



REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL NO. 128 OF 2014

BETWEEN

GEORGE OUMA OMBUYA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 49 of 2014 at the Principal Magistrate's Court at Ndhiwa, Hon. B.R Kipyegon, RM dated on 7th October 2014)

JUDGMENT

1. The appellant in the subordinate court was convicted of the offence of attempted defilement contrary to **section 9(1) and (2)** of the ***Sexual Offences Act***. The particulars of the charge were that on 31st January 2014 at East Kabuoch Location in Ndhiwa District, he intentionally attempted to cause his penis to penetrate the vagina of WAK, a child aged 16 years.
2. In addition, appellant faced an alternative charge of committing an indecent act with a child. At the same time and place he was alleged to have intentionally touched the breasts, buttocks and rubbed the vagina of WAK, a child aged 14 years with his penis.
3. The appellant's case is set out in the petition of appeal dated 21st October 2014 in which he challenges the conviction on the ground that there was lack of evidence to sustain the conviction, that there were contradictions in the testimony of the complainant (PW 1) and that the prosecution did not prove its case to the required standard.
4. Mr Odera, counsel for the appellant, submitted that the testimony of PW 1 was not corroborated and that PW 1 denied that the appellant had defiled her and that the appellant was framed and that the charges against him were the result of a grudge against him by PW 2, a teacher at the school.
5. Ms Ongeti, counsel for the respondent, was of the view that although the facts could not sustain a conviction on the offence of attempted defilement, there was sufficient evidence to support the alternative charge of an indecent act and that therefore the court should convict the appellant on the alternative charge.
6. As this is a first appeal, I am obliged to review and evaluate the evidence afresh and reach an independent conclusion as whether to uphold the conviction. In so doing an allowance should be made for the fact that I neither heard nor saw the witnesses testify.

7. When put on the stand to testify PW 1, the complainant, stated that on the night of 30th January 2014 she was found by the head teacher, PW 2, about to leave her dormitory. She told him that she was going to fetch water to drink. PW 2 told her to go and sleep. She also stated that when she entered the kitchen she found the appellant, a watchman, who asked to assist her with her assignment and when she declined he threatened to beat her and she ran away in the process, the appellant touched her breasts.
8. At the point of giving this testimony, the prosecutor informed the court that PW 1 was deviating from her original statement to the police. PW 1 responded as follows:

I have only told what the head teacher told me to come and say. It is true that what I have spoken is different from what really happened. What I initially told the police was the truth.

The court then recorded the following;

I have noted the concern raised by the prosecutor and as admitted by the minor. However, I shall now give a chance to the minor to narrate only that which happened to her and not what the head teacher advised her to come and say.

9. Thereafter PW1 testified how at 10 pm she went to the washrooms and when returned to the dorm, she met the watchman signaled to her and called her name. She went to pick her book, pencil, rubber and went to the kitchen where the appellant was. After talking to her, PW 1 testified as follows:

He begun to touch me on my upper arm and I pulled away at the door he held my breast using his hand. He had his phone in hand. He did not ask me for sex, though he only touched my breast. The head teacher suddenly walked into the kitchen and found the 2 of us inside. He inquired what we were doing and I told him I had gone there to take water. He then told me to go and sleep. I was not found under the table. I was in the kitchen and I wore a skirt, shirt and sweater. He held my breast from outside my clothing. We stayed in the kitchen for about 30 minutes. Other pupils were in the dormitory except me. I was born in 1998 and I have a birth certificate.

10. PW 2, the teacher, testified that on the material day he proceeded to the school after being called on phone that something was going on in the school. He was joined by the school manager and they proceeded to the kitchen. They met the appellant some distance from the kitchen and asked him what was happening. At first he denied that there was anything but he admitted that there was a woman from outside the school in the kitchen. When got into the kitchen, he found PW 1 under a table. He told her to go back to the dormitory. He testified that the appellant ran away.
11. PW 3, a clinical officer at Ndhiwa District Hospital, examined PW1 on 1st February 2014. His examination did not disclose anything other than normal genitalia. She concluded that PW 1 had sexual intercourse before the incident. Likewise she examined the appellant on his penis but did not find anything that would indicate he had sexual intercourse. PW 4, a police officer at Ndhiwa Police Station, was at the Station when the appellant and complainant were arrested after being brought from Rianga DO's office. He conducted investigations and organized for the medical examination to be carried out on them. The final prosecution witness was PW 1's father, PW5, who produced the original birth certificate which showed PW 1 was born on 12th June 1998.
12. The accused gave a sworn statement when he was put on his defence. As regards the events of 29th January 2014, the appellant testified as follows:

They left to sleep at 9.30pm and after lights off on the bathrooms, I went to a hostel within the school compound. On coming back, I found lights on and I went to check. I asked who was around and I was afraid. I saw someone touch the rope and I switched on my torch. I

saw she was a girl and I called her. She did not come near me and I asked her what she was up to. She had touched clothes on the hanging line. Unfortunately, the teacher was around and he found me standing just apart with the girl. The teacher asked what I was doing and asked the girl what she was doing. The girl said she had gone to the toilet and was asked to go and sleep. I went on with my work to the next day when I was called by the school manager and alleged I was found trying to defile a girl. I asked the head teacher what had happened and he said never accused me of defilement.

13. The learned magistrate found the appellant guilty of attempted defilement on the facts presented by the prosecution. **Section 9** of the **Sexual Offences Act** refers to an attempted defilement as an act which would cause penetration. It states as follows;

9(1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.

14. In **Francis Mutuku Nzangi v Republic** NRB CA Crim. Appeal No. 358 of 2010 [2013]eKLR, the Court of Appeal elucidated the meaning of an attempt, as defined by **section 388** of the **Penal Code (Chapter 63 of the Laws of Kenya)** as follows;

Our understanding of this provisions is that if a person conceives an idea or plan to commit an offence and sets out to effectuate the intention by taking definite steps or puts in motion a chain of events or state of things calculated to attain that objective as manifested by some open and discernible act or acts but fails to achieve his objective, he will be guilty only of an attempt to commit the offence. The attempt is proved whether or not that person did all the acts necessary to perfect the offence and quite irrespective of what intervening act or change of heart may have aborted the fulfillment. It also matters not that circumstances did in fact exist, unbeknown to the person, that would have rendered his success impossible.

15. From the evidence I have outlined, I agree with learned counsel for the State, that the offence of attempted defilement was not proved. The appellant did not do anything that would point to an attempt to effect penetration. I therefore find that the charge of attempted defilement was not proved and therefore the conviction is quashed in that regard.

16. Was the alternative charge of indecent act with a child proved? Under **section 2** of the **Sexual Offences Act**, an “indecent act” is defined as follows;

an unlawful intentional act which causes:

- a. *Any contact between any part of the body of a person the genital organs, breast or buttock of another, but does not include an act that cause penetration*
- b. *Exposure or display of any phonographic material to any person against his or her will.*

17. What happened in the room was really the PW 1’s word against the appellant. PW 1 gave clear testimony of what happened after she had been cautioned by the court to tell the truth. The appellant who cross-examined her did not shake her testimony or put to her his version of events as stated in his defence. What in fact emerged from the cross-examination is that the appellant knew PW 1 prior to the incident. The appellant’s defence put him together with PW 1 at night although his version is that he was outside when he was caught but both PW 1 and PW 2 put the scene of incident in the kitchen.

18. The evidence of PW 1 was credible. There was no reason for PW 1 to lie or implicate the appellant. The learned magistrate was persuaded the PW 1 spoke the truth after she had been told to tell speak the truth. In the circumstances, and in light of the proviso to **section 124** of the **Evidence Act (Chapter 80 of the Laws of Kenya)** it was not necessary that her testimony be corroborated as long as the learned magistrate was satisfied that PW 1 was telling the truth and recorded the reasons.

19. The appellant contends that the charges against him were trumped up. I am not persuaded particularly because the initial testimony of PW 1 in which she stated that she had been told what to say to the court by PW 2 tended to absolve the appellant. Furthermore, no questions were put to PW 2 to suggest that there was a grudge or that the charges were trumped up.
20. I therefore find that there was sufficient evidence to support for conviction on the alternative charge of committing an indecent act with a child contrary to **section 11(1)** of the ***Sexual Offences Act***. The charge sheet stated that the appellant intentionally touched the breasts, buttocks and rubbed the vagina of PW 1. The evidence though is clear that the appellant only touched PW 1's breasts. I do not think that the variance between the charge and the evidence is fatal to the prosecution case as the essence of the offence of an indecent act with a child is intentionally making contact with the breasts, buttock or genital organs of the child. In this case the appellant intentionally touched her breast. As the offence was proved, I convict him.
21. Under **section 11(1)** of the ***Sexual Offences Act***, it is only necessary to prove that the victim is a child. In this case PW 5 provided a birth certificate to show that PW 2 was born in 1998 which confirms that she was 16 years old. She was a school going girl and there was no suggestion that she was an adult. Although the charge sheet as drawn showed two contradictory ages, I do not think that the appellant was prejudiced particularly in light of the nature of the offence which only requires proof that the offender is a child.
22. A mandatory minimum sentence of not less than 10 years imprisonment is prescribed under **section 11(1)** of the ***Act***. I therefore sentence him to 10 years in that respect.
23. I allow the appeal only to the extent that I quash the conviction for attempted defilement and substitute it with a conviction for an indecent act with a child contrary to **section 11(1)** of the ***Sexual Offences Act***. The appellant is sentenced to 10 years imprisonment to run from the time of the original conviction.

DATED and DELIVERED at HOMA BAY this 20th day of March 2015.

D.S. MAJANJA

JUDGE

Mr Odero instructed by Odero Osiemo and Company Advocates for the appellant.

Mr Oluoch, Senior Assistant Director of Public Prosecutions, instructed by the Office of Director of Public Prosecutions for the respondent.