



**REPUBLIC OF KENYA**

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

**LODWAR HIGH COURT CRIMINAL APPEAL NO. 60 OF 2016**

**MICHAEL LOKOMAR ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**( An appeal from conviction and sentence in original Lodwar Principal Magistrate's court criminal case No.722/2012 delivered on 15/3/2013 by E N Wasike Resident Magistrate)**

**JUDGMENT**

The appellant Michael Lokomar was charged with the offence of attempted defilement contrary to section 9(1) (2) of the sexual offences Act Act o.3 of 2006. The particulars of the offence are that on the 10<sup>th</sup> day of October, 2012 at [particulars withheld] village in Turkana Central within Turkana County, intentionally attempted to cause his penis to penetrate the vagina of S. E. a girl aged 7 years.

The case for the prosecution was that on 10/10/2012 the appellant went to the home of J N the mother of the complainant at 7pm. He then spread a mat and asked the complainant to sleep on it. She complied. Appellant then removed his clothes and undressed the child and placed his penis between her thighs and below the anal region. The complainant cried and the father came. The appellant then started running away but was arrested. The complainant was taken to hospital. PW2 R E testified that he went home and on arrival found the appellant holding the complainant and her clothes pulled down. He pushed him aside and then raised an alarm whereupon appellant was arrested and handed over to police. PW3 M L the step-mother at the complainant was at the market when she was informed of the incident. She went home and found appellant seated on the verandah and the complainant next to him. She however did not notice anything unusual on the complainant. PW4 P.C Daniel Ngeera the investigating officer recorded witness statements and on that basis caused appellant to be charged with present offence.

The appellant gave unsworn evidence in his defence. He testified that the material day he repaired a vehicle and was paid shs.600 which he paid to one Kome who was repairing his phone. He started going home and on reaching the roundabout he met a lady who borrowed his phone. While still waiting for her to make the call, he saw 2 people come and start questioning the woman. The man then took his phone form the lady. We went to question him and a scuffle ensued but the other man with others overpowered him and took the phone away and entered into a taxi. He went to the police station where he found the 2 men who alleged he had committed the offence, he was arrested and charged with the present offence.

It is upon this evidence that the appellant was found guilty, convicted and sentenced to ten (10) years imprisonment. The appellant then preferred this appeal faulting the judgment on the grounds that:

- 1. That the learned trial magistrate erred in-law and facts in convicting the appellant without noting that he overstayed in the police custody.**

**2. That PW1, PW2 and PW3 in this case are all family members. The learned trial magistrate did not consider this as single evidence.**

**3. That the learned trial magistrate erred in law and facts by convicting the appellant without key witnesses in this case e.g neighbours mentioned**

**4. That the appellant was not supplied with a copy of statements during the trial of his case**

**5. That the learned magistrate erred in law and facts in convicting the appellant without any medical report from the medical officer**

**6. That the learned trial magistrate erred in law and facts in convicting the appellant without noting that he was not arrested within the scene of crime**

The appellant filed written submission in support of his appeal. He submitted that the age of the complainant was not proved to be seven (7) years as age assessment was not done; that all the witnesses who testified were from same family and that no birth certificates clinic card or notification of birth was presented to prove the date of birth. Appellant further submitted that the trial magistrate did not consider his defence without giving reasons and that trial court did not give him an opportunity to call his witnesses and that the sentence of ten (10) years imprisonment was harsh in the circumstances.

Mr. Kimanthi for the state opposed the appeal. He submitted that the appellant was caught in the house where he was attempting to defile the child; he was found to have pulled the clothes down but had not defiled her but his trouser zip was open and that the sentence of ten (10) years is the minimum sentence for the offence under section 9(2) and cannot be said to be harsh or excessive.

This is a first appeal. 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 ( **See Ekeno – v – Republic 1972 EA32**).

The appellant was charged with the offence of attempted defilement contrary to **section 9(1) (2) of the sexual offences Act**. The 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”**

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 as if were 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”**

In the prove of an attempt to commit an offence the prosecution must prove the **mens rea** which is the

intention and the actus reus which constitute the avert act which is geared to the execution of the intention. The **actus reus** must be more than mere preparation to commit the act as there is a difference between preparation mere preparation to commit an offence and attempting to commit an offence ( see **Abdi Ali Bere – vs – Republic (2015) ECLR**).

The evidence in support of the charge is the one given by PW2 R E the father of the complainant. In his evidence he stated;

**“ I found my wife was not at home. I then heard a child making noise in the compound on opening the gate, I found my two children one seven years and the other is 1 year. The small was outside the house and the big one was inside the house in the verandah. I then entered the house and found the accused with my daughter aged 7 years. He was holding the child’s by hands and the child clothes had been pulled down. The under garments of the child were below the knees. I saw the accused stripping the child’s clothes. My eyes met with the accused I then pushed the accused away and took the child. I then called my wife – M L and explained the events”.**

On being cross examined by the appellant the witness stated that he found the appellant trying to remove the child’s clothes; while he was inside the compound. The child complainant who was aged 7 years old testified through an intermediary and the evidence of what happened is materially different from what PW2 the father stated. She had stated through the intermediary that the appellant had inserted his penis between her legs. PW2 however stated that when he came he found the child with her inner clothes pulled down and the appellant on the verandah holding the child’s hands.

I have considered the judgment of the learned trial magistrate. He relied on the evidence of the intermediary who testified on behalf of the complainant. In his judgment the trial magistrate stated;

**“After analyzing the prosecution case vis-a-vis the defence case, the court is now tasked with the responsibility of determining whether the accused actually committed the offence he is being charged with. PW1 stated in her evidence how the accused person went into their home found her, spread the mat and told PW1 to lay over it. She also testified how the accused told her remove her clothes and inserted his penis in a region below the vagina that is between the legs and the anus. PW1 testified that she felt pain.”**

The trial magistrate found that the child was vulnerable and could not testify and hence directed that she testifies through her mother, PW1, s an intermediary. PW1 proceeded to testify on her own account. It is not apparent from the record that the PW1 communicated questions to the child and she responded. The trial magistrate, in my view misunderstood the role of an intermediary which is to act as a channel of communication between the witness and the court and instead allowed PW1 the mother to testify as if she was the complainant.

The role and place of an intermediary was explained by the court of appeal in **M M V Republic NRB Criminal Appeal No. 41 of 2013 (2014) eCLR** as follows:

**Is an intermediary the mouth piece of the vulnerable witness or is he or she the witness? According to section 2 of the Sexual Offences Act, an intermediary is defined to mean among other things, a person who gives evidence on behalf of a vulnerable witness.**

**Section 31(1) provides inter alia that:-**

**A court shall not convict an accused person charged with an offence under this Act solely on the uncorroborated evidence of an intermediary.**

**We have seen that in Article 50(7) of the constitution an intermediary is a medium through which the accused person or complainant communicates with the court. In our understanding, the evidence to be presented is not that of the intermediary himself or herself**

but that of the witness relayed to court through the intermediary. The intermediary's role is to communicate to the witness the questions put to the witness and to communicate to the court the answers from the victim to the person asking the questions, and to explain such questions or answers, so far as necessary for them to be understood by the witness or person asking questions in a manner understandable to the victim, while at the same time according the victim protection from unfamiliar environment and hostile cross-examination; to monitor the witness' emotional and psychological state and concentration, and to alert the trial court of any difficulties.

The key work in sub section 7 is emphasized as shown below to demonstrate the place of the intermediary's evidence.

If a court directs that a vulnerable witness be allowed to give evidence through an intermediary, such intermediary may;

- a. Convey the general purport of any question to the relevant witness.
- b. Inform the court at any time that the witness is fatigued or stressed and
- c. Request the court for a recess.

The word through is used also in subsection 4(b) in describing the protection of the witness by providing an intermediary through whom his evidence is relayed. It is the witness who gives the evidence which is

explained communicated to the court and the reverse through an intermediary in the manner and style developed between the two.

The evidence as given by the intermediary is not supported by PW2 who testified that he found the child and the appellant at the veranda of the house while holding her hand. The evidence of PW2 in my view is the one that is more credible. It however does not support the charge that the appellant had attempted to defile the complainant but rather that he found her with the complainant and her inner clothes were lowered. There was in view no evidence adduced or an attempt at penetration which is the main ingredient of the offence of defilement. I am therefore satisfied that the conviction was not supported by evidence on record. I consequently allow the appeal, quash the conviction of the attempted defilement and set aside the sentence of ten (10) years imprisonment imposed.

I therefore direct that the appellant Michael Lokinar be set at liberty unless otherwise lawfully detained.

Dated at Lodwar this 17<sup>th</sup> day of May, 2017.

**S N RIECHI**

**JUDGE**