



**REPUBLIC OF KENYA**

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

**HCCRA NO. 192 OF 2017**

**KNL.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**[An appeal from the original conviction and sentence of the Principal Magistrate's Court at Kabarnet Cr. Case no. 592 of 2014 delivered on the 6<sup>th</sup> day of February, 2015 by Hon. S.O. Temu, PM]**

**JUDGMENT**

1. This is an appeal from the conviction and sentence of the Appellant for 10 years for the offence of attempted defilement contrary to section 9(1) as read with 9 (2) of the Sexual Offences Act, the particulars of which were that the Appellant had “on 30<sup>th</sup> day of June 2014 in East Pokot District within Baringo County, intentionally and unlawfully attempted to cause his penis to penetrate the vagina of CA a child aged 12 years in violation of the said Act.”

2. Upon full trial the trial Court (S. O. Temu (PM) in Criminal case no. 592 of 2014 delivered a judgment on 6/2/2015 finding the Appellant guilty as charged:

“Upon hearing the entire case the issues for determination were:

- 1) Whether the accused was at the Complainant's house on the date of the incident.
- 2) Whether his actions amounted [to] attempted defilement.

As per the evidence of PW2 which was taken under oath it was indeed clear beyond any reasonable doubt that the accused had gone to their house on the 30/6/14 and he had struggled with PW1 with intention of removing her clothes.

The two witnesses had seen the accused well when he went to the first house as PW1 had a torch which had new batteries and that they had seen in in the second house well where they had stayed up to the morning.

The accused had sat on the complaint's bed when he entered the house first and when she ran away she had followed her to the said house where he struggled with her as he wanted to remove her pant which he could have successfully done had not been the intervention of PW2 who went to her rescue.

The accused's actions were clear as he followed the Complainant and struggled with her clothes but [he] did not succeed.

It is thus safe to state that the accused's sole intention was to defile the Complainant but thank God that PW2 was with her.

I thus find that the prosecution had proved their case beyond any reasonable doubt as the accused defence and cross-examination did not contradict nor offer any reason as to why he was at the Complainant's house at that night and why he was following her from one house to the other nor why he wanted to remove her clothes if he did not intend to defile her.

I thus find the accused guilty and I convict him for the offence of attempted defilement as it was clear the Complainant was 12 years old on the date of incident as the Certificate of Birth, the accused is thus [convicted] under section 9 (2) of the Sexual Offences Act.”

3. The Appellant being aggrieved with the decision of the trial Court filed a Petition of Appeal on 2<sup>nd</sup> October 2017 on the following grounds:

- a) *That the trial Magistrate failed in both law and fact by sentencing me in a case which had no overwhelming evidence.*
- b) *That, the trial Magistrate failed by imposing the sentencing me over a case that there was no P3 Form brought to Court to clear doubts.*
- c) *That the trial Magistrate failed in both facts and law by convicting and sentencing me in a case that had no sufficient identification or recognition.*
- d) *That the trial Magistrate failed in both facts and law by sentencing me in a case that had no exhibit like the said torch used for identification.*
- e) *That the trial Magistrate failed by relying on hearsay evidence.*
- f) *That the trial Magistrate failed in law by upholding that the knife brought to Court was mine, failing to notice that this exhibit was brought by the Complainants to side where I was arrested.*
- g) *That the trial Magistrate erred in convicting me a harsh sentence without remission in a case which was not water tight and had no stand.*

4. The Appellant filed further grounds of petition on 3/10/2018 stating:

- 1) *That he is first offender.*
- 2) *That the Court to consider the time he has been in remand.*
- 3) *That he was convicted on 6/2/2015 without remission and Court to give him back remission.*
- 4) *That he has children who depend on him and he has served 3 years 8 months.*
- 5) *That he has reformed.*

5. He further pleaded in his Submissions:

- a) *That he was sentenced without remission and he is unable to assist his family.*
- b) *That he has reformed from the harsh conditions of prison and promises to reform.*
- c) *That his family in Pokot is suffering.*
- d) *The mistakes emanated from the use of alcohol and bad company.*
- e) *The Court considers the time spent in remand and enable him go back home build the Motion through his skills.*

6. The Prosecution made oral submissions as follows:

- a) *The appeal is opposed.*
- b) *The minor is 12 years old as per the Birth Certificate indicating she was born on 22/8/2002.*
- c) *Pw1 evidence is corroborated by Pw2 who was also present.*
- d) *Pw1 and Pw2 testified that they were able to identify Appellant when Pw1 flashed a torch on him.*
- e) *Pw1 and Pw2 had known the Appellant for a long time as he was.*
- f) *Pw2 confirmed on cross-examination that Appellant had tried to remove the clothes of Pw1 in her presence and both of them had struggled with the Appellant the whole night and could not get help as it was at night.*
- g) *Evidence shows that the Appellant was determined to defile Pw1 by going to two houses.*
- h) *The evidence is inconsistent and overwhelming against the Appellant.*
- i) *10 years is the minimum sentence under section 9 (i) and (ii) of the Sexual Offences Act and thus pray that appeal be dismissed.*

**Issues for Determination**

7. The issues for determination are:

- a. Whether the offence of attempted defilement was proved, and
- b. Whether the Appellant was properly identified as the assailant.

### **Determination**

#### ***Principles of the law of attempt***

8. In accordance with the definition of attempt in section 388 of the Penal Code, the test for attempt requires a demonstration of an intention to commit the offence and overt act towards the commission of the offence which is sufficiently proximate or immediately connected to the attempted offence. See *Mwandikwa Mutisya v. R* (1959) EA 18 and *Mussa Said v. R* (1962) EA 454.

9. In discussing the principles of law on attempt in the case of attempted larceny, Spry, J. (as he then was) in *Mussa s/o Said v. R* (1962) EA 454, 455 Letters C- D said:

*“The principles of law involved are very simple but it is their application that is difficult. If the Appellant intended to commit the offence of larceny and began to put his intention into effect and did some overt act which manifests that intention, he is guilty of attempted larceny. (Penal Code, s. 380). The burden on the prosecution is therefore first to prove the **intention** and secondly to prove **an overt act** sufficiently proximate to the intended offence.*

*The intention will, in the majority of cases, only be capable of proof by inference and it follows in such cases that **the act must be of such a character as to be incompatible with any other reasonable explanation**. Secondly, even if the intention is established, **the act itself must not be too remote from the alleged intended offence.**”*

10. In *Keteta v. R*, (1972) EA 532, 534, Madan Ag. CJ. (as he then was) put the matter succinctly as follows:

*“A mere intention to commit an offence which is in fact not committed cannot constitute an attempt to commit it. There must also be an overt act which is immediately and remotely connected with the offence intended to be committed and which manifests the intention to commit the offence. A remotely connected act will not do.”*

11. The resolution of the first issue will, therefore, entail a consideration whether the acts complained herein against the Appellant, if proved, disclose an intention to defile the Complainant and were *sufficiently proximate* to the intended offence of defilement or *immediately connected* thereto.

#### ***Analysis of the Evidence***

12. I have reevaluated the evidence of the prosecution and the unsworn statement of the defence before the trial Court in compliance with the duty of the first appellate Court (See *Okeno v. R* (1972) EA 32).

13. The defence denied the offence and gave an unsworn statement relating to his arrest and detention at Churo AP post before escort to Loruk Police station. No evidence was given in direct answer to the charge of attempted defilement although the accused was entitled even to remain silent (Article 50 (2) of the Constitution).

14. For the Prosecution, PW1 and PW2 testified that the Appellant had gone to the Complainant’s house and attempted to defile her on the night of 30/6/2014. According to PW1 *“the accused had come and kicked open the door... He had come to the bed and we started struggling as he pulled my clothes but [I] managed to escape to my mother’s house.”* The accused had followed the Complainant to her mother’s house where he gained entrance by digging the wall and *“the accused had tried to remove my clothes and we struggled and my [cousin] had come when I screamed for help. When A. came, the accused continued to remove my inner pant A. had hit him on the back. The accused had become afraid and he ran away.”*

The Complainant’s cousin A. (PW2) who was sleeping in the same house as the Complainant confirmed the Appellant had kicked the door open and *“started to touch the Complainant C. and she had managed to escape outside to the other house.”* The accused had *“left also. The accused had come back to the house where I was and he asked me where C was and I informed him that she had escaped. The accused had gone out and I heard C. screaming and I went to see what was happening and I found the accused struggling with the Complainant.”*

PW3, the Complainant’s auntie and mother of A. (PW2) corroborated the evidence of the two minors [as minors’ evidence, each of which requires corroboration cannot corroborate the other evidence] as follows:

*“On 1/7/14 at about 2.00am A. had come to my home with C. They informed me that the accused had gone to their house at night at about midnight and he disturbed them and wanted to defile C. The accused had allegedly removed C her inner pant. They had struggled upto morning. I thought that the accused had managed to defile the child and I took her to hospital for checkup. The doctor stated that the child was okay. I went to the AP post with C. and A. and we reported. We were asked to go home and look for the accused and when he was found he was arrested.”*

PW4, the Complainant’s uncle and husband to PW3 had on being informed of the incident by his wife tried to trace the Appellant for arrest.

The Appellant's conduct in going into hiding to avoid arrest after the incident as testified by PW4 is telling, as follows:

*"I searched for the accused but he could not be traced. I looked for him for six days and I received word that he was at Waminto area. The Complainant's family came to my house and informed me the accused had been spotted in one house. I went to the said house at night and we knocked the door and the lady who was there refused to open. The elders demolished the wall and we found the accused inside. The accused had refused to come out. The accused had kicked the door open from inside and escaped by jumping the fence. The men I was with had run after him and they had arrested him. We took him to the AP post and they had asked us to take him to Loruk [police station]."*

PW5, the police officer who received the Appellant after arrest by members of the public confirmed the evidence of PW4 as follows:

*"On 10/7/14 I was at the Post when people came there at 3.00am and they had one suspect who had attempted to defile a child. I escorted the suspect to Loruk police station for his safety as members of the public were annoyed."*

PW6, the Investigation Officer who received the Appellant and knife exhibit alleged to have been used by the Appellant to threaten the witness PW2, also produced the Complainant's certificate of Birth indicating she was 12 years at the time of the incident. The knife was also produced.

**15. There was no reason in the evidence presented before the Court as to why the two minors aged 12 years could have lied to Court about their uncle about so serious an allegation as attempted defilement. I have no doubt as to the truthfulness of the prosecution's case.**

#### ***Proof of attempted defilement***

16. I consider that the proved acts of the assailant in breaking into the Complainant's house at midnight when the Complainant was sleeping and struggling with the 12 year old Complainant on her bed for the first time and later following her to her mother's house when she managed to escape and trying to remove her inner pant before the intervention by the Complainant's cousin are act from which the intention to defile the Complainant may be inferred, as they are not consistent with any other reasonable explanation. The acts were sufficiently proximate to the intended act of defilement as had the intervention of PW2 not stopped the assailant, he would have succeeded to remove the girl's inner pant and defile her. The said acts clearly amounted, in law and fact, to attempted defilement.

#### ***Identification of the Appellant***

17. The evidence of identification as relates to identification of the Appellant is one of both visual identification using a torch light and recognition by the two minors PW1 and PW2 were relatives of the Appellant. PW1 said:

*"I had a torch when the accused struggled with me. The batteries for the torch were new as we had purchased them on the same date.... The accused had married my mother's sister and I call him uncle."*

18. PW2 said:

*"The accused had come back to the house where I was and he asked me where C. was and I told him that she had escaped. The accused had gone out and I had heard C screaming and I went to see what was happening and I found the accused struggling with the Complainant. I was able to identify the accused because C.'s torch was on. I had got hold of the accused and he had drawn a knife and he threatened me with it. .... I had screamed for help and the accused had left but he did not go away upto the morning."*

19. In an ordeal that lasted from midnight to the morning, the two eyewitnesses PW1 and PW2 who were relatives of the Appellant had **the means** by way of torch lighting and **ample opportunity** to recognize the assailant during the protracted engagement in terms of the length of time that the incident took place and in the conversations with the Appellant at the two occasions in the two houses, when, respectively, the Complainant PW1 sought to know from the Appellant why he had come to her bed and when the Appellant had enquired from A. PW2 as to the whereabouts of the Complainant C.

20. I find that the Appellant was properly identified as the assailant in the attempted defilement of the Complainant. The trial Court's judgment in the matter must be affirmed.

#### ***Benefit of Remission***

21. As regards remission, the Appellant was sentenced on 6<sup>th</sup> February 2015 during the hiatus when the provisions for remission under section 46 of the Prisons Act had been repealed by the Statute Law (Miscellaneous Amendments) Act of 2014. The benefit of remission was, therefore, not available to the Appellant. Unfortunately, the offence for which he was convicted has a minimum sentence so that this Court has no discretion to reduce the term, even if it were so sought, to ameliorate the harshness of the lack of remission.

#### **Orders**

22. Accordingly, for the reasons set out above, the Court finds no merit in the appeal against conviction and sentence for attempted defilement contrary to section 9 (1) as read with 9 (2) of the Sexual Offences Act, and the same is dismissed.

23. However, in terms of the proviso of section 333 (2) of the Criminal Procedure Code the Court directs that the sentence of 10 years will be reckoned from the 10<sup>th</sup> July 2014 when the Appellant was arrested and detained awaiting trial.

*Order accordingly.*

**DATED AND DELIVERED THIS 25<sup>TH</sup> DAY OF FEBRUARY 2019**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:**

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent