REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CORAM: D. S. MAJANJA J.

CRIMINAL APPEAL NO. 9 OF 2016

BETWEEN

THOMAS ANDUKA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. T. Olando, RM dated 18th September 2016 at the Magistrates Court at Eldoret in Criminal Case No. 6270 of 2014)

JUDGMENT

1. The appellant, **THOMAS ANDUKA**, was charged and convicted of the offence of attempted defilement contrary to **section 9(1)** of the ***Sexual Offences Act*** ("the ***Act*"**). The particulars were that on 17th September, 2014 at **[particulars withheld]**, Wareng Sub-County within Uasin Gishu County, he intentionally and unlawfully attempted to cause his penis to penetrate the vagina of CC, a child aged 11 years.

2. The appellant was sentenced to 10 years' imprisonment and now appeals against conviction and sentence. In his grounds of appeal, he contends that the prosecution did not prove the offence beyond reasonable doubt. He states that the trial magistrate failed to find that the child denied that he was the suspect and that the element of penetration was not established. He also contended that the child's evidence was taken without conducting a *voire dire*.

3. As this is a first appeal, I am required to evaluate the evidence before the trial court and reach an independent decision as to whether or not I should uphold the decision of the trial court. In so doing allowance must be made for the fact that I neither heard or saw the witnesses testify.

4. The evidence against the appellant was that of the child, PW 1, who testified that on 17th September 2014 as she was looking for firewood she met the appellant looking after his cows. He gave her 10/= and told her to remove her clothes and he removed his trouser and told her to lie down. PW 2 who was also in the forest recalled that when he heard some noise, he went to see what was happening. He found PW 1 lying down and the appellant removing his trousers. When he made noise, they both ran away. PW 1 told her mother, PW 4, what had taken place and when she was taken to hospital and examined by PW 4, the Clinical Officer, she did not find anything remarkable. In his defence, the appellant denied the offence but admitted that he knew PW 1 as they came from the same village.

5. The crux of this appeal is whether the prosecution proved that the appellant had committed the offence of attempted defilement. **Section 9(1)** of the ***Act*** refers to an attempted defilement as follows;

> *9(1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.*

6. The Court of Appeal in ***Francis Mutuku Nzangi v Republic*** **NRB CA Crim. Appeal No. 358 of 2010 [2013] eKLR** elucidated the meaning of an attempt, as defined by **section 388** of the ***Penal Code (Chapter 63 of the Laws of Kenya)***. It stated as follows;

> *Our understanding of this provisions is that if a person conceives an idea or plan to commit an offence and sets out to effectuate the intention by taking definite steps or puts in motion a chain of events or state of things calculated to attain that objective as manifested by some open and discernible act or acts but fails to achieve his objective, he will be guilty only of an attempt to commit the offence. The attempt is proved whether or not that person did all the acts necessary to perfect the offence and quite irrespective of what intervening act or change of heart may have aborted the fulfillment. It also matters not that circumstances did in fact exist, unbeknown to the person, that would have rendered his success impossible.*

7. In other words, an attempted defilement is a failed defilement and that is why the intention to penetrate is a key ingredient of the offence (see ***Pius arap Maina v Republic*** **ELD HCCRA No. 247 of 2011 [2013] eKLR**). Under **section 2** of the ***Act***, *"*"*penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person."* In ***David Aketch Ochieng v Republic*** **[2015] eKLR** Makau J observed that:

> ***The appellant was charged and convicted with an attempted defilement contrary to Section 9 (1) of Sexual Offences Act No. 3 of 2006. What is attempted defilement? It can safely be stated to be the unsuccessful defilement. For a successful prosecution of an offence of attempted defilement, the prosecution must adduce sufficient evidence to the required standard to prove an attempted penetration....***

8. In this case the testimony of PW 1 and PW 2 was that the PW 1 was already lying down. PW 1 testified that the appellant had removed his trouser while PW 2 also stated that when he found them, the appellant had removed his trouser. But for the fact that PW 2 arrived at the scene, the appellant would have proceeded with the act of penetration. The only purpose of removing his trouser was to effect that act of penetration. The appellant's intent is reinforced by the fact that he had already lured the PW 1 by giving her 10/-.

9. In establishing an attempt, medical evidence is not necessary as urged by the appellant. Further, the record show that the *voire dire* was conducted properly and PW 1 sworn. Her testimony was corroborated and as such the conviction was safe.

10. The mandatory minimum sentence for attempted defilement under **section 9(2)** of the ***Act*** is 10 years' imprisonment.

11. The conviction and sentence affirmed. The appeal is dismissed save that the sentence shall run from **22nd September, 2014**.

DATED and DELIVERED at ELDORET on this 24th day of APRIL 2019.

D.S. MAJANJA

JUDGE

Appellant in person.

Ms Mokua, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.