



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 36 OF 2014**

**(BEING AN APPEAL ARISING FROM CONVICTION AND SENTENCE IN CRIMINAL CASE NO. 1698/2012 DELIVERED BY P. KULECHO RESIDENT MAGISTRATE ON 27/6/2013)**

**SAMWEL BIWOT CHELANG'A.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

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

1. The appellant was charged with the Offence of **Attempted Defilement contrary to Section 9(1) (2) of the Sexual Offences Act No. 3 f 2006**. The particulars of the offence were that on the **11th July 2012** within Trans Nzoia County intentionally attempted to cause his penis to penetrate the anus of E K a child aged 4 years.

2. The matter proceeded to full trial and the appellant found guilty and convicted to serve 10 years imprisonment hence this appeal. The appellant has raised several grounds including the fact that there was no medical evidence to support the charges and that the evidence of a single witness was not sufficient.

3. The learned state counsel has conceded to this appeal and I find the reasons indeed plausible.

4. The facts as presented by **PW1, the minor** who was aged 4 years old suggested that the appellant pierced his buttocks using a torch as he lay him on his bed.

5. **PW2, J R** a grandmother to the complainant did not witness the incident but explained what she was told by the minor. She went on to state that;

**“ ----- I tried to interrogate the minor and he recounted the entire ordeal again . He clarified that Sammy had laid on top of his (E) back.”**

6. Clearly nowhere does the child talk of the appellant lying on the minors back.

7. PW5 the Clinical officer upon examination that;

**“The child told me the suspect flashed a torch into his anus. I carried out physical examination on him.**

**Description of the private parts- penis normal. Around the anus there were no signs of erosion lab test urine normal. ----- I indicated that the same was a case of attempted sodomy.”**

8. In his sworn defence the appellant testified that PW2 owed him some Kshs 18,600 and when he inquired she refused to pay and had accused him of embarrassing her. The rest of his witnesses seemed to suggest that the appellant infact was not at the scene at the time of the incident.

9. I find that the age of the complainant was clearly proven by his immunization card. Both the complaint and the appellant knew each other and PW2 stated as such.

10. The only area which was not proven is whether or not there was an attempted penetration. I do not think so. All that the complainant stated was that the appellant had pierced him using a torch. The P3 form produced did not elicitate this. There was no injury or at all.

11. In the premises I shall allow this appeal, set the appellant free unless lawfully held.

**Delivered, signed and dated at Kitale this 11<sup>th</sup> day of December, 2017.**

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**H.K. CHEMITEI**

**JUDGE**

**11/12/2017**

**In the presence of;**

**M/S Kakoi for the Respondent**

**Appellant – present**

**Court Assistant – Kirong/silvia**

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