



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 176 OF 2018**

**(From Original Conviction and Sentence in Criminal Case No. 9 of 2017 by the Senior Resident Magistrate's Court at Hamisi)**

**DOMINIC MULA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

1. The appellant was convicted by Hon. Dennis Ogal, Resident Magistrate, of attempted defilement contrary to Section 9(1) as read with section 9(2) of the Sexual Offences Act No. 3 of 2006. He was sentenced to ten years' imprisonment. The particulars of the charge against the appellant were that on the 26<sup>th</sup> day of January 2017 at [Particulars Withheld] Village, [Particulars Withheld] Sub-Location, Shaviringa Location, Hamisi Sub-county in Vihiga County, he intentionally attempted to cause his penis to penetrate the vagina of SM, a child aged six years.
2. He had also faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006. The particulars of the alternative charge were that on the same date and the same place stated in the main count, he had intentionally touched the vagina of the subject child with his penis.
3. The appellant pleaded not guilty to the charges before the trial court, and the primary court conducted a full trial. The prosecution called four (4) witnesses.
4. SM, the complainant, testified as PW1. She gave sworn testimony. She identified the appellant as her neighbour. She said that she was six years old and in Standard 1. She explained that on the material day the appellant called her to his house, he removed her pants and his own and did bad things to her, pointing at her vagina. After the incident she walked home. She did not experience any pain. Thereafter she reported to her mother PW2, what had happened. Whereupon she took her to the police and later to hospital. PW2, AV, the mother of PW1, said that PW1 told her she had been defiled by the appellant. She examined her vagina and found it to be swollen and bruised. Her underpants were also wet. She took her to hospital the following day. The appellant was arrested on the day of the incident. Videnyo (PW3) was the nursing officer who attended to the PW1 and prepared the Police Form 3 which was put in evidence. He stated that PW1 was brought in by PW2. The history given was of attempted defilement by a person that PW1 and PW2 knew. On examination he found that the vulva of PW1 was swollen Vagina. There was no discharge, but her vagina emitted a foul smell. He saw pus cells in PW1'S urine, suggesting an infection. His conclusion was that someone had attempted to penetrate her vagina since it was swollen. Police Constable Moses Okello testified as PW4. He was the police officer who received the report and investigated the matter.
5. The appellant was put on his defence. He gave a sworn statement and did not call any witnesses. He denied the offence, and explained how he had spent his time on the material day.
6. After reviewing the evidence, the trial court convicted him on the main charge, and sentenced him as stated in paragraph 1 of this judgment.
7. Being dissatisfied with the conviction and sentence the appellant appealed to this court and raised several grounds of appeal. He averred that the trial court did not consider that he was a minor at the material time alleged in the pleadings, and that the evidence was fabricated. He also averred that by the court rejecting his defence it had shifted the burden of proof to him. He also pleaded that the age of the victim had not been proved.
8. Being the first appellate court, I have re-evaluated all the evidence on record. I have drawn my own conclusions, whilst bearing in mind the fact that I did not have the benefit of observing the witnesses as they testified. The Court of Appeal's decision in the case of ***Okeno vs. Republic (1972) EA 32*** has consistently been cited on this issue. In its pertinent part, the decision is to the effect that: -

*“An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the*

*appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. 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 findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can 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."*

9. The appeal was canvassed on 20<sup>th</sup> June, 2019. The appellant relied on written submissions that he placed before the court, while Mr. Ng'etich, Senior Prosecution Counsel, made oral submissions. The appellant's written submissions summarized the evidence of the trial court and reiterated the grounds of appeal set out in the petition. Mr. Ng'etich submitted that the issue of the age of the appellant was being raised for the first time on appeal and, therefore, it was an afterthought. On the evidence of the witnesses being contradictory, he submitted that the same was adequately corroborated. On crucial witnesses not being called, he submitted that the prosecution called sufficient evidence to support its case. On the competence of the nursing officer to testify he submitted that the appellant had opportunity to cross-examine him on that aspect but he did not avail himself of that chance. He submitted that the age of the victim was adequately and properly proved.

10. On the age of the appellant as at the date of the commission of the offence, I have seen from a record an age assessment report on the appellant dated 9<sup>th</sup> February 2017 which put his age at twenty-three. The warrant for his committal to remand, dated 30<sup>th</sup> January 2017 put his age at eighteen years, while that dated 27<sup>th</sup> March 2018 put it at twenty years. The material on record, therefore, makes him an adult. When he testified he variously described himself as a welder and a *boda boda* operator. Although, he has claims on appeal to have been a minor he has not produced any material to establish that he was a child at the time.

11. He has argued that the age of the complainant was not sufficiently proved. The charge sheet put her age at the material time at six years. When she testified PW1 stated that that was her age. The documents placed on record put her age at six. She testified that she was in Standard 1, and age six is the ripe age at which most pupils begin primary school. I am satisfied that the age of the victim was properly established. On the competence of PW3 to testify, I note that the appellant cross-examined him, and did not challenge him on his qualifications. Regarding contradictions in the evidence, it is clear from the evidence that the testimonies were fairly clear flowing and consistent, and if there are inconsistencies the same are minor and did not affect the overall picture. I agree with the state that the witnesses that they called were adequate to prove the case that had been set against the appellant.

12. I am persuaded in this appeal that the prosecution established its case to the required standard. The appeal must, therefore, fail. I shall confirm the conviction, and, given the age of the victim, I uphold the sentence.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 26<sup>th</sup> DAY OF July 2019**

**W MUSYOKA**

**JUDGE**