



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO. 33 OF 2019

JOSEPH OWINO KHADUDU.....APPELLANT

VERSUS

REPUBLIC.....REPUBLIC

(From the original conviction and sentence in S.O.A. case No. 92 of 2018 of the

Chief Magistrate's Court at Busia by Hon.P.Y Kulecho – Senior Resident Magistrate)

JUDGMENT

1. The appellant, **Joseph Owino Khadudu**, was charged with an 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 22nd August 2018 within **BUSIA** County, intentionally attempted to cause his penis to penetrate the vagina of **ETM**, a child aged 3 years.
3. He was convicted after trial and sentenced to serve ten years imprisonment. He has appealed against both conviction and sentence.
4. The appellant was represented by Mr. Okutta, learned counsel. He raised six grounds of appeal that I have summarized as follows:
 - a) That the learned trial magistrate erred in law and in fact by convicting the appellant without sufficient evidence.
 - b) That the learned trial magistrate erred in law and in fact by shifting the burden of proof to the appellant.
 - c) That the learned trial magistrate erred in law and in fact by disregarding material evidence.
 - d) That the learned trial magistrate erred in law and in fact by substituting her opinion as evidence.
 - e) That the learned trial magistrate erred in law and in fact by failing to draw issues for determination.
5. **The state opposed the appeal through Mr. Gacharia, learned counsel, who contended that the conviction and sentence were proper.**
6. The facts of the prosecution case were briefly as follows:

The complainant's mother had left her daughter at home. She returned home at about 7 p.m. As she was approaching her house, she heard her daughter crying from the house of the appellant. She called her out and her daughter responded. The appellant took time to open the door. When he finally opened, her daughter emerged crying and holding her stomach. Her daughter did not tell her anything. When she examined her, she found her covered by some slimy substance which she suspected to be semen. She took her daughter for medical examination and the appellant was charged with the offence for which he was convicted and sentenced.
7. The appellant opted to remain silent at the close of the prosecution case.
8. 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**.

9. I have made very many observations on the manner of drafting of a charge. It would appear both the prosecution and the trial courts do not take heed of the same. Unlike a few years ago when the prosecutors were police officers who were not trained lawyers, the current crop of prosecutors are graduates of law schools. We expect them to perform better. Equally, the first duty of the court taking plea is to check whether the charge is appropriately drawn.

10. In the instant case, we do not have section 9 (1) (2) of the Sexual Offences Act. The same ought to have read "... contrary to section 9 (1) as read with section 9 (2)" I hope in future these basic mistakes of draftsmanship will be detected and rectified at the appropriate time.

11. From the proceedings herein, I notice that the appellant understood the charge facing him in spite of the error. I therefore find that the error is curable under section 382 of the Criminal Procedure Code.

12. An attempted offence is established when the acts of an accused person have gone beyond mere preparation. 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 offence to be construed to be an attempt, it must pass the "but for" test. In the instant case therefore, I will endeavour to find whether the offence of attempted defilement was established.

13. The evidence of MA (PW1) and the complainant's mother is that when she heard her child cry and knocked at the appellant's door, the latter told him to wait before he opened the door. She however did not testify as to how long she waited before the door was opened. This would have given credence to her suspicion if she waited for an inordinate long time.

14. When she (PW1) examined her daughter, she said she was covered with a slimy substance which she suspected to be semen. The child was examined on the same day as was testified to by Kenneth Pyatich (PW3) a clinical officer. The treatment book which was produced as an exhibit and the evidence of PW3 do not support the averment of the complainant's mother that she was covered with a slimy substance.

15. The treatment book indicate that the complainant was seen at 9.52 p.m. on the same day. If there was a slimy substance at about 7 p.m. by the time of examination it would have dried. Since there was no evidence that the complainant had been bathed prior to being taken to hospital, the evidence of caking of the slimy substance could not have escaped the clinical officer who examined her.

16. The medical evidence of PW3 was very crucial for he was an independent person and the learned trial magistrate ought to have indicated why she did not rely on it.

17. Children cry all the time for various reasons. Female children are not exceptional. It was erroneous for the learned trial magistrate to conclude that just because the complainant herein cried from a locked house there must have been an attempt to defile her.

18. I find that the evidence at the disposal of the learned trial magistrate was not sufficient to establish a prima facie case against the appellant, leave alone a conviction. I accordingly quash the conviction and set aside the sentence. The appellant is set at liberty unless if otherwise lawfully held.

DELIVERED AND SIGNED AT BUSIA THIS 18TH DAY OF FEBRUARY, 2020

KIARIE WAWERU KIARIE

JUDGE