



**REPUBLIC OF KENYA**

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

**(CORAM: CHERERE-J)**

**CRIMINAL APPEAL NO. 225 OF 2016**

**BETWEEN**

**JAMES AMESA ANYAMBA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Appeal against Conviction and Sentence imposed in Criminal Case Number 268 of 2014 in the Principal Magistrate's court at Kimilili by Hon. D.O.Onyango (SPM) on 23.11.16)*

**JUDGMENT**

**The trial**

1. **JAMES AMESA ANYAMBA (hereinafter referred to as the Appellant)** has filed this appeal against his conviction and sentence on a charge of attempted defilement of a girl contrary to section 9(1) as read with section 9 (2) of the Sexual Offences Act No. 3 of 2006.

**THE PROSECUTION'S CASE**

2. The prosecution called 8 witnesses in support of the charges. **PW1 CMW** the complainant stated that she was born on 10<sup>th</sup> June, 1998 as shown on her birth certificate. She recalled that on 6<sup>th</sup> December, 2013, she met the Appellant and one Simon on a motor cycle. It was her evidence that the Appellant took her near a river, asked to have sex with her but she refused. She told court that her parents found her near the river with the Appellant whom they arrested and beat up. **PW3 JM** the complainant's father recalled on 6<sup>th</sup> December, 2013, he sent the complainant and her siblings to buy kerosene but the complainant did not return. He went out to look for her and found her with the Appellant near a river. He raised an alarm and Appellant was arrested by **PW6 ENM**. **PW2 MW** and **PW4 RW** saw the Appellant after his arrest on 6<sup>th</sup> December, 2013. **PW5 JS**, complainant's brother aged 12 years who was in company of complainant on the material date reported to her father that complainant had been dragged by a man whom he identified as the Appellant and their father went to look for her and took her home. **PW8 IGNATIUS OKUMU**, a clinical officer examined complainant on 23.01.14 and found that her hymen was torn. He produced the complainant's P3 form **PEXH. 1**. **PW7 IP DAVID EKERO** received complainant's report on 07<sup>th</sup> December, 2014 and after investigations caused Appellant to be charged on 03.03.14.

**THE DEFENCE CASE**

3. When the appellant was put on his defence, he denied the offence. He stated that he was assaulted by **PW6 ENM** and one **PSK** on 06.12.13 and that upon reporting the matter to police the same day, he was framed with the offence of defilement which was reported the following day on 07. 12.13.

4. The learned trial magistrate considered the evidence and finding the charge of attempted defilement proved Appellant to 10 years' imprisonment.

**The Appeal**

5. Aggrieved by the conviction and sentence, the appellant lodged the instant appeal on 06.12.16. From the 7 grounds of appeal and written submissions filed by the appellant on 06.02.18, the Appellant asserts that the prosecution case was made up due the complaint he made after he was assaulted by **PW6 ENM** and one **PSK** on 06.12.13.

6. When the appeal came up for hearing on 07<sup>th</sup> August, 2019, Appellant submitted that he was wholly relying on the written submissions. Mr. Akello, learned Counsel for the state conceded the appeal on various grounds. First that the name of complainant's father appearing on the certificate of birth was **PW2 MW and not PW3 JM** who told court that he was the father of the complainant. It was also submitted on behalf of the state that for the defilement that allegedly occurred on 06.12.13, complainant was not examined until 23.01.14 and Appellant was not charged until 03.03.14 long after he had made an assault claim against **PW6 ENM** and one **PSK**.

7. In order to consider this appeal, it is important to remind myself of the key ingredients necessary to establish a sexual offence under the Sexual Offences Act which are:

- i. Age of the victim.
- ii. Identity of the offender
- iii. Penetration.

8. Together with the ingredients, I will also consider the grounds of appeal raised by the appellant.

**i. Age of the victim**

9. The complainant's certificate of birth **PEXH. 4** shows that she was born on 10<sup>th</sup> June, 1998 was therefore 16 years old at the material time.

**ii. Penetration**

10. Concerning the question of penetration, the law under **Section 2 of Sexual Offences Act** defines penetration to entail: -

***“partial or complete insertion of a genital organ of a person into the genital organ of another person.”***

11. Although the complainant's P3 form **PEXH. 1** filled by **PW8 IGNATIUS OKUMU** shows that her hymen was torn, she was categorical that Appellant did not defile her.

12. There is evidence that the Appellant was known to the complainant and was arrested on the date of the incident.

13. The gravamen of this appeal really turns on the issue of whether the prosecution proved that Appellant attempted to defile the complainant.

14. 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 accused, and then prove steps taken by the accused to execute the defilement which did not succeed. Attempted defilement is a failed defilement, failed because there was no penetration. Attempt to commence an act is defined as

**388(1) where a person intending to commit an offence begins to put his intentions into execution by means adopted to its fulfillment, and manifests his intention by some overt act but does not fulfill his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.**

**(2) it is immaterial except so far as regards punishment whether the offender does all that is necessary on his part for completing the commission of the offence or whether the complete is prevented by circumstances independent of his will or whether he desists of his own motion from further prosecution of his intention”**

15. Complainant's told court that the Appellant held her hand and led her to a river. She walked along and although she was with her siblings did not raise an alarm. In her own words, Appellant asked her for sex and she refused. Complainant told court that Appellant removed her pants. There is no evidence that Appellant undressed and the complainant's evidence that he attempted to insert his genital organ in hers while he was dressed is unbelievable. In my mind, I am convinced that the complainant would never have reported this matter had her brother not reported it.

16. From the evidence tendered, I find with respect that the prosecution case that Appellant attempted to defile the complainant not proved beyond any reasonable doubt and ought to have been rejected.

17. Accordingly, and for the reasons set out hereinabove, this appeal succeeds. The conviction is quashed and the sentence set aside. Unless otherwise lawfully held, it is ordered that the Appellant be set at liberty. It is so ordered.

**DATED AND DELIVERED IN BUNGOMA THIS 09<sup>th</sup> DAY August 2019**

**T. W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

**Court Assistant** - Brendah

**Appellant** - Present

**For the State** - Mr. Akello