REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CRIMINAL APPEAL NO. 26B OF 2018

EZEKIEL OTIENO KAGERA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal case No.1018 of 2014 of the

Chief Magistrate's Court at Homa Bay by Hon. P.Gichohi–Chief Magistrate)

JUDGMENT

1. Ezekiel Otieno Kagera, the appellant herein, was convicted for the offence of attempted defilement contrary to section 9 (1) (2) [sic] of the Sexual Offences Act No.3 of 2006.

2. The particulars of the offence were that on the 7th day of September, 2014 at [particulars withheld], Homa Bay District within Homa Bay County intentionally attempted to cause his penis to penetrate the vagina of HA. a child aged 12 years.

3. The appellant was sentenced to serve 10 years imprisonment. He has appealed against both conviction and sentence.

4. The appellant was in person. He raised grounds of appeal as follows:

a) That the learned trial magistrate erred in law and in fact relying on medical evidence that did not link him to the offence.

b) That the learned trial magistrate erred in law and in fact by convicting on insufficient evidence.

5. The appeal was opposed by the state through Mr. Ochengo, learned counsel.

6. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32.**

7. Section 9 (1) (2) of the Sexual Offences Act does not exist. The charge to that extent was erroneously drafted. It ought to have read:

…contrary to section 9 (1) as read with section 9 (2) of the Sexual Offences Act …

Since the appellant fully participated in the trial, I find that he was not in any way prejudiced and the error is curable under section 382 of the Criminal Procedure Code.

8. According to the evidence of H.A. (PW1), the appellant defiled her after he had removed her underpants. Her evidence was graphical on how he did it.

9. RAO (PW2), the complainant's mother testified after the complainant had taken too long, she went to check on her. She had sent her to the house of the appellant to fetch a hoe. She met with her at the door while she was holding her underpants. When she later checked her genitalia, she saw some discharge.

10. When Dr. Mutai Mercy (PW3) examined the complainant, she concluded that there was attempted penetration due to foul smelling discharge.

11. An attempt to commit a crime is defined in **the Oxford Concise Law Dictionary (2nd Edition)** as:

> **Any act that is more than merely preparatory to the intended commission of a crime; this act is itself a crime.**

For an attempted offence to be committed, the actions complained of must pass the **"but for**" test. In the instant case, we do not have evidence of the circumstances that prevented the defilement to be completed.

12. The evidence on record is contradictory. The complainant and her mother contend that there was defilement. Given the age of the complainant one is left wondering why she did not cry out of pain and why there were no tell-tale signs.

13. Whereas the medical evidence was clear that there was no defilement, it introduced another angle to the case. Since when did a foul smell from the perineum (not from the vagina) become evidence of attempted penetration? This was a professional deceit. Perineum is described by **the Concise Oxford Dictionary** as:

> **The area between the anus and the scrotum or vulva.**

14. When the learned trial magistrate conducted voir dire, she concluded as follows:

> **The child is intelligent and very brave. She is friendly smiling all the time apparently encouraged by the atmosphere in court…**

15. This was contrary to the evidence of the complaint's mother who testified that the child was mentally challenged. The same came from the evidence of Dr. Mutai Mercy (PW3). Had the trial magistrate appreciated this fact on her observation, she could have been keener in taking the complainant's evidence.

16. I am persuaded to arrive at a verdict that the prosecution did not prove its case against the appellant. Consequently, I quash the conviction and set aside the sentence. The appellant is set at liberty unless if otherwise lawfully held.

DELIVERED AND SIGNED AT HOMA BAY THIS 21ST DAY OF JULY, 2021.

KIARIE WAWERU KIARIE

JUDGE