



**REPUBLIC OF KENYA**

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

**HCCRA NO. 25 OF 2019**

**RMW.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

***(Being an appeal from the Judgment of the Senior Resident Magistrate Hon. M. N.***

***Munyendo (M/s) dated 22/03/2019 in Othaya SRM Sexual Offence Case No. 13 of 2018.)***

**JUDGMENT**

1. **RMW** the Appellant was charged with the offence of attempted defilement contrary to section 9(1) (2) of the Sexual Offences Act No. 3 of 2006. The particulars were that the Appellant on the 5<sup>th</sup> day of July 2018 at around 1130 hours at [Particulars Withheld] village, Kihugiru sub-location, in Nyeri south sub-county within Nyeri county, intentionally attempted to cause his penis to penetrate the vagina of SWM a child aged 13 years.

He faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006.

2. He denied the charges and the matter proceeded to full hearing. The prosecution called five (5) witnesses while the accused gave a sworn statement and called one witness. Thereafter the trial court found the Appellant guilty convicted him and sentenced him to ten (10) years imprisonment.

3. Being aggrieved by the judgment, the Appellant filed this appeal through the firm of Magua & Mbatha advocates raising the following grounds:

- a) **That**, the learned trial Magistrate erred in fact and in law in passing judgment convicting him when the prosecution had not proved the case by discharging the required burden of proof, thereby occasioning a miscarriage of justice.
- b) **That**, the learned Magistrate erred in law and in fact in convicting him on the uncorroborated and or insufficiently corroborated evidence of a minor thereby occasioning a miscarriage of justice.
- c) **That**, the learned trial Magistrate erred in fact and in law in relying on the evidence of the prosecution witnesses which was insufficient and contradictory as
- d) **That**, the learned Magistrate erred in law and in fact in convicting him whereas the ingredients/particulars of the offence of attempted defilement were not established and proved to the required standards, thereby occasioning a miscarriage of justice.
- e) **That**, the learned Magistrate erred in law and in fact in convicting him on the basis of a defective charge sheet, which failed to set out the acts that he engaged in that would cause penetration with a child thereby occasioning a miscarriage of justice.
- f) **That**, the learned Magistrate erred in fact and in law in reaching an erroneous finding from the defence and the evidence of the Appellant as well as his submissions, thereby occasioning a miscarriage of justice.
- g) **That**, the learned Magistrate erred in fact and in law in failing to acknowledge that the complaints attending the charges and the criminal prosecution in the matter was as a result of the animosity that exists in a matrimonial dispute involving him and his wife, Pw3 thereby occasioning a miscarriage of justice.
- h) **That**, the learned Magistrate erred in law and in fact in failing to find and rule that there was no cogent, substantial, credible and

direct evidence connecting him to the offence of attempted defilement or committing an indecent act with a minor.

i) **That**, the learned Magistrate erred in law and in fact in convicting him on highly contradictory, misleading, inconsistent and unreliable evidence presented by the prosecution.

j) **That**, in any event, the learned Magistrate erred in fact in meting out sentence that was grave and excessive in the circumstances, based on the mandatory nature of the sentence.

4. The case that was presented to the trial court was as follows: Pw1 (SW) who was born on 24<sup>th</sup> December 2005 and is a step daughter to the Appellant testified that on 5<sup>th</sup> July 2018 she slipped and fell on her way to school. She got injured and returned home. Her mother (Pw3) attended to her and left her home with her elder sister (Pw2) and their last born. The Appellant was home and preparing the shamba to plant spinach. At 11:00 am Pw2 went to the river to wash clothes and SW remained with the baby who was asleep on the bed.

5. The Appellant returned home, found her in the house and locked the door from inside. He told her to get onto the bed and sleep. She told him she was washing dishes but he ordered her to comply. Their house was a single room and has two beds. She was to sleep on her parents' bed. The Appellant pulled her and told her to remove her clothes which she refused. He threatened to stab or strangle her as he had done in 2017. She therefore complied and removed her dress, tee-shirt and inner wear while the Appellant also removed his. **There was a knife on the table which the Appellant held in his hand.**

6. The Appellant told her to sleep and he slept on top of her. He took his penis and tried to insert it inside her vagina, as she faced up. She screamed and shortly heard her sister (Pw2) calling her name. The Appellant touched her vagina with both hands. Pw2 told the Appellant to open the door or she would call their grandmother or any elderly person. He dressed up and opened the door and Pw2 entered and found her wearing her dress while on the bed. She explained to her what was happening. The Appellant left and returned at 6:00 pm. Pw2, SW and the baby decided to leave for the bushes and returned at 5:00 pm.

7. The girls reported the incident to their mother (Pw3) when she returned home. Pw3 asked the Appellant about it and he became very aggressive. While in school the next day S.W was called to the head teacher's office where she found two police officers to whom she narrated her ordeal. The Appellant was later arrested. She recorded her statement and went to Othaya district hospital where she was examined by the doctor. In the year 2017 the Appellant had defiled her but the matter was settled at home.

8. In cross examination she said she remained home to wash dishes as that's what had been assigned to her. She feared screaming because the last time when she screamed the Appellant strangled her. She said she did not know if she sustained any injury as the Appellant tried to insert his penis in her vagina. She denied colluding with her mother to frame the Appellant.

9. Pw2 (RWM) who is SW's sister had gone to the river to wash clothes, but she returned home to collect more clothes. She had left SW, B (baby) and the Appellant home. Before reaching home she heard screams from their house. She rushed and found the door closed from inside and she called S.W who did not respond. She called the Appellant and threatened to call neighbours. After sometime the Appellant opened the door and left. SW was dressing up and crying. She reported to her that the Appellant had tried to rape her. They later took the baby and went to the bushes to hide. The rest of the evidence is similar to that of SW.

10. Pw3 NW is the mother to SW and RWM. she stated that on 5<sup>th</sup> July 2018 7:00 am SW returned home after suffering an injury on her hand. She gave her medicine and left her, B, RMM and the Appellant at home and gave the girls work to do. When she returned in the evening she received the report of an attempted defilement of S.W by the Appellant.

11. On being asked the Appellant became aggressive and violent towards her and even hit her right leg. She was unable to walk the next day. RMW reported the matter to the police the next day. She took SW to hospital in the company of two officers. She identified the P3 form, SW's birth certificate and the knife the Appellant had threatened SW with.

12. In cross examination she said she did not tell her mother in-law about the attempted defilement since she feared her husband, the Appellant. She denied trying to fix the Appellant by this matter. She said the Appellant hit her leg when she asked him about the issue at hand.

13. **Pw4 Thomas Mwangi** a clinician from Othaya sub-county hospital used the patient card to fill the P3 form.

#### **Findings:**

- Normal outer genitalia
- Hymen was old and broken.
- No documentation of whether there was any blood in the outer genitalia
- No spermatozoa
- Presence of pus cells and epithelial cells

- HIV (negative), No syphilis, Not pregnant.

He produced the P3 form (EXB3). SW told him there had been an actual defilement in 2017.

14. In cross examination, he said the P3 form shows SW's vagina was not touched.

15. **Pw5 No. 99739 P.C.W Florence Ngina** confirmed that the reportee of this matter was RWM. She went with PC Wavinya and the driver to S.W's school and interrogated her. They visited the home with SW and RMW. They left with the Appellant's children for the police station. SW was then taken to hospital. She recovered the knife the Appellant had used to threaten S.W was EXB2. She further stated that the Appellant had used his hands to touch SW's vagina.

16. In his sworn defence the Appellant denied the charge saying on 5<sup>th</sup> July 2018 morning he went to town to buy spinach seedlings for his farm. After instructing SW and RWM he went to cut firewood with his mother (Dw2) at the farm upto 4:00 pm. He left for town at 5:30 in search of jobs. He returned home at 7:00 pm and found when his wife (Pw3) had not returned. The children were crying because of hunger. Pw3 arrived at 8:00 pm and they quarreled.

17. **Dw2 NWG** who is his mother and who lives close by came. Pw3 was demanding for fees of Kshs.12,000/= for RWM who had been sent home. Her big girls went to sleep at Dw2's as usual. The next day he went to work and at about 5:00 pm as he relaxed in the house with his wife, SW arrived with some women who told her they were going to Othaya police station.

18. He had been charged with assault and attempted defilement. Pw3 kept demanding for money from him for her to withdraw the charges. For the assault case Cr. No. 521/2018 she demanded for Kshs.20,000/= and in this case she wanted Kshs.50,000/=. He was eventually acquitted in the assault case. He denied the charges.

19. **Dw2** testified that on 5<sup>th</sup> July 2018 she spent the day with the Appellant looking for firewood at JW's place. They finished at 5:30 pm arriving home at 6:00 pm. She heard children crying and they said they were hungry. She asked Pw3 why she was not cooking for the children.

20. S.W and RWM slept at her place and they did not tell her anything about this matter. The next day they went back to the bush where they spent the entire day. In the evening police officers came and took away the Appellant and Pw3. He informed her he had been charged with attempted defilement.

21. The appeal was canvassed by written submissions. Mr. Magua counsel for the Appellant merged grounds 1,2,3,8 and 9 together arguing that the evidence was insufficient to sustain a conviction. He refers to the evidence of SW and that of the doctor (Pw4) and submits that the same was not sufficient since what SW told the court and what she told the doctor was not tallying. To him SW was not truthful and section 124 of the Evidence Act ought not to have been applied.

22. On ground 4 he refers to the definition of "attempted defilement and indecent act" under the Sexual Offences Act. He submits that the issue here is what the Appellant did that could have amounted to attempted defilement or indecent act. The removal of clothes alone could not amount to attempted defilement. He refers to the case of **Musembi Mutiso –vs- Republic (2014) eKLR** where the court noted:

*"It is for this reason that the prosecution had to discharge its duty of proving the case beyond any reasonable doubt. They had to adduce evidence of how the penetration occurred, when and where it happened. This was not done. Therefore, believing that the Appellant was the culprit who committed the heinous offence was a misdirection on the part of the court. A re-evaluation of evidence adduced shows that there was a gaping doubt in the matter. The benefit should have gone to the defence ..."*

23. Counsel contends that no detailed account was given on how the alleged acts were carried out. He refers to the findings in **L.C –vs Republic (2017) eKLR, Pius Arap Maina –vs- Republic(2013 eKLR; Lucas Omondi Omole –vs- Republic (2016) eKLR; David Aketch Ochieng (2015) eKLR** for persuasion. He faulted the trial court for applying the provisions of section 388 of the Penal Code to this case when the Sexual Offences Act defines what an attempt is. It is his submission that what the Appellant is alleged to have done did not amount to an attempt to defile. He refers to the case of **Daniel Ombasa Omwoyo –vs- Republic (2016) eKLR** in support of this submission.

24. Counsel has submitted that the charge sheet was defective for omitting to set out the acts that the Appellant was engaged in with the child. That the charge was not clear nor ambiguous. He refers to the cases of: **Sigilani –vs- Republic (2004) 2 KLR 480. Stanley Muriuki –vs- Republic (2016) eKLR; Charles Karuga Kinyua –vs- Republic HCCRA No. 319 of 2008 at Nyeri** (unreported). His further submission is that the failure to include the words willfully and unlawfully made the charge to be defective, as it did not disclose "mens rea". He cites the cases of **Wambua Kaimeta & Another –vs- Republic (2016); Gideon Mwenda Kamundi –vs- Republic (2018) eKLR**.

25. On ground 6 and 7 counsel submits that there was animosity between the Appellant and Pw3 (wife) and this led to the framing up of the charge, against the Appellant. That Dw2 (Appellant's mother) confirmed this. Finally he submits that the sentence was unconstitutional, grave and excessive in the circumstances of the case. Relying on the case of **Francis Karioko Muruatetu & Another –vs- Republic S.C petition No. 15 and 16 of 2015**, he submits that the mandatory nature of the minimum sentence meted out against the Appellant was unconstitutional. To support this argument he cites the case of **Christopher Ochieng –vs- Republic (2018) eKLR**.

26. The appeal is opposed by the Respondent through learned counsel Mr. Ondimu. He accepts that the prosecution has the primary duty of proving its case beyond reasonable doubt. He has referred to section 107(1) Evidence Act; **Woolmington –vs- DPP (1935) AC 462; Miller –vs- Minister of Pensions (1947) 2 ALL ER 372**.

27. In response to the issue of a defective charge sheet counsel has referred to the proceedings and submits that the charge and particulars

were clear and enabled the Appellant to fully participate in the trial without any difficulty. On the omission of the words willfully and unlawfully he states that the trial court handled the issue very well and there was no error. He has referred to what the court said at page 5 paragraph 14 of her judgment which is as follows:

*“The accused has actively participated in the trial this can be demonstrated by the lengthy cross-examination and the detailed defence and submissions filed. I can confidently state that the omission of the word unlawful did not prejudice the accused as the particulars of the charge sheet detailed the essential ingredients to prove an offence of attempted defilement and indecent act with a child. I accordingly cure this defect under section 382 of the Criminal procedure Code.”*

28. It's his submission that in a case of this nature the prosecution must prove the intention to so act and the overt act committed for purposes of accomplishing the offence. He has in support referred to the cases of **KNL –vs- Republic (2019) Eklr; Keteta –vs- Republic (1972) E.A 532 and Michael Lokoma –vs- Republic (2017) eKLR and Abdi Ali Bere –vs- Republic (2015) eKLR.**

29. Counsel submits that Pw1 was proved to be 13 years old (EXB1) and she was therefore a minor. On the issue of attempted defilement he has referred to the evidence of Pw1 on what the Applicant did to her. That she states at page 22 lines 16 and 17 as follows:

*“My father did not insert, he was trying to insert”.*

He has also referred to RWM's evidence where she said that upon her arrival at the house she found the door locked and it was only opened after she threatened to call neighbours. The Appellant left after opening the door. Its then that SW explained to her what had happened as she cried.

30. According to Mr. Ondimu the following are the acts constituting attempted defilement;

- The action of the Appellant locking the door from the inside the house;
- The use of threats (using kitchen knife) by the Appellant for victim to remove all her clothes;
- The Appellant's direction that victim sleeps on his bed;
- The attempt of the Appellant to insert his penis to the victim's vagina; and
- The acts of the Appellant in touching the private parts of the victim using his hands.

31. He further submits that the evidence of SW is corroborated by Pw2 who:

- Found the victim wearing his dress;
- Found the victim on her parent's bed;
- Found the victim crying inconsolable; and
- The victim told her that Appellant tried to rape her.

He argues that the acts stated above were sufficiently proximate to the intended act of defilement. Had Pw2 not intervened the Appellant would have succeeded in defiling SW. He supports the trial court's finding at page 8 of the judgment on this issue.

32. Counsel has further submitted that the Appellant's identification was one of recognition and it was broad daylight and she knew him well. See **Peter Musau Mwanzia –vs- Republic (2008) eKLR** on reliability on evidence of recognition. He has dismissed the claim of a grudge between the Appellant and Pw3 saying that inspite of what had happened the Appellant and Pw3 spent the night in the same house. That there was no evidence that SW and RWM were in any way prompted or compelled to lie against the appellant. He did not find any inconsistencies and/or contradictions in the prosecution case.

33. On sentencing of the Appellant counsel has submitted that sentencing remains discretionary. He cites the case of **Joseph M. Kanyita –vs- Republic 2017 eKLR** to support his argument. On the other hand he agrees that the sentence passed against the Appellant requires consideration by this court. He cites the case of **Raphael Mutinda –vs- Republic (2019) eKLR** where Odunga J. stated

*“What the said section provides for is a prima facie mandatory minimum sentence. However, in the current constitutional dispensation the constitutionality of such sentences is highly doubtful since in my view they do not permit the court to consider the peculiar circumstances of the case in order to arrive at an appropriate sentence informed by those circumstances. Whereas the court is given the leeway to impose any sentence over and above the minimum sentence, the section like any other sections prescribing for minimum sentences does not permit the court the discretion to consider whether a lesser punishment would be more appropriate in the circumstances. In those circumstances, it is my view that such provisions do not meet the constitutional dictates .....*

45. In my view the opinion of the Supreme Court with respect to mandatory sentences apply with equal force to minimum sentences. My view is in fact supported by the Kenya Judiciary Sentencing Policy Guidelines ..”

34. He however argues that the sentence meted out on the Appellant is deserving and appropriate after the trial court took into account the information in the victim impact statement. He has referred to the case of **Kamaro Wanyingi –vs- Republic (2008) eKLR** on the reason behind sentencing.

35. Counsel further submits that SW was aged 13 years when she testified yet no *voir dire* examination was conducted. It’s his contention that this was not fatal. He placed reliance on the case of **John Ndachu Ng’ang’a –vs- Republic (2017) eKLR** which cited the case of **Maripett Loonkomok –vs- Republic (2016) eKLR** where the issue of failure to conduct a *voir dire* examination was raised. He submits that failure to conduct *voir dire* examination was not fatal as S.W had been cross examined at length by the Appellant’s counsel.

#### **Analysis and determination**

36. I have considered the evidence on record the grounds of appeal both submissions and the cited authorities and the law. The issue for determination is whether the case against the Appellant was proved beyond reasonable doubt. In other words whether the ingredients of

the offence of attempted defilement were proved by the prosecution. The Appellant herein was charged with the offence of attempted defilement contrary to section 9(1) as read with section 9(2) of the Sexual Offences Act. The section provides that:

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

*9(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.*

37. The ingredients forming the offence of attempted defilement are similar to those of the offence of defilement except penetration. The prosecution must therefore prove the age of the complainant’ positive identification of the assailant, the steps taken by the assailant to execute the defilement which did not succeed, infact attempted defilement due to lack of penetration.

38. In order to prove an attempt to commit an offence the prosecution must prove the *mens rea* which is the intention and the *actus rea* which constitutes the overt act which is geared to the execution of the intention. The *actus reus* must be more than mere preparation to commit the act as there is a difference between mere preparation to commit an offence and attempting to commit an offence. See **Abdi Ali Bere –vs- Republic 2015 eKLR**. This was the position taken in the following cases:

**Benson Musumbi –vs- Republic (2019) eKLR, John Gatheru Wanyoike –vs- Republic (2019) eKLR, Daniel Simiyu Wanyonyi –vs- Republic (2019) eKLR .**

39. In determining this appeal the court has to establish:

- i. Whether the charge sheet was defective.
- ii. Whether failure to conduct a *voir dire* examination on SW was fatal to the prosecution case.
- iii. Whether the age of the complainant was proved.
- iv. Whether there was an act to cause penetration which was not successful.
- v. Whether the appellant was positively identified as the assailant.
- vi. Whether the sentence was unconstitutional harsh and excessive.

#### **(i) Whether the charge sheet was defective.**

40. Section 134 of the Criminal Procedure Code provides:

*“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”*

Section 137 Criminal Procedure Code provides for the rules of framing charges and information. The contents of the charge sheet showing the charge against the Appellant plus the particulars is well set out at the beginning of this judgment. A perusal of the same shows that the charge and particulars were very clear and precise. Particulars do not have to give a summary of the evidence. What the Appellant is alleged to have done is clearly stated and the Appellant was not misled about anything.

41. On the failure to include the words unlawful and willful counsel submitted that this rendered the charge sheet defective. My take on this is that the offence of defilement involves minors who by law cannot give consent. It obviously means any defilement is unlawful and that

remains the position. I therefore do not find any defect in the charge sheet.

**(ii) Whether failure to conduct a voir dire examination on S.W was fatal to the prosecution case**

42. Section 19(1) of the Oaths and Statutory declarations Act which deals with how evidence of children of tender years should be taken provides:

*19. Evidence of children of tender years (1) Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section.*

43. **Who then is a child of tender years?** The Court of Appeal in the case of **Patrick Kathurima –vs- Republic (2015) eKLR** and many others has held that a child of tender years is a child under the age of fourteen (14) years. The birth certificate (EXB1) shows that SW was born on 24<sup>th</sup> December 2004. At time of the alleged incident she was 13 years plus seven months. She first testified on 4<sup>th</sup> September 2018 when she was thirteen years plus nine months. This proceedings were however discarded when an order was made for the case to be heard de novo. This order was made on 9<sup>th</sup> October 2018.

44. SW therefore testified in respect to the judgment being challenged on 3<sup>rd</sup> December 2018 when she was exactly 13 years and eleven months and nine days. So she was left with 20 days to clock 14 years. Considering the pronouncements by the Court of Appeal in the case of **Maripett Loonkomok –vs- Republic (supra) and John Ndachu Ng’ang’a (supra)** on this issue I am of the view that the peculiar circumstances of each case should be considered. In the instant case WW was just left with a few days to come out of the bracket of children of tender years.

45. SW gave evidence on oath and was taken through cross examination by the defence counsel. No issue was raised by the defence counsel at that point. Considering S.W’s age at that point in time I find that failure to conduct a voir dire examination for her was not fatal to the prosecution case.

**(iii) Whether the age of the complainant was proved.**

46. The age of SW at the time of incident was confirmed through the birth certificate (EXB1) which showed she was born on 24<sup>th</sup> December 2004. She was therefore thirteen years plus seven months at the time of the alleged incident. The only requirement of age is that the victim be under 18 years as that qualifies him/her to be a child under the laws of Kenya. I therefore find that SW was a minor.

**(iv) Whether there was an act to cause penetration which was not successful.**

47. The charge facing the Appellant was one of “attempted defilement” and not “defilement”. There is evidence by pw1-Pw4 to the effect that in 2017 SW was defiled but no report was made because the matter was resolved at home. This explains the finding by the clinician (Pw4) that the hymen was old broken.

48. Counsel for the Appellant has submitted that there is no evidence of what was done to show that there was an attempted defilement. sw explained all that happened to her on this day. She said she was threatened with a knife when she declined to remove her clothes. By this time the door to their one roomed house had been locked from inside. The moment she co-operated and removed her clothes the knife was placed back on the table.

49. Thereafter the man removed his clothes and told her to lie on the bed and he lay on top of her. Its then that he tried to insert his penis inside her vagina and she screamed. Her sister RWM heard and came shouting her name. RWM shouted for the man to open the door or she calls the neighbours. Its then when dressed up opened the door and left. That is SW’S evidence.

50. RWM supported this evidence by saying what she heard, saw and did. When she got into the house she found SW dressing up while crying. She explained to her the ordeal she had been through. I find SW to be a truthful witness. She never pretended she was defiled. She just explained what happened to her the way it was.

51. The learned trial Magistrate summarized all this very well at paragraph 24-26 of her judgment as follows:

*24. This being a case of attempted defilement, I found that the following acts (a) undressing the minor through threats; (b) making her lie on the bed facing up; (c) the accused undressing himself; (d) mounting on top of the minor; and € removing his penis and attempting to insert it on the minor’s vagina all led to the irresistible conclusion that the accused intended to defile the child. His plan collapsed when the minor screamed and her sister responded.*

*25. There was no eye witness to the commission of the offence, however Pw2 observed Pw1 soon after the ordeal and testified that she was crying inconsolably. Her (Pw1’s) demeanor was consistent with someone who had just undergone a harrowing experience.*

*That said, I am also properly guided by the provision of section 124 of the Evidence Act which states,*

*Notwithstanding, the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap 15) where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:*

*Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim o the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth”.*

26. Pw1 gave evidence that was materially logical and consistent. She remained steadfast even on cross examination. I was satisfied she was telling the truth. I was thus satisfied that the offence of attempted defilement was established.

52. I find SW to have been a truthful witness. She did not exaggerate about anything. Had she been a liar she would have said she had been defiled. She did not do that.

53. Counsel for the Appellant had submitted that Pw4 said the P3 showed that SW was not touched. Pw4 however explained to the court that SW narrated her ordeal in Kikuyu language. Further that by saying that her vagina was “not touched” she simply meant that her vagina had not been penetrated”.

54. After analyzing the evidence on record it is clear that what was done by the man who was with SW was preparation an attempted to penetrate her genital organ. RWM’s appearance saved the day,

otherwise the person was set to go all the way. He cannot explain anything less after removing his clothes, lying on the undressed body of the child and trying to insert his penis in her vagina. He did all this after locking the door from inside. I am satisfied that there was real attempt to defile SW.

**(v) Whether the appellant was positively identified as the assailant.**

55. This incident occurred in broad daylight. SW said the person who locked her inside the house was her father whom she identified as the Appellant. He is the same one who lay on her after ordering her to remove her clothes.

56. RWM explained that when she reached the house after hearing SW’s screams she shouted for the door to be opened. The person who opened the door was the Appellant and he went away. When Appellant returned home in the evening RWM confronted him wanting to know why he wanted to rape SW further when their mother came home the two girls reported to her what had happened while she was away. They had spent the rest of the day with the baby B in the bush since they did not know what was going on.

57. The Appellant raised an alibi defence supported by his mother (Dw2). This defence only came up when the Appellant was placed on his defence. All this was never put to Pw1 – Pw3 in cross examination for them to confirm or deny. Upon cross examination the Appellant said he has no dispute with SW and even pays her fees. He even added that S.W has no reason to frame him

58. He also said his wife Pw3 was framing him for not playing fees for RWN. In cross examination Pw3 made it clear that RWN’s fees was paid for by her own mother. Since the evidence shows that SW was not the Appellant’s daughter, it clearly follows that RWN was also **NOT** his daughter. In her evidence RWN said when she confronted the Appellant on why he had tried to defile her sister he told her to shut up since he could do the same to her. I therefore find the Appellant’s defence to be an afterthought which has not displaced the prosecution case.

**(vi) Whether the sentence was unconstitutional harsh and excessive.**

59. The punishment for attempted defilement is provided for under section (92) of the Sexual Offences Act. The Appellant is dissatisfied with the sentence of ten years passed against him. I have considered the circumstances of this case, the mitigation and the victim impact report filed that was filed: What the Appellant did to this innocent child who looked upto him as a father was evil. He betrayed her trust in him. I will however interfere with the sentence since the word used in section 9(2) Sexual Offences Act is “liable” and the court can therefore exercise discretion.

60. The upshot is that the appeal succeeds in respect to sentence only and I make the following orders:

a) The conviction is upheld.

b) The sentence of 10 years imprisonment is set aside and substituted with one of seven (7) years imprisonment.

Orders accordingly.

**Dated and signed this 11<sup>th</sup> day of November 2020, in open court at Makueni.**

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**H. I. Ong’udi**

*Judge*