



IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO. 69 OF 2013

CORAM: D. S. MAJANJA J.

BETWEEN

FREDRICK MURIITHI.....APPELLANT

AND

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence of Hon.I. Ruguru, Ag. RM dated 25th April 2013 at Chief Magistrates Court at Mombasa in Criminal Case No.2188 of 2012)

JUDGMENT

1. The appellant, **FREDRICK MURIITHI** was charged with and convicted of the offence of attempted defilement contrary to **section 9(1)** and **(2)** of the **Sexual Offences Act** ("the **Act**"). It was alleged that on 16th July 2012 in Likoni District, he unlawfully and intentionally attempted to cause his penis to penetrate the vagina of MW, a child aged 16 years. After a full trial and conviction, the appellant was sentenced to 10 years' imprisonment.

2. In his petition of appeal, he contends that the prosecution did not prove all the elements of the offence and that his defence was not taken into account. On its part the State urges that the prosecution proved all the elements of the offence.

3. Before I consider the grounds of appeal, I reiterate that it is the duty of this court, being a first appellate court, to subject the evidence on record to a fresh review and scrutiny and to come to its own conclusions, all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see **Okeno v Republic [1972] EA 32**).

4. The complainant, PW 1, narrated to the court in her testimony what took place on 16th July 2012 at 6.00am. She was going to work when she met the appellant. She narrated what happened as follows:

[The appellant] told me to accompany him to his house but I refused. He grabbed me and lifted me up and took me to his house and locked me inside his house..... He told me, "Kneel down." I refused..... He moved close but I pushed him away. He grabbed my blouse and told me he can kill me. He told me to sleep on the carpet but I refused He removed my skirt and I remained with bikers

5. According to PW 1, the appellant went outside briefly and when he returned, she screamed as he held her throat attracting neighbours. She managed to run away and the appellant followed her to a neighbour's house where locked herself inside. In the meantime, the appellant started banging on the door while alleging that PW 1 had stolen from him. A neighbour, PW2 heard some screams and a man saying "I will kill, I will kill" at the door. She looked inside the house and saw a young woman. When she broke into the house, PW 1 told her that the appellant had wanted to defile her and it was not true that she wanted to steal from him as alleged by the appellant.

6. Other neighbours came to the scene and escorted PW 1 to the police station where she reported the incident. She told the court that she later saw the appellant, reported to the police and then they went to the appellant's house. PW 3, a police officer, recorded that on the material day, he saw PW1 walking towards him without her shoes. PW 1 told him that the appellant had attempted to sexually assault her. He took her report and they proceeded to the appellant's house. They later opened the house and found PW1's shoes in the house.

7. In his sworn defence, the appellant denied that he had attempted to defile PW 1. He told the court that he was arrested on the material morning when he went to collect his money at Ujamaa village and that one the police officer had a grudge against him.

8. **Section 9** 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.

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

10. In other words an attempted defilement is a failed defilement and that is why the intention to penetrate is a key ingredient (see **Pius arap Maina v Republic ELD HCCRA No. 247 of 2011 [2013] eKLR**). I find the evidence was sufficient to prove that the appellant intended to defile PW 1. He forcefully took her to his house and tore off her skirt. Although, he did not remove his penis to effect penetration, his intent was clear but for the fact that PW 1 fought back and attracted neighbours who foiled his felonious intent. PW 1's testimony was corroborated by that of PW 2 and PW3. In light of the credible evidence of the witnesses, his defence that he was being framed could not hold and was properly dismissed. I affirm the conviction.

11. Proof of age is a question of fact and in this case, PW 1 was taken for an age assessment which showed that she was 16 years. She also confirmed in her evidence that although she did not have her birth certificate, she was aged 16 years old as she was born in 1996. What is clear is that PW 1 was below the age of 18 years. The sentence of 10 years imposed on the appellant is the statutory minimum and despite the plea and mitigation, I cannot depart from it. I accordingly affirm it.

12. The appeal is dismissed.

DATED and DELIVERED at MOMBASA on the 30th day of August 2018.

D.S. MAJANJA

JUDGE

Appellant in person.

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