**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO.125 OF 2017**

***(From C.M's Court at Webuye Cr.No.588 of 2015 by: Hon. N.N. Barasa (SRM)***

**ERICK WAFULA WAMALWA.…..APPELLANT**

**V E R S U S**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

**Erick Wafula Wamalwa** was convicted by Hon. Barasa for the offence of attempted defilement contrary to section 9(1)(2) of the Sexual Offences Act.

The particulars of the charge are that on 26th June, 2015 at [particulars withheld] Area Chetambe Location, Bungoma East, Bungoma County, intentionally attempted to cause his penis to penetrate the vagina of V.W, a child aged 8 years.

In the alternative, the appellant faced a charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act.

It was alleged that on 26/6/2015 at [particulars withheld] Area, Chetambe Location, did an indecent act by touching the private parts of V.W. a child aged 8 years.

The appellant was convicted on the main charge and sentenced to serve 20 years imprisonment.

Being dissatisfied with the conviction and sentence, the appellant preferred this appeal citing one ground of appeal; that the sentence was too harsh and excessive. The appellant filed written submissions on 14/9/2018 in which he raised other grounds.

The second ground is that, the prosecution evidence was contradictory and the offence was not proved to the required standard.

Ms. Njeru learned counsel for the State opposed the appeal contending that there are no contradictions in the prosecution evidence. Counsel submitted that the complainant was sent for firewood at 3.00 p.m. When passing through a sugar cane plantation, the appellant grabbed her, removed her under pant, placed her on his lap and she screamed; that PW2 rescued PW1, took her to the mother, then to the hospital; that PW2 corroborated PW1's evidence that PW1 had been undressed and the appellant was also found naked; that the appellant ran off leaving behind his clothes; that the complainant was found with bruises to the neck.

Later, the appellant was found at his grandmother's home while dressing. Counsel urged the court not to interfere with the conviction or sentence.

This being the first appeal, it is required of this court to review all the evidence adduced in the trial court, assess it and draw its own conclusions. The court of course bears in mind that the trial court was better placed in assessing the demeanor of the witnesses having had a chance to see and hear them. *See* ***Kiilu v Republic (2005) KLR 174***.

The prosecution called a total of five witnesses.

After a *voire dire* examination, the court was of the view that the complainant, PW1, V.W. give unsworn evidence. PW1 told the court that she is 8 years, in standard 3 at [particulars withheld] Primary School; that on 26/6/2015 at 3.00 p.m. she was going to fetch firewood; that the appellant, who is her neighbor called her for sugar cane and she went with him. He then removed her clothes, pulled down her under pant and put her on his lap and put his penis in her vagina and she screamed; that the appellant put his hands on her mouth and Enos (PW2) who was going to work at [particulars withheld] School rescued her; that Enos took the appellant's clothes when the appellant ran away; that Enos took her and informed her mother what had happened.

**PW2 Enos Wandera Wasike** was going to work about 6.00 p.m. on 26/6/2015 when he heard a child scream in the sugar cane plantation. He went to find out, found the appellant lying on the child and was naked while the child was half naked. He screamed and the appellant tried to fight with him but he ran and PW2 remained with the appellant's clothes. He took PW1 to the mother, PW3.

**PW3 FW**, the mother of PW1 recalled the 26/6/2015; that she was sick and she sent PW1 to look for firewood at 3.00 p.m.; that PW1 did not return by 5.00 p.m. and she went in search of her and found her with PW2. PW2 had some clothes in his hand; that PW2 informed PW3 how he found the appellant trying to have sex with the child; that PW3 accompanied PW2 to the appellant's home and they found the appellant dressing in the grandmother's house. PW3 identified the complainant's birth certificate.

**PW4 Busenwa Johnson Masai**, a Senior Clinical Officer at Webuye Hospital produced a P3 form in respect of PW1 which had been completed by his colleague, Letisura on 27/6/2015. PW4 said that on examination, PW1 was found to have bruises on the neck but her genitalia were intact and he concluded that there was an attempt to defile PW1.

**PW5 PC (W) Fundi Loise** testified on behalf of the investigating officer, PC Rael who had gone on transfer; that the investigations officer received a report of an alleged attempted defilement and she visited the scene and re-arrested the appellant from members of public.

When the appellant was placed on his defence, in his unsworn statement, he denied committing the offence and stated that the child was stealing his sugarcane and on seeing him, she screamed and ran away when Enos (PW2) arrived and enquired what he wanted to do to the child; that he had a grudge with Enos; that a crowd of people arrived and stripped him of his clothes and that Enos framed him with this case; that the child lied and the parents wanted him to pay them but he refused.

The appellant faced a charge of attempted defilement contrary to section 9(1) of the Sexual Offence Act. The said section provides as follows:

> "***A person who attempts to commit an act which would cause penetration with a child is guilty of an offence of attempted defilement."***

Defilement is defined under Section 8(1) of the Sexual Offences Act as "***A person who commits an act which causes penetration with a child is guilty of an offence termed defilement***."

Penetration is defined under Section 2 of the Sexual Offences Act as:

> "***penetration***" means "***the partial or complete insertion of the genital organs of a person into the genital organs of another person***".

In an offence of attempted defilement, the prosecution must prove all the ingredients of defilement except penetration; the prosecution must prove:

> ***(1) The age of the complainant;***
>
> ***(2) Positive identification of the perpetrator;***
>
> ***(3) Steps taken by the perpetrator towards executing the act of defilement which failed for want of penetration.***

After conducting a *voire dire* examination, the court was satisfied that PW1 was a child of tender age. She gave unsworn evidence. Her birth certificate was produced in evidence. She was born on 20/3/2008 and was therefore about 8 years as of 2015 when the offence was committed.

Section 388(1) of the Penal Code defines what an attempt entails:

It provides:

> ***"388(1) where 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 further prosecution of his intention.***
>
> ***(3) It is immaterial that by reason of the circumstances not known to the offender it is impossible in fact to commit the offence."***

In such an offence, therefore, the prosecution needs to prove the *mens rea* (intention) and the *actus reus* which is the overt act that is done, geared towards the commission of the offence.

In the instant case, the identity of the appellant is not in dispute. PW1 knew him as a neighbor and so did PW2. The appellant admits that he was known to them. The incident occurred in broad daylight. The appellant also acknowledged having been at the scene of crime.

PW1 told the court that the appellant called her for sugar cane, got hold of her, removed her clothes and inner wear. He also removed his trouser and put her on his lap and inserted his penis in her genitalia when she screamed and it is then PW2 arrived. The appellant fled leaving behind his clothes which PW2 picked up. PW2 corroborated PW1's evidence. PW3 also found PW3 carrying the appellant's clothes. The incident occurred during the day between 3.00 p.m. to 6.00 p.m. PW2 & 3 followed the appellant to his house and found him dressing in his grandmother's house. The trial court had no doubt that the appellant was not only identified but recognized. The prosecution evidence was very consistent and remained unchallenged even in cross examination.

In his unsworn defence, the appellant alleged that PW2 framed him following a grudge. The appellant raised this allegation as an afterthought. He never put any questions to PW2 regarding the alleged grudge. The appellant also alleged that PW1 was stealing his sugar cane but he never put such question to PW1 or the mother PW2. PW1 is a child of tender age and I believe she told the court the truth.

The defence was not believable.

I therefore, find that the appellant had the intention to commit the offence having lured the child into the sugar plantation and put his intention into action by removing the child's clothing and his own and was actually trying to insert his genitalia into PW1's when he was interrupted. On being examined, PW1 was found with some bruises on the neck which is evidence of force.

On the totality of the evidence before the trial court, the appellant was caught red handed, attempting to defile PW1. The charge was proved beyond reasonable doubt and the conviction was well founded.

As regards sentence, Section 9(1) provides a minimum sentence of 10 years. The appellant was sentenced to serve 20 years in prison after the court considered that he was a first offender and had pleaded for leniency. The court also considered the presentence report which was not favourable as the appellant was known to harass women after he was intoxicated and abused drugs.

The appellant was only 26 years at the time of sentence. He may benefit from rehabilitation programmes in prison. For that reason, I reduce his sentence to 15 years imprisonment from the date he was sentenced by the trial court.

The appeal on conviction is dismissed.

The appeal on sentence succeeds in part.

**Signed** and **Dated** at ***NYAHURURU*** this ***9th*** day of ***April, 2019***.

**R.P.V. Wendoh**

**JUDGE**

**Delivered by *S. Riechi (J)* at BUNGOMA this *20th* day of May, *2019*.**

**PRESENT:**

Ms. Nyakibia - Prosecution Counsel

Wilkister - Court Assistant

Appellant - present