REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 139 OF 2013

EDWARD OTIENO OUKO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case No. 854 of 2013 in the Senior Principal Magistrate's court at Nyando)

J U D G M E N T

1). The appellant was charged with the offence of Defilement contrary to section 8 (1) (2) of the Sexual Offences Act No. 3 of 2006. The particulars are that on the 22nd day of May 2013 at [particuluars withheld]village, West Koguta sub location in Nyakach District within Kisumu County intentionally caused his penis to penetrate the vagina of I A O, a child aged 6 years. He was equally charged with an alternative count namely indecent assault contrary to section 11 (1) of the Sexual Offences Act No. 8 of 2001. The appellant was convicted after full trial and sentenced to life imprisonment.

2). Briefly the facts were that the complainant who was 8 years old was going home from school at around 2 p.m on the material day. The appellant chased her into a bush and attempted to defile her. Because of her shouts PW3 and PW4 heard and came to her rescue. The appellant was then arrested and taken to Sondu Miriu police station. The minor was taken to hospital by PW2 her father where a P3 form was filled and was at the same time treated.

3). PW5 Dr. Omwenga Peter from Nyakach District hospital told the court that:

> **"there were no bruises, hymen appeared not perforated though there was tenderness on examination".**

4). In his unsworn evidence the appellant simply denied the charge. He only described how he was arrested while at his maternal uncles home.

5). I have perused the entire evidence on record and listen to the oral submissions by the state and the appellant. The duty of this court is to reevaluate the evidence afresh with a view of arriving at a fresh and independent finding. See **Okeno -VS- Republic [1972] EA 32**.

It is clear that the offence took place at 2 p.m which was obviously day time. PW3 and PW4 testimony that they found the appellant in the act clearly corroborates the minor's testimony. The entire process that led to the subsequent arrest by the appellant was never displaced during cross examination nor in his

defence. I do therefore hold that the prosecution proved its case against the appellant.

6). The next pertinent issue to determine is whether the minor was really defiled. The P3 form and the subsequent testimony by PW5 the doctor suggest that there was no penetration. The doctor found that there was tenderness on the thighs but there was no actual penetration. One of the key ingredients in proving defilement is penetration. In this regard I do not find any such evidence.

7). In the premises having found as shown above, the only option available is for this court to interfere with the charge and sentence pursuant to the provision of section 354 of the Criminal Procedure Act. The proper charge should have been attempted defilement. PW3 and PW4 in reality rescued the minor from the appellant who was in the exercise of defiling her. His mission thankfully was not fully accomplished. As found above the evidence no evidence leading to defilement was availed. There was no penetration which is a key ingredient. Consequently and having found that the proper charge ought to have been Attempted Defilement under section 9 of the Sexual Offences Act, it follows that the sentence ought to be changed too. The sentence under section 9 (2) give a maximum period of a custodial sentence of 10 years.

8). Taking into consideration the circumstances herein I find that the appellant had it not for the two witnesses PW3 and PW4 he would have accomplished his heinous act. I there fore reduce the sentence from live imprisonment to 10 years custodial sentences. This shall I believe cause the appellant to learn a life long lesson.

Orders accordingly.

Dated, signed and delivered Kisumu this 27th day of November, 2014.

H.K. CHEMITEI

JUDGE