



**IN THE HIGH COURT OF KENYA AT MERU**

**CRIMINAL APPEAL NO. 148 OF 2019**

**CORAM: D.S. MAJANJA J.**

**BETWEEN**

**NURA GODANA GALGALO .....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

***(Being an appeal from the original conviction and sentence of Hon. S. M. Mungai, CM dated 22<sup>nd</sup> August 2019 the Magistrate's Court at Isiolo in Sexual Offence Case No. 26 of 2018)***

**JUDGMENT**

1. The appellant, **NURA GODANA GALGALO**, was charged, convicted and sentenced to 10 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 16<sup>th</sup> September 2018 at [particulars withheld] in Merti Sub-county of Isiolo County, he intentionally attempted to cause his penis to penetrate the vagina of MA, a child aged 15 years.
2. The appellant appeals against conviction and sentence on grounds set out in his petition of his appeal filed on 3<sup>rd</sup> September 2019 and amended grounds of appeal. The thrust of that appeal was that the prosecution failed to prove the case against the appellant beyond reasonable doubt. That the evidence was contradictory and uncorroborated. The appellant also contends that the sentence was harsh and excessive in the circumstances.
3. The respondent relied on its written submission. It contended that the prosecution proved every element of the offence and that the sentence was within the law and appropriate for the case.
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 complainant, MA (PW 2), testified that she was aged 17 years and that on the material day, she was going to Merti to meet her mother. At about 6.00pm, they started looking for a boda boda. She knew the appellant who agreed to take her to Saleti. She narrated what happened as follows when she embarked on the motorbike:

*As we proceeded, the accused diverted to the bushes off the road. I jumped off the bike because I realized he was intending to defile me. I started running back to the main road. The accused followed me (sic). I started screaming when the accused caught me and held my hands. He started pulling me back to the bushes. By then it was almost 7.00pm and darkness was setting in. Accused was called on his cellphone and he refused to receive the call. When he was on phone, I managed to release my hand and ran off to the main bush and hid myself from him.*

6. After her ordeal, PW 2 managed to go home whereupon she reported to her mother, PW 3. They reported the incident to the police. The elders attempted to settle the matter but the police arrested the appellant. PW 2 was taken to the hospital for examination and treatment where she was examined by a clinical officer who prepared a P3 medical form which was produced by PW 1, a clinical officer. He explained that PW 1 was examined on 19<sup>th</sup> September 2018. Apart from an old perforated hymen, nothing remarkable was noted. The investigating officer, PW 4, gave an account of the investigation and caused the appellant to be charged.
7. In his sworn statement, the appellant (DW 1), denied the offence. He admitted that he knew PW 2 as a neighbour. He denied that he carried her on the material day or that he attempted to defile her. His witness, DW 2, was his uncle. He denied knowledge of the offence but stated that the case was as a result of a grudge following the elections.

8. **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.*

9. 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.*

10. 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).

11. I have outlined the testimony of PW 2. The question is whether the acts of the appellant manifested or pointed to the facts that he was going to commit an act of penetration. I am afraid that the evidence falls far short of demonstrating any overt act pointing to defilement. The facts show that the appellant jumped off the motorbike when she realized the appellant was not taking her to the agreed destination. In short, the offence of attempted defilement was not proved.

12. I allow the appeal, quash the conviction and sentence. The appellant is set free unless otherwise lawfully held under a separate warrant.

**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.