



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CRIMINAL APPEAL NO 45 OF 2016

JOSEPH KIHUMBA NDUNG’U.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original Conviction and Sentence in Nanyuki CM Criminal Case No 1241 of 2015 – W Gichimu, PM)

J U D G M E N T

1. The Appellant herein, **JOSEPH KIHUMBA NDUNG’U**, was convicted after trial of *attempted defilement* contrary to **section 9(1) & (2)** of the ***Sexual Offences Act, 2006***. It was alleged in the particulars of the offence that on 09/11/2015 at Ruai Village in Laikipia County, he attempted to cause his penis to penetrate the vagina of one JK, a child aged 12 years. On 29/04/2016 the Appellant was sentenced to ten (10) years imprisonment. He has appealed against both conviction and sentence.

2. In his petition of appeal the Appellant has advanced the following grounds of appeal -

- (i) That the conviction was based upon doubtful and inconsistent evidence.
- (ii) That the trial court erred in dismissing the Appellant’s sworn defence.
- (iii) That the charge was not proved beyond reasonable doubt.

3. In his “*Amended Supplementary Grounds of Appeal*” the Appellant added the following grounds –

- (iv) That the charge was defective.
- (v) That the circumstances of the Appellant’s arrest were unclear.

The Appellant filed written submissions, which I have read.

4. Learned counsel for the Respondent supported the conviction. He submitted that all the ingredients of the offence were proved beyond reasonable doubt.

5. I have read through the record of the trial court in order to evaluate the evidence placed before that court and arrive at my own conclusions regarding the same. This is my duty as the first appellate court. I have borne in mind however that I neither saw nor heard the witnesses testify, and I have given due allowance for that fact.

6. To begin with, the complaint that the charge was defective was not argued. I find nothing defective in it at all. The offence charged is fully disclosed by the particulars given.

7. The prosecution case was that on the material date the complainant, who testified under oath after a *voire dire* examination by the court, was out in a forest collecting firewood at about 11.00 am on the material day. While bending picking firewood and holding a panga, the Appellant held her by her waist and tried to remove her skirt. PW1 resisted while hitting him with the panga. He lifted up her skirt while holding her; she screamed but he put his hand over her mouth and nose. She hit him with her panga and he let her go, but then held her and started again to lift her skirt while trying to force her down. She continued to resist. The struggle went on for some time. She screamed again and hit him yet again with her panga. He then let her go and she managed to run away to the home of a neighbour called Ngatia.

8. PW1 informed N what had happened. He escorted her to another neighbour who had a phone which she used to call her father.

9. The father came accompanied by police officers. They went to look for the Appellant while she was taken to hospital. She was not present when the Appellant was arrested.
10. PW1 stated clearly that she knew the Appellant though she did not know his name. In cross-examination she stated that he was employed by one Joseph to graze his cattle, and that his home was not far from her home. She always saw him grazing cattle around the area where she normally collected firewood.
11. N testified as PW4. He stated that he was at home when the complainant came to his home crying and told him that someone had tried to defile her in the forest. He advised her to go and inform her father.
12. PW2 and PW3 were police officers. They stated that they accompanied the father of the complainant to look for the Appellant. They found and arrested him. PW2 stated that they found him at the home of his employer where they arrested him. PW3 on the other hand stated that they found him grazing goats in a thicket. He was emphatic that they did not find him at home. The father of the complainant did not testify.
13. PW5 was the investigating officer. He recorded witness statements and charged the Appellant.
14. In his own defence the Appellant gave sworn evidence. He testified that on the material day he was grazing cows and goats when the goats strayed into the complainant's land; that the complainant hit one goat with a stone; and that he picked up a stick and threatened to beat her up but did not. He further stated that in her turn the complainant threatened to go and inform her father; that indeed she went and borrowed a phone which she used to call her father; and that later as he had his lunch the complainant's father came with two police officers and arrested him. He was later charged.
15. The Appellant's own testimony corroborated quite a bit of the complainant's testimony. He admitted finding and confronting her, and he witnessed her calling her father on a phone. He also did not deny that the complainant knew him well; at any rate he never challenged her identification/recognition of him.
16. Just like the trial court, I found the complainant's testimony to be clear and consistent. It was not shaken in any way in cross-examination by the Appellant.
17. I am satisfied upon the evidence placed before the trial court that the interaction between the complainant and the Appellant was as narrated by the complainant, and not as narrated by the Appellant. The Appellant grabbed her and tried to force her onto the ground while trying to undress her. The complainant strongly resisted. The struggle lasted some time and, happily, the Appellant did not succeed. The complainant was able to escape.
18. What was the Appellant's intention in forcibly interacting with the complainant the way he did?
19. "Attempt" is defined in section 388 of the *Penal Code* as follows-
- "388(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 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."***
20. By grabbing the complainant by her waist, and by trying to force her onto the ground while trying to undress her, the Appellant began to put his intention into execution as what he was doing was adopted to fulfilment of his desire to defile her. He clearly manifested his intention by repeatedly trying to lift up her shirt while trying to force her down onto the ground. Those were the overt acts. Happily he did not fulfill his intention to such an extent as to commit the offence of defilement, but he is, by law, deemed to have attempted to commit the offence.
21. I am satisfied beyond reasonable doubt that the Appellant committed the offence charged. He was convicted upon good and sound evidence. His conviction is safe. There is no merit in the appeal against conviction.
22. As for sentence, the Appellant was awarded the minimum term of imprisonment permitted by law, the trial court having decided that he deserved a custodial sentence, which he clearly did deserve.
23. In the result, I find no merit in the appeal in its entirety. It is hereby dismissed. It is so ordered.

DATED AND SIGNED AT NANYUKI THIS 18TH DAY OF AUGUST 2021

H P G WAWERU

JUDGE

DELIVERED AT NANYUKI THIS 14TH DAY OF OCTOBER 2021