



**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. 133 OF 2017**

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

**BETWEEN**

**NDEGWA DIO.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence of*

*Hon.L. K. Gatheru, RM dated 21<sup>st</sup> July 2017 at Senior*

*Principal Magistrates Court at Mariakani*

*in Criminal Case No. 174 of 2017)*

**JUDGMENT**

1. The appellant, **NDEGWA DIO** was charged with the offence of attempted defilement contrary to **section 9(1) and (2)** of the **Sexual Offences Act** ("the Act"). It was alleged that on 17<sup>th</sup> March 2017 at 1330 HRS at [particulars withheld] Village, Samburu Location, Kinango Sub-County of Kwale County, he intentionally attempted to cause his penis to penetrate the vagina of KM, a child aged 10 years, 2 months. After a full trial and conviction, the appellant was sentenced to 15 years' imprisonment.

2. In his petition of appeal, he contends that the prosecution did not prove all the elements of the offence and that his defence was not taken into account. On its part the State urges that the prosecution proved all the elements of the offence.

3. Before I consider the grounds of appeal, I reiterate that 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 to 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**).

4. The prosecution's case was that on 17<sup>th</sup> March 2017, the complainant, PW 2 and her brothers were coming from school when they saw the appellant as they were about to cross the river. The appellant told them that they should go and see a donkey that had just given birth. PW 2 testified on oath that the appellant pulled her by the hand and dragged her towards a forest thicket as her brother shouted and cried for help. It turned out that there was no donkey giving birth. She narrated what happened as follows:

*The accused person didn't say anything but he held my skirt. The green skirt was on top. He pulled it and opened it. He managed to pull out the green skirt and I was left with the short brown skirt. I had buttoned the short dress from the front and he then held it. It got torn on the lining. After he pulled me for a short distance while ahead of me, he had then held me from the back and held me tightly to remove the skirt. That is the time he opened the outer skirt and removed it. He also attempted to remove the inner skirt and I had screamed a lot and so did my brother .....*

5. PW 2 managed to break free and ran away to report to their father. She testified that the assailant was wearing a white trouser with red stripes and a red shirt with rasta style hair. PW 1, the complainant's father, testified that on the material day, the children came to him and told him that someone had come to them on their way home and held PW 2 until he released her. He recalled that PW 2's green skirt and inner brown skirt were torn and the inner lining was missing. He also told the court that PW 2 described the assailant and he together with

other people started looking for the suspect whom they found herding cattle about 200 metres from where the incident took place. They arrested him and took him to the police station.

6. The investigating officer, PW 4, confirmed that on the evening of 17<sup>th</sup> March 2017, PW 1 and PW 2 came to the station to report the incident of attempted defilement. They were accompanied by members of the public who had brought the appellant. He re-arrested the appellant who wore white shorts, a red shirt and had dreadlocks and had been assaulted by members of the public. He visited the scene of the incident which was about 200metres from the footpath. He issued a P3 form. The clinical officer, PW 3, examined PW 2 on 18<sup>th</sup> March 2017 and signed the P3 form. He did not see any visible signs of injury on her body and concluded that there was no penetration.

7. In his unsworn statement, the appellant denied that he had attempted to defile PW 2. He stated that on the material day, he was looking after cows in the forest when five people came and started assaulting him while alleging that he had defiled a girl. He was thereafter arrested.

8. In his petition of appeal and written submissions, the appellant complained that the prosecution had not proved its case beyond reasonable doubt. He pointed to the fact that the trial court relied on evidence that was not credible and that he was not identified as the person who perpetrated the act complained of. He further contended that he was not identified and that his conviction was fraught with doubt. He submitted that the age of the child was not proved and that the charge sheet was defective in so far as it did not give the real age of the child.

9. The respondent on its part submitted that the prosecution proved all the elements of the offence and that the testimony of the child, PW 2 was well corroborated by that of PW 1. Counsel noted that the appellant was properly identified by PW 2 and was arrested after the incident. He urged the court to dismiss the appeal.

10. The issue for consideration in this appeal is whether the prosecution proved the offence of attempted defilement which under **Section 9** of the **Act** is defined 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 10 years.*

11. 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.*

12. 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**).

13. I am satisfied that the testimony of PW 2 was sufficient to prove that the appellant intended to defile her. His actions of forcefully trying to remove PW 2's outer and inner skirt in the circumstances where he dragged her to a nearby thicket betrays his intention to unlawfully cause an act of penetration. That he failed to do so, is because she was able to scream and set herself free. Her credible and firm evidence was corroborated by the testimony of her father, PW 1 to whom she narrated the ordeal immediately after she left. In addition, she was able to describe the clothing he was wearing and his appearance to PW 2 leading to his arrest within the vicinity. The appellant's defence was a mere denial and the consistent prosecution evidence supported by the sequence of events leading to his arrest leaves me no option but to uphold the finding that it is the appellant who attempted to defile PW 2.

14. Proof of age is a question of fact and in this case, it is not in doubt that PW 2 was a child. Her father produced the clinic card which showed that she was born on 6<sup>th</sup> January 2007 making her 10 years 2 months at the time of the incident. Under **section 9(2)** of the **Act** the minimum sentence for the offence of attempted defilement is 10 years' imprisonment. The sentencing notes do not disclose any reason why the minimum sentence was enhanced to 15 years' imprisonment.

15. While I affirm the conviction, I allow the appeal only to the extent that I quash the sentence of 15 years' imprisonment and substitute it with a sentence of **ten (10) years' imprisonment**.

**DATED and DELIVERED at MOMBASA on the 5<sup>th</sup> day of September 2018.**

**D.S. MAJANJA**

**JUDGE**

Appellant in person.

Ms Ogega, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.