



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. E064 OF 2021

BETWEEN

RIMITA MUTETHIA RUKUNGA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence in Criminal Case S.O No. E009 of 2020 in the

Principal Magistrate's Court at Tigania by Hon. A Hon. G. Sogomo (PM) on 19.03.2021)

JUDGMENT

The charge

1) **RIMITA MUTETHIA RUKUNGA** (*Appellant*) has filed this appeal against sentence and conviction on a charge of attempted defilement contrary to section 9(1) as read with section 9(2) of the Sexual Offences Act No. 3 of 2006 (**the Act**). The offence was allegedly committed on 16th October, 2020 against **FK** a child aged 15 years.

Prosecution case

2) The prosecution called a total of four (4) witnesses in support of its case. The prosecution case as narrated by the **PW1 FK** the complainant stated he was 15 years old and in form 1. 4 witnesses in support thereof. He stated that on the material date, he was hawking eggs within Muthara market when he met Appellant to whom he sold 1 eggs. That at about 10. 00 am, Appellant then called him into his nearby house and as he was shelling another egg for him and it was then that Appellant threw him on his bed and strangled to defile him but he fought back making Appellant's attempt unsuccessful. That Appellant locked him in the house till about 6,00 pm when he returned drunk and when he fell asleep, complainant escaped. Complainant arrived home distraught to find his father **PW2 AM**, who escorted him to the police station where the matter was reported. He told the court that complainant reported that a man known as KIONGOZI attempted to defile him and police identified the said person as the Appellant herein.

3) Complainant was on 19.11,2020 examined by **PW3 Kenneth Kimathi**, a clinician who found him with nail scratch marks on the anterior part of the neck, and tender swellings on the right arm. He produced the P3 form as PEXH.1. **PW4 PC John Rotich**, investigated the complainant's complaint and caused Appellant to be charged. He tendered a copy of complainant's certificate of birth which demonstrates that he was born on 30.05.2005.

Defence case

4) In his sworn evidence, Appellant denied the charges and said he was only came to know the complainant after he was arrested and charged.

5) *In a judgment* dated on 19.03.2021, Appellant was convicted and sentenced to serve an imprisonment term of 10 years.

The appeal

6) Aggrieved by this decision, the Appellant lodged the instant appeal. From the amended grounds and written submissions filed on 30.04.2021, Appellant raises grounds that:

1. **Prosecution did not prove the ingredients of attempted defilement**
2. **Defence case was not considered**

Analysis and Determination

7) It is a duty to re-evaluate, re-analyze and re-consider the whole evidence in a fresh and exhaustive way before arriving at its own independent decision. (See **Collins Akoyo Okemba & 2 Others vs Republic [2014] eKLR**).

8) I have considered the appeal in the light of the evidence on record, the grounds of appeal and submissions by the appellant and by the state I have identified the following issues for determination:

1. **Age of complainant**
2. **Attempted Penetration**
3. **Identification of the assailant**

Age of complainant

9) In the case In the case of **Charles Nega v Republic [2016] KLR**, the court stated:

“In an attempted defilement charge, the prosecution only has to tender evidence that the victim was below the age of eighteen years and not necessarily the specific age. Needless to say if the specific age is availed to a trial court it equally has a bearing in sentencing upon conviction.”

10) Complainant’s certificate of birth demonstrates that he was born on 30.05.2005 and was therefore 15 years when the offence was committed and thus a child as defined under Section 2 of the Children Act, Chapter 141 of the Laws of Kenya.

Attempted Penetration

11) **Section 9 of the Act under which Appellant was charged provides as follows:**

- 1) **A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.**
- 2) **A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years.**

12) **Section 388** of the Penal Code defines **“attempt”** as follows: -

(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.

13) The above section brings out the two main ingredients of an attempted offence; the ***mens rea*** which constitutes the intention and the ***actus reus*** which constitutes the overt act towards the execution of the intention.

14) From the evidence on record, I am persuaded that the intention of defiling the complainant was put into execution by locking him in the house and undressing him and were it not for the fact that he fought back, the intention to such an extent as to commit the offence would have been fulfilled.

Identification of the assailant

15) Complainant told court he knew Appellant by his name Mutethia as he had been buying eggs from him for 3 weeks. To his father PW2, complainant reported that the person that tried to defile him was one known as KIONGOZI. It was his father’s evidence that it was the police who said that Appellant was known as KIONGOZI.

16) Concerning the issue of recognition, the Court of Appeal in **Karaton Ole Lesarau v Republic [1988] eKLR** held as follows:

“Where, as here, identification is based on recognition by reason of long acquaintance, there is no better mode of identification than by name…….”.

17) Evidence by complainant that Appellant herein, whose name he did not disclose, was the assailant and there being no evidence that Appellant was also known as KIONGOZI leaves no doubt in my mind that the testimony of the complainant, is not free from the possibility of error. In view of this doubt, I find that the Appellant's conviction is unsafe.

18) In the result, I find that the appeal has merit. The conviction is quashed, the sentence set aside and it is hereby ordered that Appellant be forthwith set free unless he is otherwise lawfully held.

DELIVERED AT MERU THIS 18TH DAY OF NOVEMBER 2021

WAMAE.T. W. CHERERE

JUDGE

Court Assistant - Kinoti

Accused - Present in person

For the State - Ms. Mwaniki