



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.38 OF 2019**

**PETER MWANG.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(An Appeal arising out of the conviction and sentence of Hon. E.Kanyiri SRM**

**delivered on 14<sup>th</sup> December 2018 in Makadara CM Cr. Case (S/O) No. 119 of 2016)**

**JUDGMENT**

The Appellant was charged with the offence of attempted defilement contrary to Section 9(1) as read with 9(2) of the Sexual Offences Act. The particulars of the offence were that on 4<sup>th</sup> September 2016 at Kariobangi South Estate within Nairobi County, the Appellant intentionally and unlawfully attempted to cause his penis to penetrate the vagina of G.M., a girl aged three (3) years. In the alternative charge, the Appellant was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. The particulars of the offence were that on 4<sup>th</sup> September 2016 at Kariobangi South Estate within Nairobi County, the Appellant intentionally touched the vagina of G.M., a child aged three (3) years with his penis. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, the Appellant was convicted as charged on the main charge of attempted defilement. He was sentenced to serve twenty (20) years imprisonment.

In his petition of Appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved by his conviction stating that the ingredients of the offence of attempted defilement were not established by the prosecution to the required standard of proof beyond any reasonable doubt. He faulted the trial court for relying on the evidence of PW1 which was uncorroborated. He was of the view that the trial court was biased towards him. He took issue with the sentence meted by the trial court stating that the same was harsh and excessive in the circumstances. In the premises, the Appellant urged the court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the Appeal, the Appellant presented to court written submission in support of his appeal. He urged the court to allow his appeal. Ms. Akunja for the State opposed the appeal. She made oral submissions to the effect that the charge against the Appellant was established to the required standard of proof beyond any reasonable doubt. She averred that the complainant and her mother had gone to visit a neighbour. The complainant was playing outside when the Appellant called her to his house. He undressed her and touched her vagina with his penis. The complainant heard her mother call out her name. She left the Appellant's house. That is when it was discovered that the Appellant had attempted to defile the complainant.

Learned State Counsel submitted that the evidence by PW1, PW2 and PW3 was corroborative. They testified that the complainant was not fully dressed when she was found. Ms. Akunja was of the view that had the complainant's mother not called out the complainant's name, the Appellant would have completed the act of penetration. She averred that the complainant's age was established by a birth notification that was adduced into evidence. She pointed out that the Appellant was properly identified as the perpetrator. She was in agreement with the Appellant that the sentence meted by the trial court was harsh and excessive in the circumstances, and urged the court to review the same. In the premises, on conviction, she urged the court to dismiss the appeal.

The facts of the case according to the prosecution are as follows: PW1, M. A. A., is the complainant. She told the court that she was playing outside when the Appellant called her to his house. There was no one else in his house. He undressed her and touched her vagina with his penis. She then heard her mum call out her name. She immediately left the Appellant's house and went to her mother. She informed her mother what had transpired.

PW2, SM, is the complainant's mother. On 4<sup>th</sup> September 2019, she went to visit her friend. They lived in the same neighbourhood. The complainant went outside to play as she chatted with her friend in the house. After sometime, PW2 went outside to look for the complainant. She however could not locate her. She started calling out her name. One of the people she was with known as Victor saw the complainant emerge from the Appellant's house. She was not fully dressed. PW2 stated that the complainant was wearing a dress, a pair of trousers and tights. When she was found by Victor, her trouser and tights had been lowered down to her knees. The complainant informed her that the Appellant called her to his house and put her on a bed. He undressed her and placed his penis on her vagina. They arrested the Appellant and took him to the Chief's Camp. He was later taken to Buruburu Police Station. PW2 took the complainant to Mama Lucy Kibaki Hospital for medical examination. She stated that the complainant was three (3) years of age at that time.

PW3, Victor Mwamba, was with PW2 at their friend's house. The said friend was known as Ochieng. The complainant was playing outside. After sometime, PW2 went outside to look for her. She called out her name. PW3 stated that he heard the complainant responding from one of the neighbour's house. PW3 went outside and saw the complainant emerge from the Appellant's house. Her clothes were not properly on. The Appellant was behind her. The complainant told him that the Appellant had placed her on a bed and touched her vagina. With the help of other neighbours, they arrested the Appellant and took him to the police station. The complainant was taken to Mama Lucy Kibaki Hospital. PW3 stated that he knew the Appellant as he had seen him before at the local pub.

PW4, Rose Waweru, worked as a nurse at Mama Lucy Kibaki Hospital. She examined the complainant on 4<sup>th</sup> September 2016. She stated that the complainant did not have any physical injuries. Her vagina was normal with no bruises. Her hymen was intact. Her anal region was also normal. She did a vulva swab and discovered presence of spermatozoa. She produced the complainant's Post Rape Care Form in evidence. The complainant was also examined by PW5, Dr. Shako, of Police Surgery on 8<sup>th</sup> September 2019. She stated that the complainant's external genitalia was normal. Her left labia minora was red, which was a sign of inflammation. Her hymen was intact. PW5 also examined the Appellant on the same day. His shoulder was tender. He claimed to have been assaulted. The Appellant's genital area was normal with no signs of injuries. She produced the complainant's and the Appellant's P3 forms into evidence.

The case was investigated by PW6, Faith Muchemi from Buruburu Police Station. She stated that the Appellant was brought to the station by police officers from Kariobangi South Police Post. PW6 interviewed the witnesses and recorded their statements. She also visited the Appellant's house. It was an iron sheet single-roomed house. The complainant showed her the bed where the Appellant placed her. When the complainant was taken to hospital, a vaginal swab was done. PW6 forwarded the same to the government chemist for analysis. After her investigations, she preferred the present charges against the Appellant.

PW7, Dr. Joseph Kimani, was a Government Analyst based at the Ministry of Health. On 8<sup>th</sup> September 2019, he received exhibits from the investigating officer which included; a vaginal and buccal swab belonging to the complainant and a buccal swab belonging to the Appellant. After his analysis, he stated that there was absence of spermatozoa or blood stains in the vaginal swab. He produced a report of his findings into evidence.

The Appellant was put on his defence. In his unsworn statement, it was his testimony that when the incident occurred, he was not in Nairobi. He had gone to Kisumu to do some deliveries. He stated that on 4<sup>th</sup> September 2016 at about 3.00 p.m., he was on his way to the Civil Servant Quarters in Kariobangi South to visit his ailing brother. When he approached the Chief's Camp, he met a man and a woman. The man pointed at him and the woman started screaming. They beat him up claiming he had defiled a minor. The Appellant maintained that his was a case of mistaken identity since he was not in Nairobi on the material day. He asserted that the person who hosted PW2 and PW3 was not availed in court to adduce evidence as to whether the Appellant lived in the said plot. He denied sexually assaulting the complainant.

The trial court issued summons for the said Anthony Ochieng Owino to be availed in court to adduce evidence. He testified that he hosted a *chama* meeting at his house on 4<sup>th</sup> September 2016. He confirmed PW1, PW2 and PW3 were at his house on the said date. As they conducted the meeting, PW1 was playing outside. After sometime, PW2 went outside to check on her whereabouts. PW3 called out her name, and they heard her voice responding. It came from the direction of the neighbour's house. Anthony stated that he personally heard the complainant respond from the neighbour's house. The said house belonged to the Appellant. The houses were made of iron sheets. Anthony and PW3 stepped out. PW3 knocked on the door and the complainant came out of the Appellant's house. The complainant told them that the Appellant placed her on his bed and touched her vagina. They escorted the Appellant to the Chief's Camp. The complainant was taken to hospital. He told the court that he had known the Appellant for about eight (8) months prior to the date of the incident.

As the first appellate court, it is the duty of this court to subject the evidence adduced before the trial court to fresh scrutiny and re-evaluation, before reaching its own independent determination whether or not to uphold the conviction and sentence of the Appellant. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot therefore make comment regarding the demeanour of the witnesses (See *Okeno vs Republic* [1972] EA 32). In the present appeal, the issue for determination by this court is whether the prosecution established the charge of attempted defilement contrary to Section 9(1) & 9(2) of the Sexual Offences Act brought against the Appellant to the required standard of proof beyond any reasonable doubt.

This court has re-evaluated the facts of this case as well as the rival submission by the parties to the Appeal. Section 9(1) of the Sexual Offences Act provides that:

“A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.”

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.**

**2. It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfillment of his intention is prevented by circumstances 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 circumstances not known to the offender it is impossible in fact to commit the offence.”**

The ingredients forming the offence of **attempted defilement** required to be established by the prosecution are: the age of the complainant, proof of attempted penetration and positive identification of the Appellant. In the present appeal, the complainant testified that she was three (3) years old. Her mother, PW2, told the court that the complainant was three (3) years of age at the time the alleged sexual assault occurred. The investigating officer **produced in evidence the complainant’s birth notification which indicated that she was born on 3<sup>rd</sup> August 2013. She was therefore three (3) years old at the time of the alleged sexual assault.** This evidence was not challenged by the Appellant on cross-examination or in his defence. **This court therefore holds that the prosecution did establish that the complainant was a child within the meaning of Section 2(1) of the Children Act.**

With regard to attempted penetration, it was the complainant’s testimony that she was outside playing when the Appellant called her to his house. He placed her on his bed, undressed her and touched her vagina with penis. The complainant stated that “*uncle alinishika susu na susu yake kwa nyumba yake*”. The trial court noted that the complainant pointed to her private parts. While at the Appellant’s house, the complainant heard her mother call out her name. She left the Appellant’s house. PW3 testified that he saw the complainant exit the Appellant’s house. This fact was also corroborated by Anthony O. Owino, a witness who was summoned by the trial court. The said Anthony was the Appellant’s neighbour. PW2 and PW3 stated that the complainant was not fully dressed when she left the Appellant’s house. She was wearing a dress, a pair of trousers and tights. PW2 told the court that the complainant’s trouser and tights were lowered to her knees when she was found.

Upon re-evaluation of the evidence on record, this court is of the view that the offence of **attempted defilement** was established by the prosecution to the required standard of proof beyond any reasonable doubt. The complainant was candid that the Appellant undressed her and he touched her vagina with his penis. She told her mother, PW3 as well as Anthony what the Appellant had done to her. Her story was consistent. Two witnesses confirmed that they saw the complainant leave the Appellant’s house after they called out her name. Her inner clothes were lowered to her knees. It is this court’s view that had PW2 and PW3 not called out the complainant’s name, the Appellant would have completed the sexual act with the complainant.

The undressing of the complainant and the act of the Appellant touching the complainant’s vagina with his penis was the last act towards the commission of the act of penetration. It is logical to conclude that the Appellant was in the process of preparing to penetrate the complainant. If PW2 had not gone outside to look for the complainant, the Appellant would have succeeded in defiling the complainant. Even though the Government Analyst stated that he did not find presence of spermatozoa in the complainant’s vaginal swab, the medical evidence by PW5 as well as the P3 form indicated that the complainant’s left labia minora was reddened, which was a sign of inflammation. This corroborated the complainant’s testimony that there was an attempt by the Appellant to penetrate the complainant’s vagina. The **Proviso to Section 124 of the Evidence Act** applies.

The Appellant in his defence averred that his was a case of mistaken identity as he was not in Nairobi, but in Kisumu, when the incident is said to have occurred. He failed to produce any evidence to establish his *alibi* defence. In addition, his defence was displaced by the evidence of PW1, PW2, PW3 as well as the court summoned witness, Anthony Ochieng, who all placed the Appellant at the scene of crime. PW1 identified the Appellant as the person who touched her vagina with his penis. PW3 and Anthony Ochieng witnessed the complainant come out of the Appellant’s house half-dressed. The said Anthony stated that he had known the Appellant for about eight months prior to the date of the incident. He was his next door neighbour. This court is of the view that the Appellant was positively identified and placed at the scene of crime. **His** defence was meant to exonerate himself and the same did not dent the otherwise strong culpatory evidence adduced by prosecution witnesses connecting him with the sexual assault occasioned on the complainant. It was properly dismissed as being of no evidential value. **He was properly convicted by the trial court.**

**With regard to sentence, the trial court sentenced the Appellant to serve a custodial sentence of twenty (20) years. The minimum sentence provided by Section 9(2) of the Sexual Offences Act is ten (10) years. The trial magistrate failed to give reasons as to why she enhanced the Appellant’s custodial sentence to twenty (20) years. The Appellant was a first offender. He also spent two years in custody prior to his conviction by the trial court.** In the premises, this court sets aside the custodial sentence of twenty years (20) years imposed by the trial court. The same is substituted with an order of this court sentencing the Appellant to serve eight (8) years imprisonment with effect from the date he was sentenced by the trial court i.e. 14<sup>th</sup> January 2019. This court has taken into consideration the period that the Appellant was in lawful custody before his conviction by the trial court. It is so ordered.

**DATED AT NAIROBI THIS 9<sup>TH</sup> DAY OF APRIL 2020**

**L. KIMARU**

**JUDGE**