



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CORAM: D.S MAJANJA J.

CRIMINAL APPEAL NO. 41 OF 2016

DANIEL MAROKO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence of Hon. J.W Onchuru– PM dated 9th June 2015 at the Principal Magistrate’s Court at Nyamira in Criminal Case No. 1052 of 2014)

JUDGMENT

1. The appellant, DANIEL MAROKO, was charged, convicted and sentenced to ten (10) years imprisonment for the offence of attempted defilement contrary to **section 9(1)** as read with **9(2)** of the Sexual Offences Act (‘the Act’). The particulars of the charge against him were that on 21st October 2014 in Manga District of Nyamira County he attempted to cause his penis to penetrate the vagina of MN, a girl aged 13 years.

2. The testimony of the complainant, PW 1, was, in part, as follows;

“On 21/10/2014, I was at home when my mum left to go to the market at 11.30 am. I was washing dishes. I was left alone at home. The accused then came and knocked and found me washing dishes. He gave me Kshs. 20 but did not tell me why. He said he will do whatever he wants. He then said and spoke to me that we go and meet where we go fetching firewood. He wanted us to have sex. I told my parents to warn him. I did not want to have sex with him. He then began to fondle my breasts and caress my vagina. I began to scream and he pushed me to the bed. He removed my skirt and pulled my inner pant white in colour. My parent came and also began to scream. I told her that the accused wanted to defile me. He used his hands to touch my private parts – my vagina. He had pushed me to the bed and I had also pushed him away. He had opened his zip and removed his green jacket. I screamed when he said he could forcefully undress me. Mum came when the accused tried to escape and closed the door from outside. She then called the police who came and then took both of us to hospital and then to the police. The accused had a black trouser.”

3. The child’s mother, PW 3, recalled that on the material day, she came home from the market and heard her daughter saying “Wachana na mimi.” She asked her what was happening. PW 1 responded that it was the appellant disturbing her. She found the door locked from inside. She then called for help from the neighbours.

4. PW 4, a neighbour who was nearby, testified that on the material day, he heard PW 2 screaming and when he went to her home, he found PW 2 outside the door which was locked from inside. Police officers soon arrived at the scene.

5. One of the officers who came to the scene was PW 7, an administration police officer, who had been informed that someone was about to be lynched. He rushed to the scene with other officers and found a locked house. When he and other officers gained access, they found the appellant and PW 1. They escorted the appellant to the police station at Nyamira.

6. PW 5, the investigating officer, confirmed that the incident was reported on 22nd October 2014. He issued the P3 form and sent PW 1 to Nyamira District Hospital where a clinical officer, PW 4, examined her. PW 4 testified that PW 1 had no injuries on the genitalia and outside. He however noted PW 1’s torn pant which PW 5 produced in evidence.

7. In his defence, the appellant denied the charge and claimed that he was being framed following a land dispute. DW 2, a friend of the appellant, confirmed he was there when the police came and found the appellant with PW 1 in the house. He claimed that he investigated the incident and found that there was a pending land dispute.

8. The evidence of the prosecution witnesses all confirm that PW 1 was found in the house with the appellant on the material day. As to

whether there was attempted defilement, is a question of fact to be determined on the basis of who between PW 1 and the appellant were telling the truth. PW 1 gave clear evidence on what took place and the reason for the appellant, an old man being in the house locked from inside with a young girl are implausible. Indeed PW 1's testimony was unshaken in cross examination. His defence of a grudge was properly dismissed by the trial magistrate as there was no reason why he would go to the home of PW 2, if their families had a land dispute.

9. The testimony of PW 1 was sufficient to sustain a conviction in light of the proviso to section 124 of the Evidence Act (Chapter 80 of the Laws of Kenya) which provides that the trial magistrate may rely on the evidence of a child if, for reasons to be recorded, the magistrate believes the child is telling the truth. The trial magistrate noted, "*I do find the evidence of the complainant credible and consistent. I further take note that even during cross examination by the accused, the complainant remained steadfast and unwavering.*" PW 1's testimony was well corroborated by the other witnesses.

10. I affirm the conviction. Since the sentence was the minimum provided under **section 9** of the Act, it is also affirmed.

11. The appeal is dismissed.

Dated and delivered at Kisii this 9th day of November 2018.

D.S MAJANJA

JUDGE

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions.

Appellant in person.