



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL APPEAL NO.10 OF 2014

KENNEDY OCHIENG OKUMU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Appeal from Original Conviction and Sentence from NYANDO SPM'S Court: B. M. KIMTAI Ag. SRM

in Criminal Case No.214 of 2013.]

J U D G M E N T

1. The appellant was charged with the offence of attempted defilement contrary to Section 9(1) as read with Section 9(2) of the Sexual Offences Act No.3 of 2006 Laws of Kenya.
2. The particulars were that on the 12th day of July 2013 at Sidho East 1 Sub-Location in Muhoroni District within Kisumu County intentionally and unlawfully attempted to cause his penis to penetrate the vagina of E.A.O. child aged 13 years.
3. He was also charged with an alternative count of Indecent Act contrary to Section 11(1) of the Sexual Offences Act No.3/2006.
4. The particulars were that on the 12th day of July, 2013 at Sidho East 1 Sub-Location in Muhoroni District within Kisumu County intentionally committed an Indecent Act with E. A. O a child aged 13 years by touching her genital organ namely vagina.
5. The appellant was convicted and sentence to 10 years imprisonment hence this appeal. The brief facts of this matter are as follows.
6. **PW1 E.A.O.** On the material day had gone to fetch water with her sister at a river known as Uyanda. On the way they met the appellant who was a preacher. He advised her to go back for prayers after delivering the water at home. She indeed complied and went back. The appellant then took her to Church where he prayed for her to cast out demons. He then proceeded to remove her panties and defiled her. She later managed to escape and went home. On her way she met one Ruth Odhiambo whom she explained to her the ordeal. Ruth called the minor's father who came to the scene. She was taken to Chemelil hospital for treatment.
7. **PW2 C A** aged 12 years said that she was with the complainant on the said date at around 8 a.m. They

went with her to one Patricia's home to collect milk. They did not find her but instead met the appellant who phoned Patricia who came and gave them milk. She said that she left for home but complainant remained with the appellant as she needed prayers.

8. **PW3 PATRICIA AOKO** testified that she was a member of Legio Maria church. She said that on the material day she was at home when the appellant came and prayed for the complainant. The prayers were conducted inside the Church. She came out while rubbing her hands and when she asked to her she started crying but refused to explain to her why she was crying. The appellant told her that she had been burned by a candle. On cross-examination she said that she never heard the complainant screaming.

9. **PW4 RUTH ADHIAMBO** said that on her way from her shamba she met the complainant crying. On questioning she told her that she had been defiled by the appellant. She then phone her father who came and took her to the hospital.

10. **PW5 G A** the complainant's father told the court that he received a call from Ruth concerning the incident. He went to where she was and found the complainant crying. He was informed by Ruth what had happened. He then took her to the hospital. He produced the baptismal card showing the age of the minor to be 13 years.

11. **PW6 DANIEL OUMA OYOO** the Clinical Officer examined the complainant. His report (P3form) concluded that there was no penetration and no sexual activity. She told him the appellant inserted his penis between her thighs.

12. **PW7 JACOB OMONDI** the Assistant Chief of Sidho East Sub-Location said that he received a call from the complainant's father concerning the incident on 12.7.2013. The following day he went and arrested the appellant and took him to Chemelil Police Station.

13. **PW8 MARY ODUMBE** produced the baptismal card showing that the complainant was born on 17/8/2000. She was from school on that particular day when she met the complainant who told her what had transpired

14. **PW9 PC KEFA KASAUNI** carried out the investigations. He issued the P3 form to the complainant and later charged the appellant with the offences herein.

15. When put on his defence the appellant gave sworn evidence. He said that he was a businessman dealing with charcoal and selling petroleum jelly. On the material day he went for prayers at Legio Maria Church at Nyakungu. He stated how he performed prayers in different places but later arrested by police. He denied knowing the complainant.

ANALYSIS AND DETERMINATION

16. The appellant has mounted 4 grounds of appeal which can be summarised as hereunder:

- a. **There was no evidence of attempted defilement;**
- b. **The case was poorly investigated;**
- c. **Np forensic investigation done;**

17. The duty of this court is to evaluate the matter afresh and arrive at an independent finding with full knowledge that it never had the opportunity of seeing the witnesses like the trial court (see **OKENO VRS REPUBLIC (1972) E.A. 32**).

18. The appellant had earlier own been charged with the offence of defilement. Apparently when the investigating officer closed his case, he produced a fresh charge sheet which altered the charges to attempted defilement. Whereas that is permitted under Section 214 of the Criminal Procedure Code, can

it be said that it was fair to the appellant?

19. The evidence adduced by the complainant clearly pointed to the fact that she had been defiled. She stated as follows:

“He then took both my hands and placed them at my back and told me not to fear. I was unable to breath he then removed his long trouser and underwear he pushed my skirt up and removed my panties. He then moved closer to me he was now squatting he used his right hand to open my things he took his penis and inserted in my vagina. He then did bad things to me. After he finished he told me to lie down which I did not . I then took my pantie and ran away. I went home.”

20. This materially contradicted the finding of the Clinical Officer PW6 who examined the complainant and stated that:

“I examined her vagina and noticed whitish discharge, genitalia appeared normal with no tears or inflammation. I subjected the patient to laboratory test and no sperms noticed. I concluded that their were no penetration and no sexual activity. She told me the said person inserted pennis between her things. In her thighs there were no bruises.”

21. If indeed there was penetration as stated by the complainant the clinical officer would have found so. The complainant was indeed graphic in her description and I am not persuaded that with such activity there would not be evidence of penetration.

22. Having stated so Section 9(1) of the Sexual Offences Act states as follows:

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

23. During trial the complainant's evidence shows that there was penetration whereas the P3 form shows otherwise. Who was the to be believed? The complainant or the Clinical Officer?

24. For an offence to be proved, the evidence leading to it ought to be direct and watertight.

25. In the instant scenario, the same is swerving between defilement and attempted defilement. If there was no defilement, and simply that the appellant inserted his penis between the complainant's thighs, then there was nothing difficult for her to have said so. But her graphic description shows otherwise. Unfortunately, that is not supported by the P3 form.

26. Further as stated earlier on, Section 214 of the Criminal Procedure Code permits the changing of the charge against an accused person at anytime before the closing of the prosecution case. The accused thereafter shall be called upon to answer to the new charge and he shall be permitted to recall any witnesses and give their evidence afresh or to be further cross-examined.

27. In this matter the prosecution called its last witness, the investigating officer, who testified and thereafter the prosecution applied to amend the charges. The courts proceedings shows that the new charges were read to the appellant and he of course denied and the bond terms remained the same. Whereas the procedure was clearly followed, the appellant nevertheless ought to have been asked whether on the strength of the new amendments he would have desired to recall any of the witnesses. Whereas the same is not mandatory, but prudent practice and due process would demand that a litigant especially one who is unrepresented, ought to be explained the options available. Perhaps as in the case at hand having heard what the complainant said in support of the charge of defilement he would have applied for her to be cross-examined.

28. However as earlier stated the appellant was put on a disadvantaged position. The new charge in my mind materially altered the landscape at the last minute's amendments and closing the prosecution case

did not augur well for the appellant.

29. I think I have stated much to indicate that the prosecution did not prove its case beyond the required standards. I have heard the oral submissions by the state in opposition to the appeal as well as read the appellant's written and oral submissions. There was complete discrepancy between the charge and the evidence. There was no proof that the appellant attempted to defile the complainant. One wonders why it took 28 hours for the minor to be taken to hospital yet both her parents and especially her mother who was a teacher was at the scene barely 3 hours after the alleged incident.

30. He doubt in my mine ought to be in favour of the appellant. The appeal is allowed. The appellant set free unless lawfully held.

Dated, signed and delivered this 22nd March, 2016

H. K. CHEMITEI

JUDGE

In the presence of:

.....for statement

.....for appellant