



**REPUBLIC OF KENYA**

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

**HIGH COURT CRIMINAL APPEAL NO. 58 OF 2017**

**(CORAM: R. E. ABURILI - J.)**

**STEPHEN OTIENO ODHIAMBO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an Appeal against the Conviction and Sentence dated 29.06.2017 in Criminal Case No. 848 of 2016 at Siaya Law Courts before Hon. T.M. Olando, SRM).*

**JUDGMENT**

1. The Appeal herein arises from the judgment, conviction and sentence passed by Hon. T. M. Olando, SRM, Siaya in PM's Court Cr. Case No. 848 of 2016 on 29/6/2017.

2. The Appellant herein **STEPHEN OTIENO ODHIAMBO** was the accused person in the lower court. He was charged with the offence of **Attempted Defilement** contrary to **Section 9(1)(2) of the Sexual Offences Act No. 3 of 2006**. He pleaded not guilty and the trial proceeded in full. The trial court after hearing the prosecution and defence case, found and held that the prosecution had proved their case beyond reasonable doubt. He convicted the Appellant and sentenced him to serve 10 years imprisonment.

3. Dissatisfied with the said conviction and sentence, the Appellant now appeals to this court setting out 4 grounds of appeal as per the Petition of Appeal filed on 6/7/2017.

*(1) The Learned trial court magistrate erred in law and fact by failing to observe that the evidence adduced was insufficient to warrant a sound conviction;*

*(2) The Learned trial magistrate erred in law and fact by failing to find that the prosecution's evidence was scanty and insufficient to uphold a sound trial and conviction thereof;*

*(3) That, Appellant cannot recall all that transverse (sic) during the trial hence pray for the trial records to adduce sufficient grounds at the hearing;*

*(4) That, the Appellant prays for orders of Habeas corpus (sic).*

4. The above grounds were argued by way of written submissions presented to court at the hearing of this appeal on 17/9/2018 wherein the appellant submitted (though incoherently) that he was remorseful and apologetic, that the prosecution evidence was unreliable and contradictory, that the trial court did not consider the appellant's mitigation yet he was a first offender, and a stammerer; that he was a father of 3 children, a husband of one wife takes care of his little orphaned brother, widowed grandmother aged 96 years hence the court should consider that he is their sole breadwinner and allow the appeal and set him free.

5. The Appeal was vehemently opposed by the state through Senior Principal Prosecution Counsel, Mr. Okachi who submitted orally that this court should uphold the judgment and sentence passed by the trial court as the prosecution adduced sufficient evidence linking the appellant to the offence. That the trial court received and considered evidence carefully, the age of the victim, the effect of the crime on the victim, and the society at large and mitigation before sentencing the Appellant which sentence was lawful. Counsel urged this court to uphold the conviction and sentence of the lower court.

6. In a rejoinder, the appellant submitted that the doctor was never called to testify on the findings on the child who alleged that the appellant had defiled her.

7. This being a first appeal, this court is obliged to reassess, to re-evaluate and reconsider the trial court's evidence as adduced and come to its own independent conclusion bearing in mind that it never heard nor saw witnesses as they testified hence it cannot tell their demeanor. **See Odhiambo vs Republic (2005) I KLR.**

8. Examining the trial record, the charge facing the appellant was that of attempted defilement contrary to **Section 9(1) of the Sexual Offences Act**. It was alleged that the appellant herein on 1/9/2016 at [particulars withheld] sub-location, in Siaya District within Siaya County intentionally attempted to cause his penis to penetrate the vagina of QA, a child aged 10 years.

9. The Appellant also faced an alternative charge of committing an indecent act with a child contrary to **Section 11(1) of the said Sexual Offences Act**. In that, on 1/9/2016 at [particulars withheld] sub-location in Siaya District within Siaya County, he intentionally touched the vagina of QA, a child aged 10 years.

10. PW1, QA who was the Complainant gave sworn testimony after a *voire dire* examination and stated that she was in Class 3 at [particulars withheld] School. That on 1/9/2016, she had gone to fetch water and on her return, she met the appellant taking care of cows. He started chasing her and pushed her to the ground, removed her inner pant and threw it away then he removed his trouser and lay on her. Some people came and found him in the act and he escaped. She was helped by Mariko to the Karemo Police Station and Maria George helped her. She was then taken to Siaya Hospital. She stated that she felt pain in her private part. She identified the appellant in the dock and said that it was her first time to see him.

11. On being cross-examined, PW1 stated that she made noise and the Appellant slapped her and that Anyango came and found him defiling her, the Complainant. She maintained that he removed her inner pant.

In re-examination, she stated that the Appellant slapped her twice when she tried to make noise and that Nyagem and Achieng came.

12. PW2, BA testified that on the material day of 1/9/2016, she went to Boro and on her return she got a phone call from Karemo Police Station. She was called by her brother-in-law who was the appellant's employer. She proceeded to Karemo Police Station and found the complainant with her pant on her and the appellant too was there under arrest. She spoke to the minor who is the complainant and the accused was escorted to Siaya Police Station. PW2 was given a P3 form for the minor which was filled at Siaya Referral Hospital. She identified the P3 form, treatment notes and Birth certificate for complainant saying she was aged 10 years. She also identified the Appellant as a herder at a nearby home.

13. In cross examination by the appellant, PW2 reiterated her testimony in chief and stated that whoever called her never told her what had taken place and that when she arrived at the police station is when she was notified of what had transpired and that she was told to ask the child what had happened.

14. PW3, LA testified that on 1/9/2016, she had gone to fetch firewood and spotted the complainant and the appellant whom she called 'Daddy' and that he had removed his trouser halfway. She called him three times and she also called the person she was with to go and witness what was taking place. The appellant got up and the complainant too got up with her pant in her hand. She stated that the appellant was on top of the child. She went away to her home. She identified the appellant as a person she knew very well as he looks after cows for a neighbour. She recorded her statement at Siaya Police Station. On being cross examined, PW3 stated that the appellant was on top of the child who was crying. In re-examination, she stated that she went and informed the child's grandmother.

15. PW4, PC FC based at Siaya Police Station, who was also the Investigating Officer testified that on 21/9/2016 while at the office, she received BO PW2 and her daughter QA aged 9 years who complained of being defiled by one person known to her and the complainant narrated to PW4 how she was from drawing water when she met the appellant who got hold of her, removed her clothes and defiled her and that she was rescued by two ladies (LA) and (DA) who were fetching firewood and that the appellant took off. The case was reported to Karemo Police Station. The complainant was taken to Siaya Hospital and was issued with a P3 form. The accused was arrested and charged with the offence. She produced a birth certificate for the child.

16. On cross examination, PW4 reiterated the names of the two ladies LA and DA who rescued the child by shouting at the appellant upon which he took off and that when his employer was briefed of what had happened he escorted the accused with the child to Karemo AP Camp upon which they were taken to the police station.

17. The prosecution closed their case without calling the Clinical Officer to produce the P3 form for the complainant.

18. In his defence, the Appellant testified on oath that he lived at Agoro and was a herdsman. He denied committing the offence. He stated that the child's father had told him to go away but he declined. He stated that the doctor had not testified to show that he had defiled the child.

19. In his judgment dated 29/6/2017, the trial court reiterated the evidence on record and found that the prosecution had proved the case against the appellant beyond reasonable doubt. That the accused gave a defence which was a mere denial. The trial court believed the child's testimony and stated that her testimony was corroborated by PW3 LA who found the appellant on top of the complainant with his trouser halfway down and the complainant with her pant in her hand.

20. The trial court also found that the age of the complainant as per the birth certificate was undisputed as she was born on 25/6/2006. He accordingly convicted the appellant as charged under **Section 9(1)(2) of the Sexual Offences Act** and sentenced him accordingly.

**Analysis and Determination.**

21. I have considered the grounds of appeal, submissions by the appellant and prosecution counsel and the trial record as summarized above. The main issue for determination in this appeal is whether the conviction of the appellant was sound and therefore whether the sentence should be upheld.

22. The appellant complained that his conviction was not safe because the evidence adduced by the prosecution against him was insufficient, scanty and that in any event, the prosecution did not call the doctor who examined the complainant to produce the P3 form that would show that the complainant was defiled. He also claimed that the P3 form was not produced hence there was no basis upon which the trial court convicted him.

23. It is worth noting that the appellant was convicted of the offence of attempted defilement and not defilement. **Section 9(1) of the Sexual Offences Act** defines the offences of attempted defilement as:

***“A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.”***

24. On record is evidence by the complainant PW1 and PW3 that the child PW1 was from fetching water when she met the appellant in daylight. He pinned her on the ground, removed her pant and also removed his trouser halfway. She screamed but he slapped her twice and lay on her. As he was about to defile her, PW3 appeared, saw what was happening and called him out. He ran away and the child woke up with her pant in her hand.

25. On the basis of the above testimony by the complainant, albeit the appellant claims that evidence was contradictory, he did not point out which evidence was contradictory. In addition, the offence of attempted defilement of a child does not require medical evidence to prove the offence. The trial magistrate who heard and saw PW1 testify believed that she was telling the truth. Her evidence on what the appellant did to her was corroborated by PW3 who found the appellant on top of the child with his trousers halfway removed and the child had her pant in her hand.

26. No single contradiction was pointed out to have watered down the prosecution’s case which I find and hold was precise, cogent and consistent on the events surrounding the offence. I find no reason to interfere with that finding by the trial court which had the opportunity to observe the demeanor of PW1 the Complainant and PW3 when they testified on oath and their testimonies were not shaken even in cross examination. **See Martin Nyongesa Wanyonyi Vs Republic [2015] eKLR.**

27. Furthermore, albeit the appellant claimed that the complainant’s father had asked him to go away from his employment, in a bid to introduce existence of a grudge and for the court to infer that the case could have been framed against the appellant, I find and hold that the trial court correctly reconciled the two versions of evidence by the prosecution and that of the appellant and disbelieved the defence case as an afterthought quite correctly because albeit the appellant had an opportunity to cross examine the prosecution witnesses, he never mentioned to them that there was a grudge between him and the child’s father and or that he could have been framed on account of that alleged grudge.

28. In my view, therefore, I find and hold that the trial magistrate correctly dismissed the defence case and he cannot be faulted for doing so. The child testified that she was defiled by the Appellant but that alone cannot be contradictory where the charge reads attempted defilement as the child was too young to tell the extent of the defilement as she was aged between 9-10 years as per exhibit 3 a birth certificate hence she was not in a position to differentiate between defilement and attempted defilement. Only the police could determine which offence to charge the appellant with after getting advice of the doctor who examined the complainant and as the Appellant knew all along that he was facing the charge of attempted defilement and not any other offence, he could not claim to have been prejudiced by the charge of attempted defilement.

29. The Black’s Law Dictionary defines the word attempt as follows: -

1. ***The fact or an instance of making an effort to accomplish something, esp. without success.***

2. ***Criminal law. An overt act that is done with the intent to commit a crime but that falls short of completing from the intended crime. Under the Model Penal Code, an attempt includes any act that is a substantial step toward commission of a crime, such as enticing, lying in wait for, or following the intended victim or unlawfully entering a building where a crime is expected to be committed.***

30. From the above definition it is clear that there was no need for physical evidence such as bruises or laceration on the complainant’s private parts or thighs or any part of the body for the offence of attempted defilement to be proved. Section 4 of the Penal Code, Chapter 63, defines an offence to ***“mean an act, attempt or omission punishable by law”***. The appellant herein was charged with the offence of attempted defilement. An attempt is what is usually described as an inchoate offence. According to the Black’s law dictionary, ***“the common law has given birth to three general offences which are usually termed as inchoate, or preliminary crimes – attempt, conspiracy, and incitement. A principal feature of these crimes is that they are committed even though the substantive offence is not successfully consummated. An attempt fails, a conspiracy comes to nothing, words of incitement are ignored – in all these instances, there may be liability for the inchoate crime.”***

31. The appellant should therefore not expect any signs of defilement in the P3 form. Furthermore, Section 388 of the Penal Code states:

***“388. (1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted 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 fulfillment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.*

*(3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence.”*

32. The appellant was not able to defile the complainant because he was caught by PW3 before he accomplished his mission. He had removed the child’s pants and his own trouser halfway and was lying on top of the complainant child. Accordingly, I find that the prosecution established that an attempt to defile the complainant was made by the appellant who was positively identified by the complainant and PW3. The prosecution did prove its case beyond reasonable doubt.

33. In conclusion, I find that the trial court did not err in finding and holding the Appellant herein guilty of the offence of attempted defilement of the complainant child whose age was not in doubt. Accordingly, the conviction of the appellant by the trial court is hereby upheld.

34. On sentence, the provisions of **Section 9(2) of the Sexual Offences Act** are clear. They provide for minimum sentence of 10 years’ imprisonment based on the age of the child. The trial court meted out the minimum sentence which was lawful and not excessive. The Appellant gave no mitigations for consideration. Instead, he was mitigating on appeal, which was too late as the matter before me is not for revision of sentence or sentence review. However, even if I was to consider the appellant’s mitigations that he is remorseful and has a family of a wife and children and is the sole breadwinner of his family, there is absolutely no reason why a grown up man like the appellant would want to defile a child of the complainant’s age yet he is a married man with children. He had the opportunity to go and have consensual sex with his wife but chose to be a sex pest to a small kid. In my view, the sentence meted out on the appellant was justifiable and proportionate to the offence. I find no reason to interfere with the said sentence. The prison sentence of 10 years is hereby upheld.

**35. In the end, I find and hold that this appeal lacks merit and is therefore dismissed. I uphold the conviction and sentence meted out on the Appellant by the trial court. The appellant to serve full sentence.**

Dated, Signed and Delivered in open court at Siaya this 27th Day of November 2018.

**R.E. ABURILI**

**JUDGE**

**In the presence of:**

The appellant in person

Mr Okachi Senior Principal Prosecution Counsel

CA: Brenda and Modestar