



## IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 107 OF 2018

CORAM: D.S. MAJANJA J.

BETWEEN

**LUKA KIRIMI MUCEE ..... APPELLANT**

**AND**

**REPUBLIC..... RESPONDENT**

*(Being an appeal from the original conviction and sentence of Hon. C. Kemei, SRM dated 10<sup>th</sup> May 2018 the Magistrate's Court at Githongo in Sexual Offence Case No. 15 of 2017)*

### JUDGMENT

1. The appellant, **LUKA KIRIMI MUCEE**, was charged, convicted and sentenced to 15 years' imprisonment for the offence of attempted defilement contrary to **section 9(1)** as read with **section 9(2)** of the *Sexual Offences Act* ("the Act"). The particulars of the charge were that on 12<sup>th</sup> December 2017 at around 6.00pm in Uruku location within Meru County, the appellant intentionally attempted to cause his penis to penetrate the vagina of FK, a child aged 4 ½ years.
2. The appellant appeals against conviction and sentence on grounds set out in his petition of his appeal filed on 5<sup>th</sup> September 2018. The thrust of that appeal was that the prosecution failed to prove the case against the appellant beyond reasonable doubt. That the trial magistrate failed to consider the appellant's defence in particular that there was a vendetta between the appellant and PW 3. The appellant also complained that the sentence passed against him was harsh and excessive.
3. The respondent's case was that the prosecution proved every element of the offence and that the conviction should be upheld.
4. It is the duty of this court, being a first appellate court, to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see *Okeno v Republic* [1972] EA 32).
5. The child, FK (PW 1), gave unsworn testimony after a voire dire. She narrated what took place on the material day as follows:

*I used to live with my auntie ..... It is while there that KIRIMI accused removed my clothes. He straggled me then removed my pantie. He did that as his house, he met me outside. He met me outside. He ..... asked me to get to his house so that he could me meat. .... We got to his house. {D, her brother} was outside. Kirimi gave me the Githeri that he was taking but I did not take it. He removed my pantie and my trouser. I did not remove them. Accused removed them. He held me tightly. .... I did not know what he wanted me to do. I cried. I was feeling pain on my neck. It is Mami who came to help me when I cried..... He did not remove his clothes.*
6. A neighbour to the appellant, PW 2, recalled that on 12<sup>th</sup> December 2017, she was walking home when she met PW 1's brother crying. He told her that the accused had locked PW 1 in his house. She called out PW 1 when she heard her crying in the appellant's house. PW 1 told her that the appellant had removed her clothes and had promised to give her meat. PW 2 demanded that the appellant open the door since it was locked from inside. He opened the door and PW 1, who did not have her panties, trouser and shoes, came out of the house. She left with PW 1 and her younger brother.
7. PW 1's aunt, PW 3, recalled that she returned home on the material day at about 6.00pm but did not find her son and PW 1. She called out the children and the appellant told her that the children had left with PW 2. When she went to PW 2's house, she found PW 1 without her panties, trousers and shoes. PW 1 narrated what happened to her. She called her landlord and other neighbours who broke into the appellant's house and arrested him. She later reported the matter to the police station and took PW 1 to the hospital for examination and treatment.
8. PW 4 confirmed that she was PW 1's mother. She told the court that the child was born on 10<sup>th</sup> April 2014. She did not know the appellant

and was informed by PW 3 of the incident of defilement.

9. The investigating officer, PW 5, confirmed that the incident of defilement involving PW 1 and the appellant was reported at Githongo Police Post on 13<sup>th</sup> December 2017. As part of the investigation, he took witness statements and collected plastic black shoes, an orange pant with black and white dots and a black faded trouser from the appellant's house. She also caused photographs to be taken from the appellant's house.

10. PW 6, a farmer in the area, testified that he came on 12<sup>th</sup> December 2017 at about 9.00pm and was informed that the appellant had defiled a child. He proceeded to where the appellant resided and demanded that he open his door but the appellant refused to do so. Together with the other tenants at the plot and the landlord, they broke the door and arrested the appellant and proceeded to the police post together with the child.

11. The doctor who examined PW 1 on 20<sup>th</sup> January 2018 and produced the P3 medical form and the Post Rape Care (PRC) Form, PW 7, testified that PW 1 was seen at the Githongo Sub County Hospital on 13<sup>th</sup> December 2017. According to the treatment notes, the child had scratch marks on the face and neck which were swollen at the time. The inner thighs were also swollen. Her genitalia and hymen and the high vaginal swab did not reveal any spermatozoa. PW 7 concluded that there was attempted defilement.

12. In his sworn defence, the appellant denied the charge. He recalled that on the material day he went home after work and while he was sleeping, he heard people calling him out at about 5.00pm. They demanded that he open the door. Among the people was PW 3 who had previously threatened him. He was thereafter arrested.

13. **Section 9** of the *Sexual Offences Act* refers to an attempted defilement as follows;

*9(1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.*

14. In *Francis Mutuku Nzangi v Republic NRB CA Crim. Appeal No. 358 of 2010 [2013]eKLR*, the Court of Appeal elucidated the meaning of an attempt, as defined by **section 388** of the *Penal Code (Chapter 63 of the Laws of Kenya)* as follows;

*Our understanding of this provisions is that if a person conceives an idea or plan to commit an offence and sets out to effectuate the intention by taking definite steps or puts in motion a chain of events or state of things calculated to attain that objective as manifested by some open and discernible act or acts but fails to achieve his objective, he will be guilty only of an attempt to commit the offence. The attempt is proved whether or not that person did all the acts necessary to perfect the offence and quite irrespective of what intervening act or change of heart may have aborted the fulfillment. It also matters not that circumstances did in fact exist, unbeknown to the person, that would have rendered his success impossible.*

15. In other words an attempted defilement is a failed defilement and that is why the intention to penetrate is a key ingredient (see *Pius arap Maina v Republic ELD HCCRA No. 247 of 2011 [2013] eKLR* ).

16. Although, PW 1's testimony was unsworn, she narrated clearly what had taken place. In fact, the appellant did not contest her testimony as he did not cross-examine her. There was sufficient evidence of the appellant's intention to commit the act of defilement by the fact that he lured PW 1 to his house, removed her panties and trousers, he held her neck tightly in a manner to suggest the he intended to commit the felonious act of penetration. The medical report produced by PW 7 corroborated her testimony in so far as it confirmed the neck injuries consistent with strangling and the injuries on the thighs indicating an attempt to effect penetration.

17. There is also no doubt that it is the appellant who committed the felonious act. The appellant was known to PW 1 as he was a neighbour and the incident took place in the late afternoon or early evening. Moreover, PW 2 confirmed that PW 1 emerged from the appellant's house without her panties, shoes and trousers and the appellant was subsequently arrested from the same house. His fate was sealed when PW 1's items of clothing were found in his house.

18. When cross-examined by the appellant, PW 3 admitted that she had quarreled with the appellant because he wanted her to do prostitution so that they could share the proceeds but she rebuffed him. The appellant contented that the case against him was because of PW 3's grudge. Apart from the fact that PW 3 denied the accusation, the evidence of the offence against him was independent. Nothing of the sort was suggested to PW 1 while PW 2 saw PW 1 emerge from the appellant's house in a state of distress. She is the one who later informed PW 3 of the incident. From the totality of the evidence, the defence lacks merit and was properly dismissed.

19. There was no doubt that PW 1 was a child. According to her mother, PW 4 and the health card produced in evidence, PW 1 was born on 10<sup>th</sup> March 2013. She was therefore below 18 years old and was aged 4 ½ year old when the offence was committed. I therefore find that the prosecution proved all the elements of the offence of attempted defilement and he was properly convicted on the basis of the evidence.

20. As regards the sentence, the mandatory minimum sentence under **section 9(2)** of the *Act* is 10 years' imprisonment. I have taken into account the fact that mandatory sentences have now been declared unconstitutional and taking into account the circumstances of the case, I set aside the sentence of 15 years' imprisonment and substitute it with a sentence of ten (10) years imprisonment.

21. I affirm the conviction and allow the appeal only to the extent that I quash the sentence of 15 years' imprisonment and substitute the same with **ten (10) years** imprisonment to run from the date of arraignment, that is, **14<sup>th</sup> December 2017**.

**DATED and DELIVERED at NAIROBI this 14<sup>th</sup> day of MAY 2020.**

**D.S. MAJANJA**

**JUDGE**

Appellant in person.

Ms Nandwa, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.