



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CRIMINAL APPEAL NO. 5 OF 2020

STEPHEN OLUOCH ONYANGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in S.O.A case No. 136 of 2018 of the
Chief Magistrate's Court at Busia by Hon. S.O Temu–Principal Magistrate)

JUDGMENT

1. Stephen Oluoch Onyango, the appellant herein, was convicted for the 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 are that on 29th of November, 2018 at [particulars withheld] village of Butula Sub County within Busia County, intentionally and unlawfully attempted to cause his penis to penetrate the vagina of CKO, a child aged 6 years.
3. The appellant was sentenced to serve ten years imprisonment. He was aggrieved and filed this appeal against the sentence.
4. The appellant contended that the sentence though legal, was harsh.
5. The appeal was opposed by the state through Mr. Mayaba, learned counsel, on grounds that the sentence was legal.
6. 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**.
7. Section 9 (1) (2) of the Sexual Offences Act does not exist. The charge to that extent was erroneously drafted. It ought to have read:

...contrary to section 9 (1) as read with section 9(2) of the Sexual Offences Act ...

Since the appellant fully participated in the trial, I find that he was not in any way prejudiced and the error is curable under section 382 of the Criminal Procedure Code.

8. Sections 9 (1) and 9(2) of the Sexual Offences Act provides as follows:

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

(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.

9. The sentence prescribed under this section is mandatory. The learned trial magistrate upon making a finding that the offence was proved, the only available sentence was the one meted out.

10 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”.

11. The evidence of C.K.O was as follows:

The accused had removed his clothes. He did not remove my clothes. He only removed his trouser. I was standing. He wanted to urinate on my face. I had gone to the house and informed aunt as she was preparing potatoes and “nduma.”

12. For an act to constitute an attempted offence, it must be more than a preparatory act and must pass the “but for” test. In my analysis of evidence, I find that the evidence on record did not prove the offence of attempted defilement. However, the evidence on record proved beyond reasonable doubt the offence of committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act. I therefore quash the conviction and set aside the sentence imposed by the learned trial magistrate. I convict the appellant for the offence contrary to section 11(1) of the Sexual Offences Act. The section provides:

1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.

13. The sentence prescribed under this section is not mandatory as the one under section 9(2) of the Sexual Offences Act. I therefore sentence the appellant to serve six years imprisonment. The sentence will run from the time he was sentenced by the learned trial magistrate. His appeal succeeds only to that extent.

DELIVERED and SIGNED at BUSIA this 11th Day of November, 2020

KIARIE WAWERU KIARIE

JUDGE