



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 01 OF 2019

NICHOLAS KAVESI NZUEAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From the original conviction and sentence of Hon. E. Muiro (SRM) in Kilungu Senior Resident Magistrate's Court Sexual Case No. 67 of 2018 delivered on 4th January, 2019).

JUDGMENT

1. The Appellant was charged in the subordinate court with attempted defilement contrary to section 9(1) (2) of the Sexual Offences Act No. 3 of 2006 and in the alternative with committing an indecent act with a child contrary to Section 11(1) of the same Act
2. After a full trial he was convicted of the main count of attempted defilement whose particulars were that on 15th October 2018 at [particulars withheld] Village Mwaani Sub-Location, Ilima Location in Kilungu Sub County within Makueni County intentionally attempted to penetrate the vagina of PWK a child aged 14 years, and was sentenced to serve 10 years imprisonment.
3. Dissatisfied with the decision of the trial court, the Appellant has come to this court on appeal, with his amended grounds of appeal which he relied being as follows:-
 1. *The learned magistrate erred both in law and fact by convicting him on hearsay evidence.*
 2. *The learned trial magistrate erred on point of law and fact by failing to find that the prosecution case was not proved beyond reasonable doubt.*
 3. *The learned magistrate erred on point of law and fact by failing to appreciate that the appellant was not fully informed of all his constitutional rights contrary to Article 49(1) (a) and Article 50(1) (2) (a) (b) of the constitution occasioning serious dereliction of justice.*
 4. *The learned trial magistrate erred in law and facts by failing to find that there was no investigating officer's report.*
4. The Appellant filed written submissions to the appeal, but the Director of Public Prosecution did not file any written submissions and Ms. Gitau who appeared in court for the State informed the court that they would not file any written submissions and left it to the court to decide the appeal. The Appellant on its part relied upon the written submissions.
5. This being a first appeal, I am required to re-evaluate the evidence on record and come to my own independent conclusions and inferences – See **Okeno –Vs- Republic [1972] E.A 32**.
6. I have re-evaluated the evidence on record and considered the written submissions of the Appellant. I note that the appellant relied on the case of **Michael Mugo Musyoka –vs- republic (2015)** in supporting his contention that the evidence of the prosecution did not prove an offence of attempted defilement by him.
7. I also note that at the trial the prosecution called 5 witnesses including the Complainant PWK who testified as Pw1. The evidence of Pw1 and that of **Pw2 Titus Wambua** and **Pw3 Regina Mueni Mutuku** was to the effect that between about 5.00 a.m. – 5.30 a.m. on the material day, the Appellant and PW1 entered an unoccupied house which had no door, and as the Appellant unzipped his trousers to have sexual intercourse with the Complainant, Pw2 and Pw3 entered the premises and the Appellant then zipped his trousers, and the Complainant who was a primary school girl was then told to go to school. As a consequence of this incident the Appellant was arrested and charged with the offence. This was the prosecution evidence.

8. The Appellant on his part in his unsworn defence admitted meeting the girl (complainant) that morning who bought bread from him on her way to school but could not pay the cost.

9. The Appellant was convicted of an 'attempt' to commit defilement. The Sexual Offences Act does not define what constitutes an attempt. The Penal Code (Cap. 63 of the Laws of Kenya) under section 388 however defines 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 fulfillment and manifests his intention by some overt act, but does not fulfill 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 as regards punishment whether the offender does all that is necessary on his part for completion of the commission of the offence, or whether the complete fulfillment of his intention is prevented by circumstance 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 circumstance not known to the offender it is impossible in fact to commit the offence.

10. Having evaluated the evidence on record from Pw1, Pw2 and Pw3 and the Appellant's unsworn defence, I find that indeed the prosecution proved beyond any reasonable doubt that the Appellant attempted to have sexual intercourse with the Complainant Pw1, but was interrupted by the appearance of Pw2 and Pw3 which caused him to zip his unzipped trousers and stop his attempt.

11. There is no evidence that Pw1 objected to the attempt by the appellant to have sexual intercourse with her. However, her consent if she was a minor is no consent at all. The question is, was the age of the Complainant proved by the prosecution to be below 18 years?

12. The age of the Complainant in a defilement case is a necessary ingredient of the offence under Section 9 of the Sexual Offences Act No. 3 of 2006 as the victim has to be a child, as defined under the Act, since an adult which means a person who is aged above 18 years cannot be defiled.

13. In the charge sheet, the Complainant (Pw1) is described as being a child of 14 years. In her *voire dire* examination, she said that she was 13 years old but could not remember her date of birth.

14. In her sworn evidence however, Pw1 did not say anything about her age and no other witness testified on her age. The Complainant merely said in her sworn evidence that she was a Standard 6 pupil at [particulars withheld] Primary School.

15. With the above evidence on record, in my view, the prosecution failed to prove beyond reasonable doubt that the Complainant Pw1 was below 18 years of age. Being a primary school pupil in Standard 6 alone is not proof of the age of a person, since some people go to school late in life. I thus find that the prosecution failed to prove that the age of the Complainant was below 18 years, and on that account alone, the appeal will succeed.

16. I thus allow the appeal, quash the conviction and set aside the sentence. I order that the Appellant be set at liberty unless otherwise lawfully held.

Delivered, signed & dated this 10th day of February, 2021, in open court at Makueni.

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GEORGE DULU

JUDGE