



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 198 OF 2017

ABDUL AKIM SAID.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the decision by Hon. D. Mochache, Chief Magistrate

on 22nd August 2017 in Shanzu Criminal Case No. 638 of 2015,

***Republic v Abdul Akim Said*).**

JUDGMENT

Background

1. Abdul Akim Said was charged with the offence of attempted defilement contrary to Section 9(1) of the Sexual Offences Act No. 3 of 2006. The particulars are that Abdul Akim Said on the 3rd day of June 2015 at Vipingo village in Kilifi County within Coast Region intentionally attempted to cause his penis to penetrate the anus of S. A. a boy child aged 10 years.
2. In the alternative charge Abdul Akim Said was charged with the offence of indecent act contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006. The particular are that Abdul Akim Said on the 3rd day of June 2015 at Vipingo village in Kilifi County within Coast Region intentionally touched the anus of S. A. a child aged 10 years with his penis.
3. The trial magistrate considered the evidence of four prosecution witnesses and found that a prima facie case had been established against the accused person who was put on defence according to Section 211 of the Criminal Procedure Code. However the accused stated to court that he will not give any evidence. The trial magistrate then found the accused person guilty of the offence of attempted defilement contrary to Section 9 of the Sexual Offences Act as read with Section 215 of the CPC. The accused was then sentenced to 10 years imprisonment.
4. The appellant was aggrieved and dissatisfied by the entire decision by the trial court preferred the appeal herein on the following grounds:-
 - 1) That the learned trial magistrate erred in law and fact by finding the Appellant' conviction and sentence without considering that the offence of attempted defilement was not proved beyond any reasonable doubt.
 - 2) That the learned trial magistrate erred in law and fact in convicting and sentencing the Appellant to 10 years without considering that the prosecution case was governed by contradictions.
 - 3) That the learned trial magistrate erred in law and fact by not considering the Appellant's sworn defence evidence.
5. This appeal was canvassed by way of written submissions.

Prosecution's Case

6. PW1, the complainant said that he stays with her grandmother and goes to FH Primary and in Standard 2. PW1 said that he reported her uncle, the accused, to the police because he did bad things to him. She said that it was at night and he was asleep at NT' where he went to sleep at his uncle's room. PW1 slept in the same room with the accused where he slept on the bed while the accused slept on a mattress on

the floor. PW1 felt a lot of pain, he cried, woke up and found the accused sleeping on his back. He was naked and pushing his penis in his anus. PW1 had a small pant and a long trouser. The accused removed the trouser and tore off the pant. PW1 said that he screamed hard and the accused went back to his bed. PW1's grandmother was sleeping in another room. PW1 ran up to the room of his grandmother who checked his anus and said the accused will see. PW1's grandmother went to call the accused out but he refused to get out and the grandmother locked the accused inside the room. PW1 went and slept with his grandmother. The next day, PW1 went to school and told his teacher what his uncle had done to him. The teachers took him to Vipingo Health Centre and called his grandmother. Later PW1 told them that it was his uncle who was the accused. PW1 said that there is a boy called Idi who used to go sleep with the accused in his bed every day and that day Idi did not go and it is why he lay on her.

7. PW2, MA from Vipingo does business and stays alone. On 3.6.2015 at 11 pm, he was at her sister's place, the mother of the accused. PW2 was sick as she had told her sister who told her to go to her place. PW2 took her grandson PW1 and went there at night. PW2 used to sleep with her sister while PW1 slept with the accused and other boys. That day, PW2 went for a journey and left him at her place. At night, PW2 slept in their room while PW1 slept with the accused in another room. At night, she heard PW1 hitting the door and crying and calling her to open for him. PW2 got scared and opened. The child told him that Abdul had inserted his penis in his anus. PW2 lit the latrine and checked the child's anus. PW2 said she would go and see the accused and he went to their room and knocked and called him to come out. The accused refused to open the door. PW2 locked the accused from outside. In the morning, PW2 prepared the child who went to school. After a while the village elder went and told PW2 that her grandson had been defiled and that she was concealing it. The village elder went and came back with the head teacher and the police. PW2 and the accused were arrested. PW2 had told his sister what his son had done and asked what they should do. She told her to wait for her to come back but the police picked her before the mother came back. PW2 said that the child is 11 years old and the police took her to hospital for age assessment. PW1 had the results in court MFI - 1.

8. PW3, No. 85262 PC Jacob Abuhusi attached at Kijipwa Police Station, the investigating officer in the case said that on 4.5.2016 while on duty, a lady went and reported that her grandchild had been defiled and the suspect was about to be lynched by members of the public. PW2 requested them to go rescue the suspect whom she had locked in the home. PW3 proceeded to the scene in Vipingo area led by the village elder where they found the suspect locked in a house. He was rescued and escorted to Kijipwa police station. PW3 asked the victim and the grandmother to follow PW3 to Kijipwa Police Station where they were interrogated. PW3 said that PW1 had no certificate of birth and the age assessment was done at Coast General Hospital and it was established that the complainant was 11 years old. Age assessment as Exh 1. The complainant told PW3 that he used to sleep in the same room with the accused person who is his cousin. One night, he moved to his bed and defiled him. He sent the complainant to hospital for examination, issued them with a P3 form. Examination by the doctor revealed that no offence of defilement had been performed. PW3 identified the accused in the dock.

9. PW4, Dr. Abdulahi Hussein, the medical officer at Mtwapa Health Centre went with the P3 form for Salim aged 11 years. He had the Post Rape Care form dated 4.6.2015 where the patient was examined on 4.5.2015 at 4.30 pm. The date of action was 3.6.2015 at 10.30 pm. PW4 said that the boy reported to have been sleeping when the perpetrator tried to rape him. The clothes were not in a plastic bag. They were not given to the police. The relatives had a bag, a bath and long call. There was no tear, bruises or lacerations. The anus was intact. There was no sign of penetration. Post Rape Care form Exh 2. He had the P3 form dated 10.6.2015, the OB No. 13/6/15. There were no injuries noted as per his examination to a case of altering to sodomy. He did not examine the accused person. The person who filled the P3 form had gone on transfer but knows his handwriting having worked with him for some time.

Respondent's Submissions

10. The Respondent submits by citing Section 9 (1)(2) which provides that:-

'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.'

11. The Respondent submits that the prosecution must prove the other ingredients of the offence of defilement except penetration; it must from the age of the complainant, the positive identification of the accused, and then prove the steps taken by the accused to execute the defilement which did not succeed. Attempted defilement is as if were a failed defilement, failed because there was no penetration.

12. The Respondent submits that it was observed in the case of *Abdi Ali Bere v Republic* [2005] eKLR that in order to prove an attempt to commit an offence, the prosecution must prove the *mens rea* which is the intention and the *actus reus* which constitutes the overt act which is geared to the execution of the intention. The *actus reus* must be more than mere preparation to commit the act as there is a difference between mere preparation to commit an offence and attempting to commit an offence.

13. The Respondent submits that PW1's evidence is clear that the Appellant had removed his trousers and tore his pants then pressed his penis on PW1's anus. The Appellant is the uncle to the victim and slept together in the bedroom hence no possibility of error in identification. The Respondent further submits that the accused has been placed at the scene by all PW1, PW2 and PW3.

14. The Respondent submits that the evidence has established that the complainant was 11 years old, there was an act to cause penetration which was not successful, and the accused was positively identified by the minor as his assailant.

15. The Respondent submits that the Appellant was dissatisfied with both the conviction and sentence and has therefore appealed. However, the Respondent contends that the grounds of appeal should fail since the evidence was sufficient to secure a safe conviction, the evidence was consistent and corroborated whereby the chain of events only point towards the accused as the perpetrator giving an inference of guilt, the case was proved beyond reasonable doubt, and the Appellant did not give sworn defence, in fact he chose to remain silent and did not offer any defence after being called upon to do so.

16. The Respondent submits that the conviction was safe and the sentence of 10 years was not only lawful but also lenient. The trial court exercised its discretion judiciously since 10 years is the minimum sentence. The Respondent therefore prayed that the honourable court upholds the conviction and sentence meted by the learned trial magistrate and finds that the appeal lacks any merit thereby dismiss it.

Analysis and Determination

17. This being the first appellate court, I am guided by the principles in **David Njuguna Wairimu v Republic [2010] eKLR** where the court of appeal held:-

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellant court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

18. After considering the grounds of appeal, Records of the trial court, submissions and circumstances of the case, the issues for determination are as follows:-

- i. Whether the offence of attempted defilement was proved beyond reasonable doubt
- ii. Whether the learned trial magistrate considered the Appellant defence
- iii. Whether the sentence was harsh and excessive

Whether the offence of attempted defilement was proved beyond reasonable doubt

19. PW1 in his evidence stated that he slept in the same room with the accused who is his uncle where he slept on the bed while the accused slept on a mattress on the floor. PW1 went further and stated that he felt a lot of pain, he cried, woke up and found the accused sleeping on his back. He was naked and pushing his penis in his anus. PW1 had a small pant and a long trouser. The accused removed the trouser and tore off the pant. PW1 said that he screamed hard and the accused went back to his bed. According to PW2's evidence, at night, she heard PW1 hitting the door and crying and calling her to open for him. PW2 got scared and opened. The child told him that Abdul had inserted his penis in his anus. PW2 lit the lamp and checked the child's anus. PW2 went to check on the accused and when she knocked and called him to come out, the accused refused to open the door. PW2 locked the door from outside. PW3 said that PW1 had no certificate of birth and the age assessment was done at Coast General Hospital and it was established that the complainant was 11 years old.

20. From the foregoing, the identity of the perpetrator was established as the Appellant who was an uncle to the complainant and a person well known to him. The age of the complainant was established as 11 years after the age assessment was done at Coast General Hospital, according to PW3's testimony. The offence of attempted defilement was proved by the principles of law on attempt in the case of attempted larceny, Spry, J. (as he then was) in *Mussa s/o Said v. R* (1962) EA 454, 455 Letters C- D said:

“The principles of law involved are very simple but it is their application that is difficult. If the Appellant intended to commit the offence of larceny and began to put his intention into effect and did some overt act which manifests that intention, he is guilty of attempted larceny. (Penal Code, s. 380). The burden on the prosecution is therefore first to prove the intention and secondly to prove an overt act sufficiently proximate to the intended offence.

The intention will, in the majority of cases, only be capable of proof by inference and it follows in such cases that the act must be of such a character as to be incompatible with any other reasonable explanation. Secondly, even if the intention is established, the act itself must not be too remote from the alleged intended offence.”

21. In accordance with the definition of attempt in Section 388 of the Penal Code, the test for attempt requires a demonstration of an intention to commit the offence and overt act towards the commission of the offence which is sufficiently proximate or immediately connected to the attempted offence.

22. PW1 stated that he felt a lot of pain, he cried, woke up and found the accused sleeping on his back. That the accused was naked and pushing his penis in his anus. All the ingredients of the offence of attempted defilement was proved by the prosecution beyond reasonable doubt.

Whether the learned trial magistrate considered the Appellant defence

23. At the close of the prosecution case, the learned trial magistrate found that the evidence on record revealed that a prima facie case had been established against the accused person who was put on defence in accordance with Section 211 of the Criminal Procedure Code. However, the accused stated to the court that he will not give any evidence.

24. The Appellant cannot therefore allege in the grounds of appeal that the learned trial magistrate erred in law and fact by not considering the sworn defence evidence where there was no evidence to begin with.

Whether the sentence was harsh and excessive

25. The Appellant was charged under Section 9 (1) and (2) of the Sexual Offences Act No. 3 of 2006 which states as follows:-

(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.

26. The trial court sentenced the Appellant to 10 years imprisonment. However, the Appellant raised the issue of sentencing in the ground of appeal. The Respondent in submitting stated that the sentence of 10 years was not only lawful but lenient and that the trial court exercised its discretion judiciously since 10 years is the minimum sentence.

27. In conclusion, this court finds that the trial court's decision of finding the Appellant guilty of the offence of attempted defilement contrary to Section 9 of the Sexual Offences Act as read with Section 215 of the Penal Code and sentencing him to 10 years imprisonment was proper. This appeal is therefore dismissed and the decision of the lower court upheld. 14 days right of appeal is explained to the Appellant, orders accordingly.

DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS, THIS 13TH DAY OF JANUARY 2022

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of:-

OGWEL- COURT ASSISTANT

MS. KAMBAGA HOLDING BRIEF MR. MULAMULA FOR THE RESPONDENT

APPELLANT PRESENT IN PERSON

HON. LADY JUSTICE A. ONG'INJO

JUDGE