



**REPUBLIC OF KENYA**

**IN THE HIGH OF KENYA AT NYERI**

**CRIMINAL APPEAL NO. 190 “A” OF 2012**

**KAMARU GITIMU ..... APPELLANT**

**VS**

**REPUBLIC ..... RESPONDENT**

(Appeal from the judgment of the Resident Magistrate’s Court at Nakuru (M.W. Murage, R.M.) delivered on 24<sup>th</sup> October, 2012 in Criminal Case No. 305 of 2012)

**JUDGMENT**

1. The Appellant, **Kamaru Gatimo** was charged with the offence of attempted defilement contrary to **Section 9(1)(2) the Sexual Offences Act**. The particulars of the charge was that on the 19<sup>th</sup> July, 2012 at [particulars withheld] within Nyeri County intentionally attempted to cause his member to penetrate the backside of **BGN** a child aged 7 years.
2. In the alternative, the appellant was charged with indecent act with a child contrary to **Section 11(1) of the Sexual Offences Act, 2006**.
3. The facts of the case as recorded by the trial magistrate are that on 19<sup>th</sup> July 2012 the appellant lured the complainant (**PW1**) into his house by offering him macadamia nuts; whilst inside the house the appellant made him lie on the couch and removed **PW1’s** shorts and proceeded to sodomize him; **PW2** upon being informed by **PW6** on the on-goings at the appellants house rushed to the appellants house and met with the minor at the doorstep of the house; she stripped him to examine if he had injuries; thereafter the minor was taken for treatment at Mukurweini Hospital and was issued with a P3Form; the Appellant was arrested and subsequently charged, tried and convicted at the Resident Magistrates Court on the main charge and sentenced to fifteen (15) years imprisonment.
4. Being aggrieved by both conviction and sentence, the appellant filed a Petition of Appeal on 2<sup>nd</sup> November, 2012, raising three grounds of appeal; that the evidence adduced by the prosecution witnesses was contradictory in nature; that the prosecution did not prove its case beyond reasonable doubt and that the trial magistrate disregarded his defence on the existence of a grudge.
5. The appeal was heard on 30/11/2015 with Ms Maundu appearing for the State and the appellant being present in person; both parties made oral presentations and hereunder is a brief summation of their respective submissions.

**APPELLANTS’ SUBMISSIONS**

6. It was the Appellant’s case was that he found PW1 on the tree in the process of stealing macademia nuts from his tree; upon seeing the appellant nearing PW1 came down from the tree and ran away; PW1 had dropped 4kgs of nuts from the tree; that after consulting his son he

- decided to make a report at the nearby Police Station
7. That this case arises from a family dispute; that PW6 is his daughter in law who after writing her statement deserted her matrimonial home; that she had to be compelled and arrested so as to come and testify; that his son also refused to testify as his witness on his behalf; that his family had plans to get rid of him and to take his property and squander it.
  8. The appellant prayed that the appeal be dismissed and that he be released. The Appellant prayed that his appeal be allowed and that he be released.

### **RESPONDENTS SUBMISSIONS**

9. Ms. Maundu, the Prosecuting Counsel for the State submitted that the Appellant was arrested at the scene of crime but was not identified by the complainant as the actual offender. Moreover the testimonies of PW1 and PW2 do not give a clear account of what took place on the material days. Counsel further submitted that though the medical report shows PW1 to have been defiled, her testimony was that she was defiled by another person and not the appellant herein. Counsel therefore left the matter to court to look at the evidence in its entirety and decide the matter on appeal. He proposed that the charges be substituted to gang rape and aiding and abetting.
10. Counsel prayed that the appeal be dismissed and the conviction and sentence be upheld.

### **11. ISSUES FOR DETERMINATION**

- i. Whether the prosecution proved the key ingredients of the offence;
- ii. Whether the evidence of the prosecution witnesses was contradictory.

### **ANALYSIS**

12. This being the first appellate court it behooves me to re-evaluate the evidence on record and to reach an independent conclusion. Refer to the case of **Okeno vs R (1972) EA 32**.

#### **Whether the prosecution proved the key ingredients of the offence:**

13. The key ingredients of attempt are set out in Section of the Sexual Offences Act and they include intention and penetration; the Section reads as follows;
14. This court's considered view is that the offence being an attempt all that the prosecution needed to prove is the appellant's overt acts that would have demonstrated intention and or objective.
15. PW1 in his evidence states that the appellant lured him into the house; then he defiled him with his penis; but his evidence is devoid of any sequential acts taken by the appellant to show intention and objective.
16. That it goes without saying that the appellant must have been dressed in clothes consisting of a trouser; therefore to effectuate the intention he would have had to either partially undressed or removed his trousers so as to attain his objective; these actions or steps taken would have gone to demonstrate the appellants intention and objective.
17. PW6 who was at the scene of crime stated in her evidence that she witnessed the incident as the door was not closed; she states that the appellant used his finger to defile PW1; the question that arises is why she did not raise the alarm when she saw what was transpiring but instead chose to run away from the scene to go and inform PW2 the mother of PW1.
18. The Court of Appeal in its decision **Francis Mutuku Nzangi vs R [2013] eKLR** described an attempt as follows;
19. **"....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 discernable act or acts but fails to achieve his objective, he will only be guilty of an attempt to commit the offence.**
20. The absence of a narrative in PW1's evidence as to the steps or actions taken by the appellant to undress partially or otherwise raises doubts as to how the appellant set out to effectuate his intention.

- 21.PW6 could have caught the appellant red-handed and or could have interrupted or prevented the crime by raising an alarm but she chose to run away from the scene; her conduct then and during the trial in that she was not a willing prosecution witness raises doubts as to the credibility of her evidence.
- 22.This court is thus satisfied that the prosecution failed to prove its case to the desired threshold.
- 23.This ground of appeal is found to have merit and is allowed.

**Whether the prosecution witnesses evidence was contradictory/ inconsistent;**

- 24.That the offence being one of an attempt all that the prosecution needed to prove as an overt act; the fact that no evidence was adduced on the state of dress or undress of the appellant raises sufficient doubt in the evidence adduced by PW1 that the appellant used his member to defile him.
- 25.PW6s evidence does not corroborate that of PW1; she stated that she witnessed the incident and that she saw the appellant using his finger to defile PW1; her conduct is also raises doubt in that she chose to leave the scene instead of raising an alarm so as to prevent a crime; the record also shows that she was also not a willing prosecution witness and had to be compelled to attend court to testify.
- 26.The evidence of PW3 the clinical officer who examined PW1 states in her evidence that she did an anal swab which was taken to the lab and it revealed nothing; that there were no pus cells, no spermatozoa or pathogens; it is noted that this witness made no finding on penetration.
- 27.This court finds that there were material inconsistencies in the evidence of PW1, PW3 and PW6 that raised doubt in the prosecutions' case.

**FINDINGS**

- 28.For those reasons this court makes the following findings;
- i. There were material inconsistencies in the evidence of PW1, PW3 and PW6 that cast doubt to the prosecutions' case.
  - ii. This court finds that the prosecution failed to prove its case to the required and desired threshold

**DETERMINATION**

- 29.The appeal is found to be meritorious and is hereby allowed.
- 30.The conviction is hereby quashed and the sentence is hereby set aside.
- 31.The appellant to be set at liberty unless otherwise lawfully held.

Orders accordingly.

**Dated, Signed and Delivered at Nyeri this 12th day of May, 2016**

**A. MSHILA**

**JUDGE.**