



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL CASE NO. 19 OF 2016**

**(Being an appeal arising from conviction and sentence in Kitale Chief Magistrate's**

**Court criminal case No. 13 of 2011 delivered by J.M. Nang'ea Senior Principal Magistrate on 12/11/2012)**

**PAUL NYAANGA .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

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

1. Paul Nyanga “the appellant” was charged with the offence of **attempted defilement contrary to Section 9(1) and (2) of the Sexual Offences Act No. 3 of 2006**. The particulars being that the appellant on the 30<sup>th</sup> day of December 2010 within Trans Nzoia County, attempted to cause his penis to penetrate the vagina of D B a child aged 9 years.

2. He faced an alternative count of **committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006**. Particulars being that the appellant on 30<sup>th</sup> day of December 2010 within Trans Nzoia County intentionally touched the vagina of D B a child aged 9 years with his penis.

3. He denied the charges and the matter proceed to a full trial, whereby he was found guilty, convicted and sentenced to 10 years imprisonment on the principal count. He was dissatisfied with the judgement and filed this appeal citing the following grounds:

i) That the learned trial magistrate erred in both law and facts by considering the prosecution had proved its case beyond reasonable doubts.

ii) That the said exhibits were neither brought before the honourable court nor marked as exhibit.

iii) That the learned trial magistrate erred in both law and facts by relying on the evidence of PW1 without observing that the accused person was not examined as the law states and requires.

iv) That the learned trial magistrate failed to consider that the existed grudge between the mother of the complainant and the accused person hence fatal to the prosecution side.

**v) That the trial magistrate in facts in convicting the appellant on basis of contradictions.**

4. When the appeal came for hearing the appellant furnished the court with written submissions. I have gone through them. The appellant seems to have abandoned his appeal against conviction. He is asking the court to consider his special circumstances and reduce his sentence, or give an alternative non custodial sentence.

5. Mr Kakoi on behalf of the state opposed the appeal. He submitted that the age of PW1 had been confirmed to be that of a minor. That PW1 had also explained what the appellant did to her when she went to his house to deliver milk. He submitted that PW2 confirmed having sent PW1 to the appellant's house to deliver milk. The appellant was well known to PW1 and PW2.

6. A summary of the case is that PW1 aged 12 years was sent by her mother (PW2) to deliver milk to the appellant on 30th December 2010 4 pm. The appellant was their neighbour. He found her sweeping the house from inside. After giving her the milk he locked her inside the house. She turned to leave but he grabbed her and took her to his bed. He then undressed her by removing her panty and trousers.

7. He further removed his trousers and mounted her and he tried to penetrate her. He heard her mother calling her, and he immediately released her and told her to put on her pants and he pushed her through the window. Her trousers remained behind. She immediately told her mother (PW2) what the appellant had done to her. Villagers gathered and the appellant was arrested and taken away to the police.

8. **PW3 Reuben Bunyasi** confirmed examining PW1 and found no presence of spermatozoa, or pus cells in smears taken from her vagina. In short there was no evidence of penetration.

**PW4 E B O** the father to PW1 gave similar evidence to that of PW2. PW1's slippers and the bottle PW1 had carried milk in were found in the appellant's house. (Exhibit 2 and 3).

9. **PW5 Christopher Burkemen Kanda** was the village elder who responded to the report by PW2 and PW4. **PW6 Ken Ndege** a Dentist at Kitale District Hospital examined PW1 for age assessment. He found her age to be 9 years (Exhibit 4).

**PW7 PC David Alali** is the investigating officer. He was called by PW5 and informed of this incident. He rushed to the scene and found a crowd of people. The appellant was arrested while PW1 was taken to hospital. The report from the hospital guided them in charging the appellant.

10. The appellant gave an unsworn statement of defence. He explained how he worked on the morning of 30<sup>th</sup> December 2010. On his way back home with cattle he met PW2 and PW4.

PW4 complained that he kept on going to his home. He responded that PW4 owed him money for maize he sold him. He did not pay the debt, and this led to his being fabricated.

11. This is a first appeal. I have a duty to reconsider the evidence afresh and arrive at an independent conclusion. I also bear in mind the fact that I did not see or hear the witnesses. **See Okeno V Republic 1972 EA 32; Kinyanjui V Republic [2004] 2 KLR 364.**

I have considered the evidence on record and the grounds of appeal. I have equally considered the submissions by both parties.

12. In his appeal the appellant has challenged the evidence that was adduced against him. I will consider the evidence in three areas i.e age, attempted penetration and the identity of the culprit.

PW1's age was put at 11 years by PW2, at 12 years by PW1 herself and 9 years by PW6.

All this go to show that PW1 was a child. The court took cognizance of this fact and conducted a voire dire examination of the child to satisfy itself of her capability to testify.

13. Section 9(1) of the Sexual Offences Act talks of a child being a victim of attempted defilement. A child is defined, under the Children's Act as a person under the age of 18 years.

There is therefore no dispute that PW1 was a minor as she was below the age of 18 years.

14. The evidence of PW1, PW2 and PW4 is consistent that PW1 was sent by her mother (PW2) to take milk to the appellant who worked for a neighbour and lived in the neighbour's house. The bottle she had carried the milk in was found in the appellant's house (Exhibit 3). It was identified by PW4, PW5 and PW7.

PW2 was concerned when PW1 took too long at the appellant's and so went out to look for her. PW1 heard her calling, and left the house. PW2 saw her emerge from behind the neighbour's house. Her slippers (exhibit 2) were recovered from the appellant's house, by PW5 and PW7.

There is all the evidence that indeed PW1 had taken milk to the appellant. When she came out of the house she did not have her slippers and she did not have the milk bottle. Once she reached her mother, she gave her details of what the appellant had done to her.

16. Having removed PW1's pant and trouser and having removed his own trousers was a clear indication of his intention. He even went further and mounted the minor and tried inserting his male organ into hers. The medical examination confirmed she had not been penetrated.

17. The appellant has through his submissions abandoned the appeal on the conviction. Upon my assessment of all the evidence before me I find that the offence of attempted defilement was proved beyond any reasonable doubt.

18. On sentence Section 9(2) of Sexual Offences Act provides;

***“ 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 sentence of 10 years imprisonment is the minimum sentence for this offence and that's what the appellant got. I cannot interfere with it.

19. The upshot is that the appeal lacks merit and is dismissed. The conviction and sentence are upheld.

Orders accordingly.

Delivered, signed and dated on 30<sup>th</sup> day of August 2017 at Kitale.

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**H. ONG'UDI**

**JUDGE**

**In the presence of:**

**Ms Kagai for Mr. kakoi fro State**

**Appellant – present**

**Kirong – Court Assistant**

**Court: Judgment delivered in open court.**

**Right of Appeal explained.**

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**H. ONG'UDI**

**JUDGE**

**30/8/2017**