



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYAMIRA
CRIMINA APPEAL NO. 17 OF 2015

EDWARD MUSA OPONDO.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

J U D G M E N T

This is a criminal appeal from the conviction and sentence of the **Principal Magistrate Hon. R.M. Kahara** at Keroka, being **Criminal Case No.1160 of 2013** delivered on 29th September, 2015.

The appellant, **Edward Musa Obondo**, was charged of attempted defilement **Contrary to Section 9 (1) (2) of the Sexual Offences Act, No.3 of 2006**.

Particulars thereof were that on the 14th day of December, 2013 in Masaba North District within Nyamira County intentionally attempted to cause his penis to penetrate the vagina of **T J N** a child aged 12 years.

Alternatively, he was also charged with committing an indecent act with a child contrary to **Section 11(1) of the Sexual Offences Act No. 3 of 2005**.

The particulars being that on the 14th day of December 2013 in Masaba North District within Nyamira County intentionally touched the buttocks of **T J N**, a child aged 12 years.

Duly charged, he denied the charge, the trial ensued. He was found guilty and convicted of the offence of Attempted Defilement under **Section 215 of the Criminal Procedure Code**.

Consequently, he was sentenced to 10 years **Under Section 9(2) of the Sexual Offences Act No.3 of 2006**.

However, the appellant being dissatisfied lodged his appeal against both the conviction and the sentence.

He has 6 (six) grounds of appeal hereto, and they are:

1. The learned trial magistrate erred in law and misdirected herself fundamentally in the first instance by placing the appellant on his defence when the prosecution had not made out a prime take case against the appellant.
2. The learned trial magistrate erred in law and herself fundamental in relaying on uncorroborated

evidence.

3. The learned trial magistrate misdirected herself the burden of proof to the appellant.
4. The learned trial magistrate erred in law in not making distinction between identification and recognition and basing she is conviction on identification.
5. The learned trial magistrate grossly misdirected herself in not considering the Alibi defense of the appellant and instead shifted the burden of proof.
6. The learned trial magistrate erred in handling down excessive sentences in the circumstances of the case.

Submissions by the Appellant

Bwonwong'a for the appellant did not, in his submissions rely on his grounds of appeal, supra.

Instead introduced other grounds.

He submitted as follows:

1. That the learned trial magistrate gave a judgement without considering the evidence of the defence.
2. That if attempted defilement is an insertion into a vagina, the appellant never attempted to insert his penis into the vagina of **T J N**
3. P.W.1 says the appellant asked her to turn in opposed direction. Therefore, no penetration took place into the vagina of this lady.
4. P.W.1. says, appellant touched her buttocks. Therefore, the insertion into the vagina and anus of the minor did not take place.
5. That if penetration took place, there should have been spermatozoa and/or some bruises, could have been detected on the minor.
6. That no birth certificate was produced to ascertain the age of the minor, it could be, in the absence of birth certificate, that the minor was over 18 years.
7. That this was a case of indecent assault, not attempted defilement.
8. That the complainant did not see the inner clothes the accused was wearing.
9. That from the entire proceedings it is clear that there was no penetration and therefore the learned magistrate convicted the appellant on no good grounds, the case could have been indecent assault.
10. That I urge this court to quash the sentence and the appellant set free.

Submissions by the Respondent

The respondent, through the learned friend, Malesi, opposed the appeal. He submitted as follows:

1. The appellant, in effect, has abandoned his grounds of appeal dated 6th October 2013, by introducing, different grounds by submitting that the charge ought to have been indecent assault.

2. The appellant refers to the definition of defilement to Oxford English Dictionary. I submit this to be an error, as the act itself defines what defilement is, see **Section 2 (i) (d)**
3. That attempt defilement does not require penetration, either whole or partial. This appellant's submission is misplaced.
4. The prosecution did satisfy the ingredient of the offence of attempted defilement. I submit that the ingredient of the offence was indeed satisfied.
5. I submit that because the charge was attempted defilement, no insertion was expected and because there was no insertion, the doctor would have nothing to examine.
6. I submit that there is no corroboration by way of medical evidence, in sexual offence, I refer **S. 124 of Evidence Act.**
7. That on issue of age, I submit that this a rebuttable fact, which was never rebutted, P.W.1 – gives her age and gives the date of birth. I submit that it was upon the defense to rebut the same but did not.
8. That on issue of clothes, pants not having been produced, no useful purpose would this have achieved, as the appellant was caught in the act, I therefore submit this was unnecessary.
9. I urge the court to disallow the appeal and uphold the sentence and conviction.

The duty of the appellate Court

The duty of the first appellate court. It is common place that the first appellate court is mandated to reconsider and re-evaluate the evidence on record,

The proceedings in the lower court and testimonies thereof

P.W.1 –T J N – a minor complainant she narrates how the accused led her to the maize plantation, purportedly to chase away evil spirit and tried to rape her and was going to do so except her mother started call her in pitched voice. The accused also known as a **prophet in red Kanzu**, had also undressed to rape the girl.

P.W.2 –N K M, the mother of P.W.1. She corroborated what P.W.1. said.

P.W.3- 75952 CPL. Ibrahim, Bocha investigating officer at Keroka Police Station.

D.W.1 –Edward Musa Obondo denied even attempting to defile P.W.1

Findings and determination

On submissions, the appellant, in effect, abandoned his grounds of appeal dated 6th October, 2013 by introducing different grounds, i.e that the charge sheet ought to have read indecent assault, instead of attempted defilement.

I agree with the respondent submissions that in attempted defilement, there is no issue of penetration.

Equally, the appellant pursued different grounds introduced at the hearing, and this abandoned the ones on record.

Section 124 of Evidence act, permits the minor victims evidence to be relied on without corroboration P.W.2 found the accused making attempt to rape her daughter **T J**.

On re-evaluation of the evidence in the proceedings of the lower court on testimonies of the three (3) witnesses, leads one to find that those witnesses proved beyond reasonable doubt that the accused attempted to defile P.W.1, a minor aged 12 years. I therefore find that this appeal has no merit.

Accordingly, the appeal dated 6th October, 2013 be and is hereby dismissed.

Orders accordingly.

Dated and delivered at Nyamira High Court this 22nd day of April 2016.

C.B. NAGILLAH

JUDGE

In the presence of:

Bwonwong'a for appellant

Konga for the State

Mercy - Court clerk