3. The Prosecution evidence in summary was that on the material day, the Complainant through voire dire evidence said she met the Appellant whom she knew as "Robi" and he took her to his house promising to buy her sweets. She said he put his "dudu" into her vagina and then he wiped her and helped her to dress and she went to her home crying and told her mother.
4. The Complainant's mother who testified as PW.2 said on the material day she went home from work and did not find the Complainant. When the Complainant came home she told her that the Appellant had pain in her "dudu". She said the Complainant led her to her neighbour's house where she identified the Appellant as the person who had injured her.
5. PW.4, the Clinical Officer who Examined the Complainant said the outer part of her vagina was swollen and painful on the labia and majora and appeared red though there were no bruises.
6. PW.4 said the hymen was intact and there was no bivaginal bleeding or discharge. A lab test showed presence of numerous pus cells but on high vaginal swap there was no spermatozoa. The Clinical Officer came to the conclusion that there was attempted defilement.
7. The Appellant in his statement of defence said he is a student at KCA College, Kericho and on the material day he caned five children who were uprooting vegetables in a compound he was staying with his guardian. One of the children framed a story assisted by her mother who was in court when the child gave evidence.
8. The court found the Appellant guilty of attempted defilement and sentenced him to 10 years imprisonment.
9. The Appellant is aggrieved with the conviction and the sentence and he has appealed to this Court on the following grounds:-

(i) ***THAT*** the Trial Magistrate erred in law and fact by adjudging that a child aged 3 ½ years could testify in Court.

(ii) ***THAT*** the Learned Trial Magistrate erred in law and fact by relying on the testimony of a 3 ½ year old minor to convict the Appellant without corroboration.

(iii) ***THAT*** Learned Trial Magistrate erred in law and in fact in convicting the Appellant on the evidence of the minor who was coached by the mother yet the State had many potential witnesses.

(iv) ***THAT*** the Learned Trial Magistrate erred in law and in fact in relying on the medical report yet it was overtly contradictory in its findings.

(v) ***THAT the Learned Trial magistrate erred in law and fact in relying on the testimonies of members of the same family.***

10. The parties filed written submissions dated 11/4/2019 and 28/7/2020 which I have duly considered.
11. In the case of Okeno vs. Republic [1972] EA 32, the Court of Appeal set out the duties of a first appellate court as follows:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424.”

12. In the current case I find that the Court took the evidence of the Complainant a minor aged 3 ½ years old after applying *voire dire* and found the same reliable.
13. There are three elements to be proved for the Appellant to be convicted with the offence of defilement. The first is whether there was penetration of the complainant’s genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant.
- 14 In the case of **Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013** it was stated that:

“The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”

15. In the current case, the Complainant knew the Appellant as **“Robi”**. She is the one who led her mother to where Appellant was and pointed him out.
16. I find that there is Medical evidence that the Complainant was defiled although the Clinical Officer termed the same as attempted defilement.
17. I find that although the trial court relied on the evidence of a single witness, the Evidence Act Section 124 allows the court to rely on the testimony of a single witness in such instances. The said Section states as follows:

124. “Notwithstanding the provisions of [section 19](#) of the Oaths and Statutory Declarations Act ([Cap. 15](#)), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth”.(Emphasis added)

18. I find that in the current case, the testimony of the Complainant was corroborated by that of the Clinical Officer.
19. I find that the age of the Complainant was established by the production of the Birth Certificate which shows that the Complainant was born on 29/3/2013 and therefore on 2/9/2019, she was 3 ½ years old.
20. In the case of **Benson Musumbi V Republic [2019]eKLR** ,it was that:

“ The prosecution in an offence of attempted defilement must prove the other ingredients of the offence of defilement except penetration; it must prove the age of the complainant, positive identification of the assailant, and then prove steps taken by the assailant to execute the defilement which did not succeed. Attempted defilement is as if it were a failed defilement, because there was no penetration.”

21. I find that the Appeal herein lacks in merit. The conviction is safe and the sentence lawful.
22. I accordingly dismiss the Appeal and I uphold both the conviction and sentence.

Orders to issue accordingly.

Dated, Delivered and Signed at Kericho this 18th day of September, 2020.

A. N. ONGERI

JUDGE