



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 29 OF 2018**

**NYAGA KAREKO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

**A. Introduction**

1. This is an appeal against the judgment of the Senior Resident Magistrate Runyenjes in Sexual Offences No. 8 of 2010 delivered on 14/08/2018.
2. The appellant was charged on the main count with attempted defilement contrary to Section 9 (1) (2) and the alternative charge of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006.
3. The particulars of the offence were that on the 28/11/2016 at [Particulars withheld] sub-location in Embu County he intentionally attempted to cause his penis to penetrate the vagina of SN, a mentally challenged child aged 12years. The appellant was convicted on the main count and sentenced to serve 10 years in jail.
4. Being dissatisfied by the said judgement, the appellant filed this appeal on 1/02/2018 based on 7 grounds that can be summarized as follows;
  - a) *That the learned trial magistrate convicted the appellant against the weight of the evidence and that the evidence was full of contradictions.*
  - b) *That the learned trial magistrate erred in law and fact by disregarding the appellant's defence in cross examination.*
  - c) *That the learned trial magistrate erred in law and fact by sentencing the appellant to a harsh and excessive sentence of ten (10) years imprisonment considering the appellant was of an advanced age.*

**B. The Appellant's Submissions**

5. The appellant submitted that the magistrate convicted him without finding that there were grave contradictions by the prosecution specifically the evidence in chief of PW1 and PW2 even during cross-examination. He further submitted that the prosecution did not adduce any evidence that the appellant attempted to do any act that would cause penetration with the complainant. The appellant further submitted that the only witness who witnessed the event, PW1, did not have his evidence corroborated.
6. It was further submitted that the prosecution's evidence was insufficient, inconsistent and could not sustain a conviction. The appellant further submitted that the prosecution failed to establish the source the soil found on the genitalia of the victim.
7. The appellant further submitted that his decision to keep quiet during his defence did not mean that the burden of proof had shifted from the prosecution to him. The appellant further submitted that the sentence was harsh and excessive and that being 79 years of age, a sentence of ten (10) years imprisonment was excessive.

**C. The Respondent's Submission**

8. The respondent submitted that whereas the trial magistrate failed to comply with the rules relating to the appointment of an intermediary and/or admission of the intermediary evidence as that of the complainant, this defect was cured by the overwhelming evidence of PW1 and PW2.

9. The respondent further submitted that there was nothing on record to exhibit contradictions on part of the prosecution witnesses as the evidence of PW1 placing the appellant at the scene of crime was confirmed by that of PW4 the medical doctor who confirmed penetration.

10. The respondent argued that the trial court was correct to find that the charge of attempted defilement was sustained against the appellant.

11. It was also submitted that the appellant's defence was considered but was incapable of dislodging the evidence of the prosecution. The respondent further argued that this court could only interfere with the sentence if it was manifestly excessive in the circumstances. The prosecution counsel relied on the case of **Bernad Kimani Gacheru v Republic** in respect to the review of sentence.

#### **D. Analysis and Determination**

12. The first appellate court is enjoined to review and reconsider the evidence and make its own conclusions but always bearing in mind that it did not have the advantage of seeing or hearing the witnesses as stated in the case of **Okeno v Republic 1972 EA32**.

13. The appellant was charged with the offence of attempted defilement contrary to **Section 9(1) (2) of the Sexual Offences Act** which section provides: -

***“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.***

***(2) A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years”***

14. The issues for determination in this appeal is *whether the prosecution proved the case against the appellant beyond any reasonable doubt and whether the sentence meted out to the appellant was harsh and excessive.*

15. The victim of the offence was a mentally challenged girl aged 12 years who did not testify after the prosecution applied to have the victim declared a vulnerable witness pursuant to **Section 31 (c) of the Sexual Offence Act** and as such her testimony was given through an intermediary who was her mother. The application was successfully made on the 17/07/2017.

16. The prosecution evidence was that PW1 the victim's mother was harvesting tea in her shamba with the victim when she sent the victim to pick her clothes from some nearby tea bushes. The victim took too long to return and upon searching for her, PW1 found the appellant on top of the victim within the vicinity. PW1 identified the appellant as having worn gumboots and a grayish coat at the material time. PW2 responded to PW1's screams and arrived at the scene where she was able to identify the appellant who was walking away from the scene.

17. PW4 examined the victim and found that her external genitalia was normal. Her hymen was broken and there was soil on her private parts.

18. The appellant opted to keep quiet in his defence.

19. It is trite law that for the accused to be convicted of the offence of defilement, the requisite ingredients must be established. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant was a child and finally, whether the penetration was by the appellant. In the case of **Charles Wamukoya Karani v. 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.”***

20. In the case of **Kaingu Elias Kasomo v Republic** Malindi the Court of Appeal in Criminal Appeal No. 504 of 2010 it was observed: -

***“Age of the victim of the sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim.”***

21. The prosecution produced the birth certificate of the complainant which showed that she was aged twelve (12) years at the time the incident took place. The appellant was positively identified by both PW1 and PW2 which fact was not disputed or dislodged during by cross-examination.

22. As regards penetration, **Section 2 of the Sexual Offences Act** defines “penetration” as:

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

23. Therefore, for the offence of defilement to be proved, evidence must show that the appellant inserted his penis into the vagina of the complainant. It is not sufficient to show that the two sexual organs came into contact. It is trite law that partial insertion suffices for the purposes of penetration.

24. In the case of **Ishmael Ladama Nathan v Republic [2016] eKLR** where the appellant was found lying on top of the complainant's back with his trouser half down and the complainant's innerwear and biker were found torn, the court held that this amounted to an attempt to defile.

25. In the instant case, PW1 sought the victim after she overstayed the task she had given her. She said she was attracted by some shaking tea bushes and on checking she found the appellant lying on top of the victim. PW4 upon examining the victim found that there was soil on her genitalia.

26. In absence of any defence, the prosecution's evidence was overwhelming and unchallenged.

27. The appellant has cited that there were contradictions in the testimonies of PW1 and PW2 regarding the happenings on the material date in the evidence which was full of contradictions. It was also alleged that the defence of the appellant was not taken into consideration.

28. The Court of Appeal decision in **Erick Onyango Odeng' v. Republic [2014] eKLR** citing with approval the Uganda Court of Appeal case of **Twehangane Alfred v. Uganda Criminal Appeal No. 139 of 2001, [2003] UGCA, 6** in which it was held as follows:

***“With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution case.”***

29. On the evidence of PW2 that the child did not go to hospital, this fact was clarified by the evidence of PW1 who took her to hospital and also by that of PW4 who examined her as well as PW3 the investigating officer who personally issued the P.3 form. I am of the view that this is just a negligible contradiction which does not touch on the credibility of the witnesses.

30. I am convinced that the contradictions pointed out by the appellant regarding the testimony of PW2 on whether she heard PW1 scream or talking, is minor and does not affect the main substance of the prosecution case. Further, where there are differences in the narration of events by prosecution witnesses, especially as to recounting or recollecting the dates of the events, it is trite law that these are mere discrepancies incapable of adversely affecting the credibility of the witnesses.

31. It was therefore held in **Njuki v Rep 2002 1 KLR 77**, that: -

***“In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. About what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused... however, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused”.***

32. It therefore follows that each case must be considered on its own peculiar circumstances. In this appeal, the inconsistencies are so minor that no doubt was created as to the guilt of the appellant or put the credibility of the witnesses in question.

33. On the weight of the evidence, PW1 was the key witness. She testified in vivid detail on how she sent her daughter to collect some clothes within the tea plantation and that when she took too long to return, PW1 went to check on her and found the appellant on top of the complainant. This was indeed an overt act on the part of the appellant in preparation to defile the victim.

34. The trial court found the evidence of PW1 credible and reliable. The medical evidence confirmed soiling of the complainant's private parts. PW1 made it very clear that the complainant lay on the ground in a shamba where the soil is normally loose and this was definitely the source of the said soil. In my considered view, the prosecution's evidence was overwhelming and unchallenged.

35. With the corroboration of PW1's evidence by PW2, PW3 and PW4, I find that the prosecution established beyond any reasonable doubt the offence of attempted defilement contrary to Section 9(3) of the Sexual Offences Act against the appellant.

36. Finally, as to whether the sentence meted out to the appellant was harsh and excessive, I will be guided by the relevant law and guidelines in sentencing. Under Section 9 (3) of the Sexual Offences Act, the penalty for the offence of attempted defilement is imprisonment for a term of not less than 10 years. The trial court sentenced the appellant to ten (10) years imprisonment. Considering the nature of the offence especially that it involved a victim who was vulnerable member of society and also that in mitigation the accused showed no remorse, I find no reason to interfere with the trial court's sentence.

37. It is my considered view that the conviction was based on cogent evidence.

38. It is my finding that this appeal has no merit and it is hereby dismissed

39. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 24<sup>TH</sup> DAY OF OCTOBER, 2019.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Ms. Mati for State**

**Mr. Guantai for Ms. Muthoni for Accused**

**Accused present**