



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CORAM: D. S. MAJANJA J.

CRIMINAL APPEAL NO. 36 OF 2016

BETWEEN

GEOFFREY NYANDEKAAPPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence of Hon. N. Njagi– PM dated 20th February 2015 at the Principal Magistrate’s Court at Nyamira in Criminal Case No. 145 of 2013)

JUDGMENT

1. The appellant, **GEOFFREY NYANDIEKA**, was convicted of the charge of attempted defilement contrary to **sections 9(1) and (2)** of the **Sexual Offences Act** and sentenced to 10 years’ imprisonment. The particulars of the offence were that on 12th March 2013 in Nyamira District within Nyamira County, he intentionally and unlawfully attempted to cause his penis to penetrate the vagina of CKG, a child aged 9 years old.

2. The appellant was also charged and convicted of the offence of malicious damage to property contrary to **section 339(1)** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. The particulars of the charge were that on 12th March 2013 within Nyamira District of Nyamira County, he willfully and unlawfully tore the inner wear of CKG valued at Kshs. 150/- the property of the said CKG. He was convicted and sentenced to serve 3 years’ imprisonment on this charge. The court ordered that both sentences run consecutively.

3. The appellant appeals against conviction and sentence. The appellant’s case was that the prosecution failed to prove the offence. His counsel submitted that a crucial witness was not called and that the medical evidence and conclusions of the trial magistrate were contradictory hence the appellant was entitled to an acquittal.

4. Counsel for the respondent took the position that the evidence against the appellant was sufficient and reliable and that it was not necessary to call any other witnesses as they would not add anything to the prosecution case.

5. As this is a first appeal, I am required to re-appraise the evidence and reach my own conclusions bearing in mind that I neither heard or saw the witnesses testify. In order to proceed with this task, I will outline the evidence as it emerged before the trial court.

6. The complainant (PW 1) testified on oath after a voire dire. She told the court that she was 10 years old and that on the material day she was going home from school when she met the appellant who offered her Kshs. 20/- to buy mandazi but she rebuffed him. She described what happened to her as follows:

He followed me after a short while held me and threw me down by the side of the path, and removed my pants. He removed his inner wear and removed his thing and defiled me. He held me by the neck and threatened to strangle me if I screamed. K a young girl child passed by and screamed, and people who were taking alcohol came and apprehended the accused and started beating him
....

7. PW 1 explained that the school uniform she was putting on became muddy. She went home and reported the incident to her mother, PW 3. On her part, PW 3 testified at about 4.00pm on the material day, she heard people screaming nearby. She went to the scene and found that appellant had been apprehended. In the meantime, PW 1, who was crying, narrated to her the ordeal. She took the child to Nyamira District Hospital where she was examined.

8. The investigating officer, PW 4, testified that PW 1 accompanied by PW 3 came to report the incident on 13th March 2013 at about

3.40pm. After the complaint he issued the P3 form. The clinical officer, PW2, examined the child on 13th March 2013 and did observe any abnormalities in her private parts. He concluded that there no penetration.

9. In his sworn defence, the appellant denied the offence. He told the court that he was arrested and beaten by people as he left work on the suspicion that he had attempted to defile their daughter. He denied that he knew PW 1 and testified that he first saw her in court.

10. **Section 9** of the *Act* refers to an attempted defilement 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.

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. Although the testimony of PW 1 was to the that clear that the appellant inserted his penis in her vagina, the medical did not point to penetration hence the appellant was given the benefit of doubt. According to PW 1's testimony, the appellant had torn her panty and removed his penis and was only stopped when K screamed. That evidence was corroborated by PW 1's muddy clothes and torn panty which were produced in evidence. Further, PW 3 came to the scene immediately and found PW 1 in a state of distress after her ordeal.

13. That he was the person who assaulted PW 1 is confirmed by the fact that he was caught by members of the public and arrested immediately K raised alarm. PW 3 confirmed that when she arrived at the scene after responding to screams, she found the appellant had been arrested. The appellant's defence was a mere denial and only confirmed that he was at the *locus in quo* and was arrested by members of the public.

14. On the issue whether the failure to call a crucial witness was fatal to the prosecution case, the Court of Appeal in *Sahali Omar v Republic MSA CA Crim. App No. 44 of 2016 [2017] eKLR* held as follows:

The prosecution reserves the right to decide which witness to call. Should it fail to call witnesses otherwise crucial to the case, then the court has the mandate to summon those witnesses. But should the said witnesses fail to testify and the hitherto adduced evidence turn out to be insufficient, only then shall the court draw an adverse inference against the prosecution. This is because the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt (see. *Keter v Republic [2007] 1 EA 135*).

15. The appellant complained that the prosecution did not call K, who saw the appellant assault PW 1, screamed and attracted members of the public. I doubt that her evidence would add or subtract from the prosecution evidence in light of the other evidence which proved the offence.

16. As regards the second count of malicious destruction of property, the prosecution did produce the panty that was identified as belonging to the PW 1 and it was torn by the appellant in the course of attempting to defile PW 1. In the circumstances, the charge of malicious destruction of property was proved.

17. The sentence imposed for attempted defilement was the mandatory minimum sentence provided under **section 9(2)** of the *Act* hence it was within the law. However, since the second count was part of the same transaction, it was improper for the trial magistrate to impose consecutive sentences.

18. I affirm the conviction and respective sentences. However, I allow the appellant only to the extent that I set aside the consecutive sentences and direct that they run concurrently from the time of conviction.

SIGNED AT NAIROBI

D.S MAJANJA

JUDGE

DATED and DELIVERED at KISHI on this 21st day of NOVEMBER 2018

R. E. OUGO

JUDGE

Mr Nyangwencha, Advocate for the appellant.

Mr Orinda, Senior Assistant Director of Public Prosecutions, instructed by Office of Director of Prosecutions.