



REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPENGURIA
CORAM: JUSTICE S.M GITHINJI
CRIMINAL APPEAL NUMBER 19 OF 2015

BETWEEN

JACKSON MWOTOT NGURAKAPEL.....APPELLANT

AND

REPUBLIC.....RESPONDENT

**(Appeal from conviction judgment of the Resident Magistrate at Kapenguria (M.M Wachira)
dated**

5th day of February, 2015

In

H.C.CR.A No. 19 of 2015)

FROM ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL CASE NO. 969 OF 2012

JUDGMENT OF THE COURT

The Appellant JACKSON MWOTOT NGURAKAPEL was charged in the lower court and convicted for the offence of defilement contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act No.3 of 2006.

The particulars of this offence are that on the 7th day of September 2012 at Kamatira Forest, within West Pokot County, the accused intentionally caused his penis to penetrate the vagina of C C, a girl aged 17years.

The appellant also faced an alternative charge of indecent Act with a child contrary to section 11(1) of the Sexual Offences Act No.3 of 2006.

The particulars herein being that on the 7th day of September, 2012 at Kamatira Forest, within West Pokot County, the appellant touched the buttocks of C C, a girl aged 17 years old.

The trial Magistrate found the appellant guilty of the offence in the Main court and convicted him. He was consequently sentenced to serve 15 years imprisonment. The appellant dissatisfied with the said conviction and sentence, filed an appeal before this court on the grounds that:-

- 1. There was no sufficient evidence to warrant the Magistrate make a finding of guilty.**
- 2. The elements of the offence were not proved beyond reasonable doubt.**
- 3. The witnesses were incredible**
- 4. The appellant defence was not properly weighed, and**
- 5. Crucial witnesses did not offer evidence**

The state opposed the appeal on the ground that the appellant was rightly convicted on the weight of the evidence adduced, of which proved the charge beyond reasonable doubt.

In summary, the prosecution case is that PW 3 is the father to the complainant who's PW 2 in this case. The father works as a cook at Mt. [particulars withheld] Secondary Siyoi, where the daughter (PW 2) was schooling in Form 3. The said daughter was 17 years old then. On 7/9/2012 PW 3 sent his daughter home at about 2 pm. The complainant while going home at about 5:00pm met the appellant. The appellant held her by the neck and strangled her. He wrestled her to the ground injuring her on the neck and knees. He tore her inner clothes. She was in a skirt of which he lifted up. He then lowered his trouser upto the knees. He lifted her legs and put his penis in her pant. He did not use protection. He did the act about two times. The complainant struggled, gained some strength and run away. She knew the appellant and his home. She went and reported the incident to her mother. They reported to the area chief and she was taken for treatment at Chepareria Health Centre. The following day she was taken to Kapenguria District Hospital where she was examined and the P -3 form filled.

The P-3 form which was filled by Doctor J.K Korir on 8/9/2012 shows that the complainant had bruises on the right elbow, right thigh and right knee. Nothing was noted on her genitalia in terms of injury or discharge. The Doctor did not make an opinion as to whether there was evidence of penetration or otherwise.

The appellant in his unsworn testimony denied the offence. He alleged that he was framed. The complainant had another husband and she gave birth on 7/9/2012.

Given that this is the first appeal I have weighed the entire evidence afresh. The complainant in her evidence in brief stated that:-

".....He lifted my leg. He put his penis in my pant." Section 8(1) of the sexual offences Act states that:-

"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."

"Penetration" is therefore an important ingredient for the offence of defilement. "Penetration" is defined under section 2 as the partial or complete insertion of the genital organs of a person into the genital organs of another person.

"Genital organs" is defined to include the whole or part of male or female genital organs and for purpose of the sexual offences Act, also anus.

The question which arises is whether there's any evidence adduced in this case by the prosecution to the effect that the complainant was penetrated. Complainant stated her inner clothes were tom. She did not specify which clothes. She went further to state the appellant put his penis in her pant. He did the act two times. The Doctor's evidence strongly suggests her genitalia was intact. He noted nothing and made no opinion as to whether she was penetrated or not. The prosecution had an obligation to establish that her genital organ was penetrated by the accused's genital organ. They did not. The complainant stated she gained some strength after struggling and managed to escape. These set of facts shows that the appellant

had intention of defiling her but did not managed to penetrate her as she managed to escape. He was therefore wrongly convicted for the offence of defilement of which ingredients were not established beyond reasonable doubt. He deserved an acquittal for the offence, I do therefore acquit him of the offence and quash the sentence of 15 years imprisonment.

However, as earlier on stated the offence of attempted defilement was proved by the prosecution beyond reasonable doubt. This being a lesser offence than that of defilement, the trial Magistrate was entitled to convict the appellant of it though it was not the offence he was charged with. Section 180 of the Criminal Procedure Code enables such.

It reads:-

"When a person is charged with an offence, he may be convicted of having attempted to commit that offence although he was not charged with the attempt."

I do correct the error and convict the appellant for the offence of attempted defilement contrary to section 9(1) as read with 9(2) of the Sexual Offences Act, and sentence him to the minimum period for the offence which is 10 years. This court so orders. The period served should be considered in the new sentence.

Judgment read and signed in the open court in presence of the appellant and the prosecutor Mr. Mark Nabuyumbu, this 22nd day of September, 2016.

STEPHEN GITHINJI, J

Judge

22/9/2016