



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 68 OF 2017

PATRICK NDUNG'U.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from Original Conviction and Sentence in Molo Chief Magistrate's

Criminal Case (S.O.) No. 20 of 2017 by Hon. Rita Amwayi R M on 24/07/17).

J U D G M E N T

1. **Patrick Ndung'u**, the Appellant was charged with the offence of **Attempted Defilement** contrary to **Section 9(1)** as read with **Section 9(2)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offences were that on the **3rd** day of **February, 2017** at [**Particulars Withheld**] within **Nakuru County**, unlawfully and intentionally attempted to commit an act which would cause penetration of his male genital organ namely penis into a male genital organ namely anus of **FO** a child aged **six (6) years**.
2. After being taken through full trial he was convicted and sentenced to **fifteen (15) years imprisonment**.
3. Aggrieved, he appeals on grounds that he was not provided with witness statements to enable him prepare sufficiently for his defence and that the charge was not proved beyond reasonable doubt.
4. Facts as presented by the Prosecution were that PW2, the Complainant, a child aged **six (6) years old** was coming from school when he encountered an individual who grabbed his neck, took him to a nearby bush and made him lie on his abdomen. He removed his pair of shorts and underwear then removed his trousers and inserted his genital organ into his anus. He pricked his thighs with a needle and asked him if he had penetrated into him. He screamed and attracted the attention of PW4 **Robert Benson Onyango**, who proceeded to where the screams emanated from and saw the Appellant who on seeing him attempted to run away but he managed to grab him. The child lay on the ground with his pants having been pushed down and was crying. The individual whom he identified as the Appellant was known to him. Before people gathered he escaped. The matter was reported to the police. Investigations were carried out that culminated into the arrest of the Accused who was charged.
5. When put on his defence the Appellant opted to remain silent.
6. At the hearing of the Appeal he relied on his written submissions where he urged that **Article 50(2)(j)** of the **Constitution** was flouted therefore the trial was not fair. That medical evidence adduced by the Medical Practitioner was not relevant.
7. The State through learned Counsel, **Mr. Omutelema** opposed the Appeal. He urged that ingredients of the offence were proved. That the Appellant was about to defile the child when he was interrupted by a passerby. There was nothing to contradict evidence led by the Prosecution and the sentence was legal.
8. This being a first Appellate Court, I am duty bound to re-evaluate the evidence that was adduced before the trial Court and come to my own conclusion bearing in mind that I never saw or heard the witnesses who testified. (**See Okeno vs. Republic (1972) EA 32**).
9. In the case of **Juma vs. Republic (2007) EA 461** the Court stated:

“We hold that the state is obliged to provide an accused person with copies of witness statements and relevant documents. This is included in the package of giving and affording adequate facilities to a person charged with a criminal offence.....”

10. The practice in our Courts is for the Court to grant bail to Accused persons *suo moto* and to ensure they are furnished with copies of Prosecution witness statements to enable them to prepare adequately for the case. It is for this reason that a date is set for pre-trial directions prior to the case proceeding to hearing.

11. This is a case where the matter was mentioned thrice prior to the case being heard. There is no indication if the Appellant's rights as envisaged by the law were contravened. On the hearing date the Court Prosecutor stated thus:

“I have three witnesses and I am ready to proceed.”

And the Appellant replied as follows:

“I am ready to proceed.”

12. There is no way he could have intimated his readiness to proceed if he was not provided with the necessary information. He did cross examine witnesses extensively which was an indication of having been prepared for the case.

13. After the close of the Prosecution's case his rights to defend himself pursuant to the provision of **Section 211** of the **Criminal Procedure Code** were explained and having understood he opted to exercise his constitutional right of remaining silent and leaving it to the Court to decide on evidence adduced. He could not have been faulted. In the premises the Court did not err.

14. Regarding the charge, the age of the child as stated in the particulars of the offence was proved by a copy of the Birth Certificate that was adduced in evidence. He was born on **10th June, 2011**. As at **3rd of February, 2017** he was **six (6) years old** therefore a child.

15. After the act, the child was subjected to medical examination. PW6 **Komen Mluingwa**, the Clinical Officer who examined him found his anal orifice normal as it had no injuries. There was however evidence adduced of the child who stated that the Appellant was attempting to insert his genital organ into his anal hole when he was interrupted by PW4.

16. **Section 388** of the **Penal Code** provides thus:

“(1) When 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 the 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.”

Had his effort not been thwarted he would have completed the commission of the offence of **defilement**. In the premises the offence of attempted defilement was committed.

17. Regarding the sentence, the statute provides for a minimum sentence of **ten (10) years imprisonment**. No good reason was given why this was not considered.

18. In the result, I affirm the conviction, but set aside the sentence that I substitute with one of **ten (10) years imprisonment** to be effective from the date of conviction by the Lower Court.

19. It is so ordered.

Dated, Signed and Delivered at Nakuru this 13th day of December, 2018.

L.N. MUTENDE

JUDGE