



REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL NO. 98 OF 2014

BETWEEN

JACOB ONYANGO AUKO APPELLANT

AND

STATE RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 128 of 2011 at Principal Magistrate's Court at Rongo, Hon. P. K. Rugut, Ag SRM dated on 10th November 2014)

JUDGMENT

1. The appellant was charged with attempted defilement contrary to **section 9(1)** as read with **section 9(2)** of the *Sexual Offences Act, 2006*. The particulars of the offence were that on 24th March 2011 at [Particulars Withheld] Village in Migori County, he attempted to penetrate the vagina of BA, a child aged 7 years. He also faced an alternative charge of committing an indecent act with a child contrary to **section 11(1)** of the *Sexual Offences Act, 2006* based on the same facts. He was convicted on the principal charge and sentenced to 10 years imprisonment.
2. As this is a first appeal, I am required to review the evidence and come to an independent conclusion as to whether or not to uphold the conviction making an allowance for the fact that I neither saw nor heard the witnesses testify. In order to proceed with task, it is necessary to outline the evidence as it emerged before the trial court. The prosecution case was founded on the testimony of 3 witnesses.
3. After a *voire dire*, PW 1 testified that she was 6 years old at the time of the incident and that on the material day she was going home from the posho mill in the evening on the way she met the appellant along the footpath. The appellant took the cloth she was carrying the flour in spread it on the ground and then proceeded to remove his pants and at that point PW 2 appeared and the appellant ran away.
4. PW 2, a friend of PW 1's mother, testified on the material day as she was coming from the posho mill, PW 1 went ahead of her as she was talking to a friend. As she proceeded along the foot path, she saw a leg and the accused lying on top of PW 1. When the appellant saw her he started running away. She followed him and as they ran, met a clan elder who ordered him to stop. He was later taken to Awendo Police Station.
5. PW 3, the investigating officer, testified that on the material day at about 5.30 pm, he was in the office at when the chairman of community policing, PW 2 and another lady came with the

appellant and reported that he had attempted to defile PW 1. He arrested the appellant. He obtained a clinic card that confirmed that PW 1 was aged 7 years old.

6. The appellant elected to make an unsworn statement when he was put on his defence. He stated that he found PW 1 along the foot path and that she had placed her flour on the ground and was urinating. When she saw him, she stood up and tried to put her tight trouser on. As the trouser was tight, he tried to assist her whereupon PW 2 came and accused him of being a thief who had stolen her daughter's flour and was trying to defile her.
7. The appellant called a witness, DW 2, who testified that he was a village elder. He recalled that he was called by his brother to come and mediate a dispute between the appellant and PW 1. He found them along the road with their respective families present. He was told that the appellant had attempted to defile PW 1. The appellant told him that he was trying to stop PW 1 from having a call of nature and that he observed fresh faeces at the road side. He stated that there was a land dispute between the two families and that he tried to reconcile them without success.
8. On the basis of the testimony, the learned magistrate held that the accused attempted to defile PW 1. The appellant now appeals against the conviction and sentence grounds set out in the petition of appeal dated 18th November 2014. The appellant contends that the prosecution failed to prove the offence to the required standard. Learned counsel for the appellant, Mr Gembe, submitted that there was no direct evidence that the appellant tried to penetrate PW 1 or that he indecently handled her. He added that the evidence of PW 1 and PW 2 was contradictory and could not be relied upon. Counsel further submitted that the learned magistrate erred in holding that age was not a necessary ingredient in offence of attempt and that the age of PW 1 was not established. Counsel contended that the court did not make a finding on the appellant's defence that he was framed.
9. Ms Owenga, learned counsel for the respondent, opposed the appeal and urged that the prosecution proved all the elements of the offence to the requisite standard. She submitted that PW 1's account was corroborated by that of PW 2 and that the appellant's defence was a sham.

10. **Section 388** of the *Penal Code (Chapter 63 of the Laws of Kenya)* defines an attempt as follows;

388. (1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil 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 fulfilment 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.

11. In *Francis Mutuku Nzangi v Republic* NRB CA Crim. Appeal No. 358 of 2010 [2013]eKLR, the Court of Appeal recapitulated the provisions 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. In addition, **section 9** of the **Sexual Offences Act** refers to an act which would cause penetration. It states 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.

(2) A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years.

13. **Section 2** of the **Act** defines “Penetration” as “*the partial or complete insertion of the genital organs of a person into the genital organs of another person.*”

14. Did the appellant commit an act that would have caused penetration? There is no doubt PW 1 and the appellant were together on the material evening. The question is whose version of event was true and at any rate believable. PW 1 stated that the appellant had removed his pants when PW 2 saw him. When she was cross-examined she stated that, “*the accused removed my trouser, he removed my pant. He told me that if I screamed he would kill me...*” When asked whether the appellant slept on her, she denied that the appellant slept on her. She stated, “*At the time PW 2 came, he did not sleep on me, did not sleep on me, he was removing his trouser when PW 2 found him.*” PW 2 testimony was that, “*I saw a leg and I saw the accused lying on top of Belinda I screamed and he stated running away ... The accused had removed his trousers, he was lying on the minor, then I interrupted him.*” When cross-examined she stated that, “*The accused was ready to penetrate, I saw his penis. I screamed and he ran away ...*”

15. Although the testimony of PW 1 and PW 2 is inconsistent as whether the appellant was lying on the PW 1 and was ready to penetrate, both PW 1 and PW 2 are clear that he had removed his trouser. PW 2 confirmed in her testimony that after the appellant ran away, she assisted PW1 to put on her clothes. This corroborates the testimony of PW 1 that the appellant had removed her clothes. In his defence, the appellant stated the he was trying to help PW 1 wear her tight trousers. His own testimony confirms that he was together with PW 2 and that he touched her. The evidence, as a whole, points to the fact that the appellant was taking steps to have sexual intercourse with PW 1. He had removed her clothes and also removed his trousers. These acts constitute overt acts towards effecting his intention to secure penetration.

16. The appellant’s defence was that he was trying to assist PW 1 put on her tight trousers is preposterous as no such suggestion was put to her in cross-examination. The fact that he touched her augments his clear intention to have sexual intercourse with her. The appellant’s defence is also inconsistent with what he told DW 2 that he was trying to stop PW 1 from defecating by the roadside. The appellant himself did not suggest that he was being framed. In the circumstances and taking into account the entire evidence, the contradictions in the testimony of PW 1 and PW 2 were not material and did not affect proof of the offence. I find that the prosecution proved its case.

17. As regards the issue of age, I uphold the learned magistrate’s conclusion that under **section 9** of the **Sexual Offences Act** the exact age of the child need not be proved. It is enough to prove that the victim is a child. In this case, there is no dispute that PW 1 was a child. It follows then that the sentence imposed, being the mandatory minimum, was within the law.

18. The conviction and sentence are affirmed. The appeal is dismissed.

DATED and **DELIVERED** at **MIGORI** this 6th day of March 2015.

D.S. MAJANJA

JUDGE

Mr Gembe instructed by Gembe Capis Omollo & Company Advocates for the Appellant.

Ms Owenga, Principal Prosecuting Counsel, instructed by the Director of Public Prosecutions for the respondent.