



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NANYUKI

HCCRA. NO. 42 OF 2015

AMOS MWITIKIRIMI.....APPELLANT

-VERSUS—

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence by **Hon. T.N.NYANGENA** - Principal Magistrate dated 16th June 2014 in Nanyuki Chief Magistrate’s **Court Criminal Case No. 610 of 2012**)

JUDGMENT

1. **AMOS MWITIKIRIMI** has filed this appeal against his conviction and sentence of the offence of attempted defilement of a boy aged 7 years old **Contrary to Section 9(1) and (2) of the Sexual Offence Act Cap 62A**. He was sentenced to serve 10 years of imprisonment
2. He has appealed against his conviction and sentence. It is important to note that although all the prosecution’s witnesses gave evidence in Swahili language the Appellant failed to cross examine them. He failed to cross them even though the Learned trial Magistrate asked him twice whether he was sure he did not wish to cross examine them. It is also important to note that the appellant tendered his unsworn defence in Swahili language.
3. The complainant HM a 7 years old boy stated that on 4th June, 2012 while going or coming (it is not clear) from school he met appellant on the way. He said:

“He (appellant) took me towards the slaughter house. I screamed but there was no one along the road. ... He gave me Ksh 5/=. I took the money ... He took me to the backside, lay me on the grass. He removed my trouser and short. He opened his trouser zip and removed his penis and started inserting his penis. The watchman came and found him attempting to sodomize me.”
4. P W 3 A J described himself as Railway caretaker at railway housing. On the material date at 10.00a.m. while at work he heard a child’s voice coming from the bush. He also noted that leaves moving in the bush. Ongoing to the scene he saw HM facing downward, and the appellant lying on top of HM. When PW 3 asked the appellant what he was doing appellant stood up, very fast, and fastened his belt. P W 3 noted that appellant’s trousers had been down. P w 3 gave chase of the appellant, he tried to get away, and with the help of P W 45 they arrested him. P W 3 noted that HM was not wearing his shorts
5. P W 2’s evidence was entirely corroborated by P W 3.

6. Appellant in his unsworn defence stated that he was arrested on unspecified day in the company of seven other people. The other people were charged the following day with unspecified offence while he remained in the cell. He was later framed with the offence he faced in court. He denied committing the offence.

7. The Learned Magistrate by her judgment had this to say:

“The testimony of the minor is clear consistent and cogent the minor is of tender age and had no intention to frame the accused. From his testimony he was on his way to school. Indeed he was in school uniform. The evidence of the railways security guards corroborated that of the minor in all material particulars. They confirm that they found the minor in school uniform but without shorts. They helped him dress up.

The incident occurred in a guarded area and there were no members of the public in sight. The accused took advantage of limitation to commit the heinous act. The fact that he gave the minor a coin shows that he was determined to use all manner of tricks to trick the minor not giving in to his demands. The testimony of the mother has clearly shown that the minor was on this day prepared and released to school (sic) as usual.

The mother did not know what will befall her child on the way to school. She did not know the accused hence there is no way she could have been framing him. She was only called and informed that her child had been arrested. This means she had no idea of what had taken place till she visited the police station only to find that someone had attempted to sodomize her son. She did not know the railways security guards either did she know that they are the one who had intervened to protect her child from the accused’s act and therefore she could (sic) have colluded with them to frame. The prosecution evidence is clear, consistent and convincing. It has not been controverted by accused person. The accused declined to cross examine the watchman. I find the evidence tendered by the prosecution to be overwhelming and sufficient to convict the accused. The accused was caught on the act but before he could penetrate the anus of the minor hence P3 form does not indicate any penetration or injuries treatment.

8. I wholly agree with the above trial court’s assessment of the evidence.

9. Further I do find as the trial court did that prosecuting adduced evidence that an inchoate offence had been committed by the appellant. In the case: *KIOKONGUNZI V REPUBLIC* [2015] eKLR justice P Nyamweya defined what amount to attempt to commit an offence as follows: In **Francis Mutuku Nzangi v Republic, NRBCraCrim. Appeal No. 358 OF 2010 [2013]eKLR**, the court of appeal explained 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 as 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 to him success impossible.”

10. Bearing the above in mind this is what the appellant did;

(a) he lured HM into the bush by giving him Ksh. 5/=,

(b) he undressed HM,

(c) he undressed himself, and

(d) he lay on top of HM who was facing downward.

11. Appellant had done all acts necessary to perfect the offence of defilement. The intervening act was the watchman P W 3 who went to the scene in response to HM's cry and because he noted the leaves in bush were moving.

12. It follows that with the above evidence in mind the grounds raised by the appellant must and do fail. The prosecution's evidence was consistent and clear. The appellant's defence was an afterthought and was a mere denial. It did not shake the prosecution's case.

13. The appellants appeal is dismissed. The conviction of the trial court is upheld and the sentence is confirmed.

Dated and Delivered at Nanyuki this 7th APRIL 2016

MARY KASANGO

JUDGE

Coram

Before Justice Mary Kasango

Court Assistant – Njue

For state

For Appellant

Appellant

COURT

Judgment delivered in open court

MARY KASANGO

JUDGE