

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

HIGH COURT CRIMINAL APPEAL NO. 99 OF 2011

BETWEEN

ALEXANDER KINYUA NJERU APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Siakago Criminal Case No. 890 of 2010 by Hon. S.M. Mokuu P.M. on 15th June, 2011)

JUDGMENT

1. At the Magistrate's court, the appellant faced two charges in the alternative. The first one was defilement contrary to **section 8(1) and (2)** of the ***Sexual Offences Act*** and the alternative charge was that of indecent act with a child contrary to **section 11(1)** of ***Sexual Offences Act***. After trial, the appellant was convicted of the offence of attempted defilement.
2. The prosecution case was proved by seven witnesses. PW 1, the child's mother testified that the appellant was her employee. On 15th November 2010 at about lunch time, she requested the appellant to go to the kitchen and eat. She went about her chores but could not see her daughter FMN. When she did not see her, she set about looking for her. She found the appellant holding the child who did not have the pants on. Immediately, he saw her, he dropped the child and pulled up his trouser. She immediately called PW3, a business lady and village elder who organized members of the public to apprehend the appellant.
3. PW2 was the son of the complainant. He testified that after looking after cattle, he decided to go home for lunch. When he arrived, he heard the child and mother screaming. When he approached his mother, he saw a white discharge on the child's private parts. This discharge was also on the child's clothing. The complainant did not have her panty on. He stated that the complainant, his mother, undressed the complainant and took her to hospital. He did not take the child's under pant as he was threatened by the appellant.
4. After the incident, the complainant was taken to Kivaa Health Center. PW 4, a clinical officer, testified that he had bruises on the shoulders and upper back and that his trousers had a dried discharge around the zip area. PW 6, a medical doctor was allowed to give evidence based on the report of Dr Mwangi who was no longer available. According to the P3 forms, the child clothes had already been changed, the hymen intact, there was no vaginal discharge and injury noted and the external genitalia were intact. The swab examined did not show any spermatozoa.
5. On the basis of the evidence, the learned Magistrate dismissed the charge of defilement as no penetration was proved but found that the offence of attempted defilement was established.
6. The first appellate court is bound to review the evidence and come to its own conclusions bearing in mind that it neither saw nor heard the witnesses. I have considered the evidence and I do not find an error in the manner the Magistrate analyzed the facts. The prosecution proved the offence of attempted defilement beyond reasonable doubt.

7. The appellant has complained that his defence was not considered. In his unsworn statement, the appellant testified that he was not at the scene of the incident but was at Ishiara where he had gone to see his daughter. The learned Magistrate dismissed this alibi on the basis that the appellant was arrested at Gitaru and taken to Gitaru police station by members of the public as such he could not have been at Ishiara. I agree with this conclusion.
8. The appellant also challenges the judgment on the ground that the child did not express himself and all the evidence came from the mother. It is not necessary for a child who is a victim to testify, what is important is for the prosecution to prove the offence of defilement or attempted defilement through credible evidence beyond reasonable doubt. I am satisfied in this case, the prosecution discharged its burden. In this case, the appellant was caught with the child and his trousers were down suggesting that he was in the process of committing the of defilement.
9. Finally, the appellant has attacked the judgment on the ground that the charge sheet showed that the age of the child was 4 ½ years yet the evidence of the notification of birth showed that the child was born on 16th March, 2009. At the time the case was instituted, the child was one year, eight months. In dealing with this issue, the learned Magistrate noted as follows: ***“In the first place, in case the charge herein was that of defilement, the age of the victim could not have affected the sentence as it is within the same age bracket. Further it could not have prejudiced the accused in his defence. Therefore, I find that the anomaly in the age as per the charge sheet and birth notification causes no prejudice.”*** Like the learned magistrate, I conclude that the manner in which the charge was framed did not prejudice the appellant.
10. The accused was sentenced to imprisonment for a term of 10 years. Under **section 9(2)** of the ***Sexual Offences Act***, this is the minimum sentence. In the circumstances, I find no error in this respect and I decline to intervene.
11. The appeal be and is hereby dismissed.

DATED, SIGNED and DELIVERED at EMBU this 30th day of October 2013

D. S. MAJANJA

JUDGE