IN THE HIGH COURT AT MIGORI

CRIMINAL APPEAL NO. 32 OF 2014

(FORMERLY KISII HCCR APPEAL NO. 85 OF 2011)

BETWEEN

EVANS OBIMA GISEGE …..…….. APPELLANT

AND

REPUBLIC …..…….…….. RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 597 of 2010 at Senior Principal Magistrate's Court at Migori , Hon. K. Sambu, SRM dated on 14th April 2011)

JUDGMENT

1. In the subordinate court, **EVANS OBIMA GISEGE** was charged with the offence of attempted defilement contrary to **section 9(1)** and **(2)** of the ***Sexual Offences Act, 2006***. He was convicted and sentenced to 10 years imprisonment. The particulars of charge against the appellant were that on 21st July 2010 at ***[Particulars Withheld***] in Migori District, he intentionally attempted to cause his penis to penetrate the vagina of I E, a female child aged 14 years. He also faced an alternative charge of committing an indecent act with a child contrary to **section 11(1)** of the ***Sexual Offences Act, 2006*** based on the same facts.

2. The prosecution called 6 witnesses to prove the case against the appellant. The first prosecution witness was the complainant, PW 1, who testified that she was a primary school student in standard 4. She testified that on 21st July 2010 at about 8.30 pm she was at Alfroze Bar when the appellant called her to accompany him to another bar where he took her on a motor cycle and bought her soda. Thereafter, he took her to a room, removed his clothes and forced her to remove her clothes. She stated that he slept on her and placed his penis in her vagina for a few minutes causing her to scream. She stated that the scream attracted two police officers who came to the room and ordered them to put on their clothes and arrested them. They were taken to Stella AP Camp and thereafter to Migori Police Station. She was later taken to Migori Distict Hospital where she was examined.

3. PW 2, an officer attached to Stella AP Camp, testified that on 21st July 2010 he was called by the Uriri District Officer who told him was told go to Stella Lodge where there was a person who was boarding with a child. He went there with another officer, PW 4 and found the appellant, dressed in vest with PW 1 naked on the bed. He arrested both of them and took them to the AP Camp and later to Migori Police Station the next morning. PW 4 testified that he was with PW 2 when they found the appellant with PW 1 in the lodging.

4. PW 3, the mother of PW 1, produced her daughter's baptisimal card. She recalled that on 26th July 2010, she received information that her daughter had been arrested and that she was under police custody at Migori Police Station. She went to the Station and indeed confirmed she was the one and that she had been missing prior to the incident. She also testified that PW 1 was mentally ill.

5. PW 5, the investigating officer from Awendo Police Station, testified that he investigated the matter, took statements, organised for the accused and PW 1 to be examined at Migori District Hospital.

6. PW 6, a gynaecologist, examined PW 2 on 22nd July 2014 and filled the P3 form. He examined PW 1's clothing and noted that there were no stains. There was no discharge in her genitalia, no spermatozoa were seen and the HIV test was negative. He assessed her age to be about 14 – 15 years. He could not confirm whether sexual intercourse had taken place though he noted that PW 1 was sexually active.

7. When put on his defence, the appellant elected to give an unsworn statement. He denied committing the offence. He stated that on the material day he had quarrelled with his wife, who worked at prison. She called him and asked him to take her uniform to her which he did at about 1 pm. Later at about 7 pm he went to Migori expecting his wife to call him. When she did not, he decided to go to his home and while he was one the way someone got hold of him. Two men in jungle clothes asked him to identify himself and placed him under arrest. He was not informed the reason for his arrest. He was taken by matatu to Kakrao and upon arrival he was escorted to an AP Camp and placed under arrest. He was later placed in a Landrover where he saw a young girl seated at the rear. He was taken to Migori Police Station thereafter.

8. The appellant now appeals against the conviction and sentence principally on the ground that he was not the one who committed the offence. The appellant filed supplementary grounds of appeal and written submissions. He added that there was no discharge on the victim's genitalia, that no exhibit was recovered by the policemen, that the charge sheet was defective as the dates of arrest did not correspond with the one in proceedings, that there was no proof of age of the victim and that there was no corroboration of the prosecution evidence. The appellant contended that the trial magistrate failed to consider his defence. Ms Owenga, learned counsel for the State, submitted that all the elements of the offence were proved and that the sentence was within the law.

9. The case for the appellant calls upon the court to re-evaluate the evidence and make its own independent findings having regard to the fact that it never heard or saw the witnesses testify (see ***Okeno v Republic*** **[1973]EA 32**).

10. The offence which the appellant was facing was an attempt to defile a child. The ingredients of the offence of defilement are set out in **section 8(1)** of the ***Sexual Offences Act*** and are satisfied when the prosecution proves that a person has committed an act which causes penetration with a child. *"Penetration"* under **section 2** of the ***Act***, means, *"the partial or complete insertion of the genital organs of a person into the genital organs of another person."* Thus the prosecution must prove that there was an attempt at penetration of a child.

11. The first issue is whether it is the appellant who committed the offence. PW 1 gave clear testimony on how she was sexually assaulted. She was with the appellant from the time he picked her up, had a drink with her at a bar and when they went to the room. PW 2 and PW 4 caught the appellant with PW 1 in the lodging room and arrested them while PW 5 received them at Migori Police Station. The chain of events from the time the appellant was caught with PW 1 up to the time of his arrest leaves no doubt as to his identity and his presence in the company of PW 1.

12. The appellant's statement that he was framed by his wife has no merit. He did not put any questions to PW 2 and PW 4 which would suggest that he was not arrested at the lodge, was arrested at some other place or that he was being framed by his wife.

13. The next question is whether there was an attempt at penetration. **Section 388** of the ***Penal Code (Chapter 63 of the Laws of Kenya)*** defines an attempt as follows;

> *388. (1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.*
>
> *(2) It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfillment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.*
>
> *(3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence.*

14. In ***Francis Mutuku Nzangi v Republic*** **NRB CA Crim. Appeal No. 358 of 2010 [2013]eKLR**, the Court of Appeal recapitulated the provisions 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. PW 1 gave clear testimony how the appellant tried to insert his penis in her vagina for a few minutes before she screamed proves that there was an attempt at penetration. Although the testimony of PW 1 could be believed and no corroboration was required in accordance with the proviso to **section 124** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)***, additional facts supported the prosecution case. First, the appellant was found in a lodging room with PW 1, a child. Second, the testimony of PW 2 and PW 4, who found the appellant, in a state of undress. In light of these facts, the evidence of PW6 that he could not tell whether PW 1 had sexual intercourse neither added nor subtracted from the prosecution case. I therefore find and hold that the prosecution proved attempted penetration.

16. The appellant argued that the age of the complainant was not proved as her birth certificate was not produced. Under **section 9** of the ***Sexual Offences Act***, the prosecution need only prove that the victim is a child. Under the ***Children Act***, a child is a person is under the age of 18 years. The proof of age is a question of fact. In support of the fact that PW 1 was a child, the complainant herself testified that she was in Class 4. PW 3, her mother, testified she was born on 24th April 1997 and she produced a baptismal card and confirmed that she was in Class 4. Finally, PW 6 assessed the age of PW 1 and found that she was between 15 – 16 years old. All this evidence points to the fact that PW 1 was a child.

17. I have also looked at the manner of framing the charge and it complies with the law as it sets out the facts that constitute the offence which the appellant was convicted. Although it refers to **section 9(1)(2)** of the ***Sexual Offences Act*** which does not exist, the appellant was not prejudiced in any way.

18. I affirm the conviction and sentence. The appeal dismissed.

DATED and DLIVERED at MIGORI this 21st day of November 2014.

D.S. MAJANJA

JUDGE

Appellant in person.

Ms Owenga, Senior Prosecution Counsel, instructed by Office of the Director of Public Prosecutions for the respondent.