



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 12 OF 2018**

**BONFACE NZOMO KANYOLU.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

(Being an appeal from original conviction and sentence by Hon. M. Chesang (Resident Magistrate) In Kangundo P.M's Court in S.O. Case No. 14 of 2015 delivered on 15<sup>th</sup> day of August, 2015).

**JUDGEMENT**

1. The Appellant herein **Boniface Nzomo Kanyolu** was charged with the offence of attempted defilement contrary to Section 9(1) (2) of the Sexual offences Act. The particulars were that on the 13/08/2015 in Kangundo District within Machakos County attempted to cause his penis to penetrate the anus of PML a child aged 10 years. He was tried, convicted and sentenced to serve ten (10) years imprisonment.
2. Dissatisfied with the said conviction and sentence, the appellant lodged the present appeal wherein he has raised two main grounds of appeal namely that the prosecution had not proved the case against him beyond any reasonable doubt and further that his defence was ignored by the trial court.
3. This being the Appellant's first appeal, the role of the court is well settled. It was held in the case of **Okeno =Vs= Republic [1972] EA 32** that this court's duty is to revisit the evidence presented before the trial court afresh and subject the same by evaluating and analyzing it and then come to its own independent conclusion but bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses but however give an allowance for that.
4. **PML** was the complainant and testified as **PW.3**. He stated that he was in the company of his mother **JML (PW.1)** driving their cows home when one cow strayed into a nearby bush. His mother then instructed him to retrieve the said cow and he ran after it only to be grabbed by the Appellant herein who covered his (**PW.3**) mouth and removed his (**PW.3**) trouser. He further added that the Appellant threatened to stab him with a knife. The witness further stated that his mother called his name when the Appellant released him. The boy ran towards his mother and narrated the ordeal to her whereupon his mother raised alarm which prompted the Appellant to flee but was apprehended by members of public. On cross examination, the witness maintained that the Appellant removed his (**PW.3**) trouser and threatened to stab him with a knife and only released him after his mother called out his name.
5. **JML (PW.1)** was the mother to the victim. She stated that she and her son were heading home when one of the cows strayed into a nearby bush and that she sent the boy to run after the cow and drive it back home. When the boy delayed she went after him and called out his name six times when the boy emerged and was in a state of fear and who informed her that a man had grabbed him, removed his trouser and blocked his mouth. She added that at that juncture the assailant emerged from the bush and broke into a run. The victim pointed him out as the perpetrator. She raised alarm and members of public gave chase and apprehended him. The Appellant was handed over to the police. On cross –examination she stated that no witnesses saw the Appellant attempting to sodomize the complainant.
6. **Mwikali Muisyo (PW.2)** testified that on the material date she was taking cattle to the river when he saw the complainant running towards his mother. She stated that the mother of the victim requested her to chase after the appellant who was then running away from the scene after attempting to sodomize the victim. She ran after the appellant and together with members of public they managed to apprehend him. On cross – examination she confirmed that she did not see the Appellant sodomising the victim.
7. **Muoki Wambua (PW.4)** testified that he saw the appellant running away from the river and gave chase after learning that the appellant had attempted to sodomize the complainant near the river. On cross-examination he confirmed that he did not witness the attempted sodomy on the complainant and further denied that the Appellant was then jogging at the time of his arrest by members of public.
8. **No.85104 Pc. Vincent Maket (PW.5)** based at Kawethei police patrol base testified that a boy was presented by his mother and members of public. He learnt that the appellant had attempted to sodomize the boy. He recorded statements of witnesses and referred the victim to hospital for examination. He identified the P.3 form and treatment notes. He also visited the scene and found some shrubs and grass that

appeared to have been interfered with. On cross – examination he stated that the scene was disturbed and that there was no sand there to be harvested as contended by the appellant.

9. **Bridgitte Mbula Kawinzi (PW.6)** was the Clinical Officer at Kangundo District Hospital. She examined the complainant’s genitalia and found them intact with no tears or discharge. The anal region was intact as there were no signs of penetration. She produced the P.3 form and medical card as exhibits.

10. The Appellant was placed on his defence. He tendered an unsworn statement. He stated that he is a sand harvester and that on the material date he was looking for a place to harvest sand only to be arrested for a crime he did not commit. He maintains that he has been falsely framed for the offence.

11. Parties canvassed the appeal by way of written submissions. The appellant took issue with the prosecutions opening statement which had the effect of persuading the court to convict him even from the start before the witnesses could be heard. It was also submitted by the Appellant that the case was not proved beyond reasonable doubt. Finally the Appellant submitted that his defence was not considered by the trial court.

On the other hand learned counsel for the Respondent submitted that the *mens rea* and *actus reus* of the offence had been established by the prosecution. It was further submitted that the Appellants defence was duly considered by the trial court and that the sentence imposed was the minimum provided by the law. It was finally submitted that the appeal lacks merit and should be dismissed.

12. I have considered the evidence adduced before the trial court and the submissions. I find the issue for determination is whether the prosecution had proved its case beyond the required standard of proof. The prosecution was under a duty to prove or establish the two essential elements namely *mens rea* and *actus reus* and proceed to place the appellant squarely at the scene of crime. The appellant had been charged with the offence of attempted defilement contrary to section 9(1)(2) of the Sexual Offences Act which provides 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.

(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.

Just like a case of defilement the prosecution must prove the elements of age of victim as well as the positive identification of the perpetrator. However, the issue of penetration need not suffice since it is an attempted defilement implying that perpetrator did not succeed in his mission to penetrate the sexual organ of the victim.

As regards the aspect of the age of the complainant, the investigating officer produced the child health card as well as dedication certificate which showed that the child was born on 3/11/2005. As the incident occurred on 13/08/2015 then the child was a few months shy to 10 years old. Hence I find the victim was still below the age of 18 years and a child within the meaning of Section 2 of the children Act. The prosecution had succeeded in establishing that the victim was below the age of 18 years.

13. As regards the identity of the perpetrator, it is noted that the incident took place during the day. The complainant together with his mother and the two villagers who testified confirmed that the Appellant hailed from the same neighbourhood. The complainant gave a vivid account of his encounter with the Appellant near the river and went on to add that the appellant grabbed him, removed the trouser and covered his mouth in readiness to sodomize him but the same was thwarted by the complainant’s mother who was nearby and who called out the complainant’s name prompting the Appellant to release him. As soon as the complainant dashed out of the scene to the safety of his mother, the appellant broke into a run but was apprehended by PW.4 and PW.2 who had been alerted of the incident. PW.4 confirmed that the appellant was not at the time engaged in a jogging exercise as he was fleeing from the scene of crime. The complainant and his mother were present and witnessed the arrest of the appellant who was escorted to Kawethei police patrol base. The investigating officer (PW.5) visited the scene and confirmed that the scene which comprised of shrubs and grass appeared interfered with suggesting that there had been some struggle of some sort. He also established that there was no sand within the river and its banks for harvesting contrary to the Appellants assertion that he was engaged in sand harvesting at the time. The Appellant’s defence claim that he was arrested while looking for a place to harvest sand appears not believable in view of the credible evidence of the complainant and his mother as well as PW.2 and PW.4. I am satisfied that the Appellant was squarely placed at the scene of crime. It transpired from the evidence that the appellant also hailed from the same neighbourhood as the complainant and PW.1, PW.2 and PW.4 in which no evidence emerged to the effect that they had any differences with the Appellant before and hence the appellant’s claim that he had been falsely framed up. The trial court duly considered his defence and found that it did not shake the evidence of the prosecution.

14. Now that the appellant has been established to have been placed at the scene of crime, the next issue for determination is whether the Appellant committed the alleged offence. The offence is one of an attempted charge and it was incumbent upon the prosecution to demonstrate that the appellant engaged in acts which almost led to defilement but which failed to come to fruition and hence the attempted defilement.

#### **Section 388 of the Penal code defines attempt “as follows”**

“388(1) where a person intending to commit an offence begins to put his intentions into execution by means adopted 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 circumstances not known to the offender it is impossible in fact to commit the offence.”

The above provisions appear to highlight the essential ingredient in the commission of an offence namely *mens rea* which constitutes the intention and *actus reus* which constitutes the overt act towards the execution of the intention. Hence for these two to come into play an offender must first hatch the plot in his mind (intention) to commit an offence he contemplates and then puts the intention into action by committing the offence. The overt act (*actus reus*) in attempted offences must be clearly proved by the prosecution so as to distinguish it from mere preparation to commit an offence. This was the position of the Court of Appeal in the case of **Abdi Ali Bare =Vs= Republic [2015] eKLR** which involved an offence of attempted murder as follows:-

***“.....the more challenging question in a charge of attempted murder is the actus reus of the offence. Although a casual reading of Section 388 of the Penal Code may suggest that an attempt is committed immediately the accused person commits an overt act towards the execution of his intention it has long been accepted that in a charge of attempting to commit an offence, a distinction must be drawn between mere preparation to commit the offence and attempting to commit the offence.....”***

15. Guided by the above authority and considering the evidence tendered in support of the charge, I am satisfied that the charge was proved against the appellant beyond any reasonable doubt. The evidence of the complainant and his mother together with her two neighbours PW.2 and PW.4 placed the Appellant at the scene of crime. The complainant’s testimony left no doubt that the appellant had the intention to commit the offence of defilement as he had already pounced on the victim and undressed him. The several shouts made by the mother of the complainant in calling out his name had the effect of thwarting the appellant from completing the execution of his intention to defile the minor. The minor rushed to his mother and alerted her of the ordeal and no sooner the Appellant emerged from the bush and broke into a run. The Appellant was apprehended by members of public who had been alerted. The appellants’ claim that he was prospecting for sand in the area is not convincing since the investigating officer visited the scene and established that there was no sand in existence. This therefore left no doubt that the appellant had purposely visited the area with the aim of committing offences namely defilement of children as well as other sexual offences. This can be gleaned from the fact that the complainant had barely entered the bushes in search of the family cow that had strayed than to be ambushed by the appellant. The Appellant must have carefully hatched his plan early and executed it the moment the complainant appeared in the vicinity. The intervention by the mother of the complainant in the nick of time scuttled the appellant’s plans to defile the complainant. The Appellants action in removing the boy’s trousers was to commit an offence namely defilement but since he did not accomplish the mission the offence of attempted defilement sufficed. The removal of the complainant’s trousers was the last act by the appellant towards the commission of a sexual act. Since had the complainant’s mother not intervened, then he would have accomplished the mission of defiling the boy.

16. The Appellant has claimed that he had been convicted even before the case started. He alluded to the prosecution’s opening statement. I find this did not cause him any embarrassment or prejudice since it is standard practice for prosecution to make opening statement regarding their cases. Indeed after the opening statement the case proceeded to hearing and the appellant cross – examined the witnesses at length. I find the claim that the Appellant was condemned unheard lacks any merit since he fully participated in the trial from start to finish and even tendered his defence.

17. As regards the aspect of sentence, it is noted that the Appellant was ordered to serve ten (10) years imprisonment. The law under which the appellant had been charged prescribes a minimum sentence of ten years imprisonment. This is the sentence meted out by the trial court. I find the said sentence is the minimum possible in law and I see no reason to interfere with the same.

18. In the result it is my finding that the Appellant’s appeal is devoid of merit. The same is dismissed. The conviction and sentence by the trial court is hereby affirmed.

Orders accordingly.

Dated and delivered at **Machakos** this 2<sup>nd</sup> day of **October, 2019**.

**D. K. Kemei**

**Judge**