REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI

HIGH COURT CRIMINAL APPEAL NO. E019 OF 2021

DANIEL OTIENO ONGOI..........APPELLANT

-VERSUS-

REPUBLIC .... RESPONDENT

JUDGMENT

(Being an appeal against conviction and sentence arising from the decision of Hon. A.R Kithinji (SPM),

delivered on 1st October 2020 in Makadara, vide Criminal Case Number 2511 of 2014).

1. The appellant was arraigned in court on; 27th May 2014, charged in the main count, with the offence of; attempted defilement contrary to; section 9(1) and (2) of the Sexual Offence Act, N0. 3 of 2006, and an alternative charge of; committing an indecent act with a child contrary to; section 11(1) of the Act. The particulars of each count are as per the charge sheet.

2. The charges were read out to the appellant and he pleaded not guilty to both. The case proceeded to a full hearing wherein; the prosecution case was led by the evidence of; (PW1) "SK" (herein "the complainant"), who testified that, on the 18th May 2014, she went to school at, [particulars withheld] School, where the appellant was the Head teacher and Social Studies teacher, while the complainant was the Head girl.

3. That, the students were taking exams on that day and after the examination, the appellant told her to collect the exam papers, which she did. He then gave her his office keys and instructed her to take the papers to his office and wait for him there. She complied. The appellant followed her and while in the office, he put her on the sofa therein and moved her pant to one side. That, he then removed his pens, with the intention of penetrating her. However, as she was about to scream, he let her go.

4. The complainant testified that, she went home and did not inform anyone of what had happened as she was afraid. However, the following day she told her friend "K" who told her mother. She was then taken to; MSF clinic and the matter reported to the Police Station. The appellant was then arrested and charged.

5. At the close of the prosecution case, the appellant was put on his defence. He testified that, on the material day, he went to school and opened the classroom and left the students with a teacher called "K". He then went to watch football up to 6.30pm. That, when he went to back to school thereafter, a student approached him and told him that, her father was looking for him as he had an issue with him. That was the complainant's father.

6. That, he called the complainant's father who told him that, he would see him on the following day and on the next day, he was told him to go to the Chief's Office, but he declined to. He was then called to go the Police Station, and on reaching there, he was told that, a child had been defiled and he was arrested and charged.

7. At the close of the entire case, the learned trial Magistrate, rendered a judgment dated; 1st October, 2020, wherein, the appellant was convicted of defilement and convicted him as herein stated.

8. The appellant has moved the court vide a memorandum of appeal dated; 14th October 2020, appealing against the judgment and sentence of; Hon. A.R Kithinji (SPM), delivered on; 1st October 2020, in Makadara Chief Criminal Case No. 2511 of 2014, wherein, he was convicted over the charge of; attempted defilement contrary to; section 8(1) and (2) of the Sexual Offences Act No. 3 of 2006. (herein "the Act"), and sentenced to ten (10) years in prison.

9. The appellant has appealed on the grounds as here below reproduced: -

a) The learned Magistrate erred in law in entertaining judgment against the appellant in total disregard of the issues of law and fact raised therein;

b) The learned Magistrate erred in law in convicting the appellant solely on the basis of evidence of the prosecution witness 1 (PW-1), which lacked both merit and corroboration;

c) The learned Magistrate erred in law by convicting the appellant without considering that the prosecution was contradictory and uncorroborative hence section 163(1) of the Evidence Act (Cap 80) was not complied with;

d) The learned Magistrate erred both in law and fact in failing to scrutinize and evaluate the evidence in record so as to be able to render a judgment based on law and fact;

e) The learned Magistrate erred in law and in fact as the judgment was against the weight of the evidence adduced by the defence which facts were justifiable substantive and overwhelming as provided for in law;

f) That the learned Magistrate erred in law and fact as the conclusions drawn from the facts were perverse in the findings of fact were unreasonable, improper and inadequate in law;

g) The learned Magistrate erred in law and in fact as the judgment was against the weight of evidence adduced by the appellant;

h) The sentence handed down against the applicant by the learned Magistrate is harsh in the circumstances.

10. The appeal was opposed vide grounds of opposition, as herein reproduced: -

a) The Appeal lacks merit, is misconceived and unsubstantiated.

b) The Appeal is an abuse of the court process since the Applicant was properly convicted before the trial Court and the prosecution did discharge it burden of proof beyond reasonable doubt.

c) The application lacks merit and the same should be dismissed in its entirety

11. The appeal was disposed of vide filing of submissions. The appellant filed submissions dated; 8th March 2021, in which he submitted that, the evidence of; PWI was contradictory; as she stated that, she did not see the appellants' penis but still claimed to have seen him undress and remove his penis.

12. Furthermore, the *actus reus* in the matter was not proved, as PW1 testified that, the complainant did not penetrate her as she wanted to scream, which raises the question; "how does one appear to scream?". Finally, the prosecution did not establish *mens rea* and *actus reus*, to prove attempt of; committing an offence as provided in; *Michael Lokomar V Republic (2017) e KLR* and section 388 of the Penal Code.

13. The Respondents filed submissions dated; 21st October 2021, and argued that, the prosecutions established all ingredients that form the offence of attempted defilement being; the age of the complainant, proof of attempted penetration, and positive identification of the appellant.

14. That, the age of complainant was proved vide the birth certificate that indicated; the complainant was born on; 2nd February, 2001 and therefore, she was fourteen (14) years at the time of the offence. As regards, penetration, the attempt to penetrate was proved by the evidence of; Pw1's narration was clear and coherent and not contradictory in any way. Finally, the appellant was positively identified.

15. I have considered all the materials placed before the court, including the aforesaid submissions. I note that, the role of the 1st appellate court is to evaluate the evidence adduced in the trial court afresh and arrive at its own conclusion. In so doing, the court warns itself that, it did not have the benefit of the demeanor of the witnesses.

16. The subject role of the 1st appellant court was well articulated by the Court of Appeal in the case of; ***Okeno vs. Republic (1972) EA 32,*** **as follows: -**

"An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) E.A. 336 and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala V. R [1957] E.A. 570. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that, the trial court has had the advantage of hearing and seeing the witnesses".

17. Be that as it were, the appellant was convicted of the offence of; attempted defilement. The offence is created under section 9(1) and (2) of the Act 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.

18. Pursuant to the aforesaid, the key ingredients of the offence are;

> ***a) Proof that the victim is a child;***
>
> ***b) The act complained of could cause penetration;***
>
> ***c) Proof that, the accused person committed the offence.***

19. **As regards the issue of; the complainant being a child, the prosecution produced her birth certificate marked as; "P.EX. 3" which shows that, she was born on;** 2nd December 2000, **therefore she was about** thirteen (13) years and five (5) months at the time of the commission of the offence on; 18th May 2014.

20. The provisions of section 2 of the Act states that, a "child" has the meaning assigned thereto in the Children Act. The Children's Act defines a child as "any human being under the age of eighteen years". Therefore, pursuant of the aforesaid provisions; the complainant herein was a child, **at the time of commissioning of the offence.**

21. As regards the issue of whether, the appellant attempted to defile the complainant. I note that, the alleged act is said to have occurred in the presence of the complainant and the appellant only. As such there is need to establish additional evidence to corroborate and/or rebut the evidence on either side. The complainant testified in a nutshell as follows;

> ***"He placed me on the sofa set in the room. He removed my pant to one side. When he saw I was to scream he let go. He had removed his penis but it had not penetrated me."***

22. In cross examination by the learned defence counsel, she stated as follows: -

> ***"I did not see this penis. I was lying facing upwards. I felt something on my vagina. I could not open my legs. I could not push him as he was very strong.***
>
> ***I saw some watery substance on my clothes. On that day, I went with the clothes and washed it. Am not fixing him. I had no grudge with the accused".***

23. In re-examination she stated that;

> ***"He laid on me and I could not see his penis. I felt his penis touch me. I did not open my legs. One of my legs was on the sofa and the other was down. I was fearing because I could not imagine a teacher could do that to me."***

24. On the other part, the appellant denied all the aforesaid evidence and stated that, he left the students under the care of another teacher. That, he is being fixed as a result of grudge between him and the complaint's father arising out of school management.

25. The question that arises is whether, the evidence of PW1 is believable. In that regard, I find that, according to the evidence of PW3, MA working with MSF, the complainant presented a history of defilement on; 18th May, 2014. That, she had gone to school for tuition and the teacher asked other pupils to leave and told her to remain behind. He then locked the door placed her on the chair and defiled her". That, upon genital examination, it was established that, she had "thick smelly discharge. Genitalia, had a small bruise at the posterior fourchette" but the hymen was intact.

26. The complainant's mother, PW4 PN testified that, she got information of the incident from Mama A, as the complainant had shared the same with A. PW5 Dr Kazi Shako who examined the complainant three days after the alleged offence found that, "the hymen was normal but there were multiple tears of thereof. That, there was a tear before the right labia minora and posterior fourchette.

27. Upon consideration of the aforesaid evidence, I find that, indeed, through as the complainant narrated the incident to different people, she maintained that, the appellant instructed her to go to his office and he attempted to defile her. Further, she shared the incident with a friend K and/or A, who informed the mother who then informed the complainant's mother. She thus testified, "I woke up and went home and never told anybody. The following day I told a friend who told her mother". In cross examination, she stated; "after I felt bad and informed my friend E".

28. The question is; would a child of about thirteen and half years, who is fixing the Headmaster and/or teacher go to that extent of; sharing such an otherwise "undignified incident" with third parties. What of the medical evidence, does it corroborate her evidence? Both reports indicate, a bruise or tear on the posterior fourchette. In fact, Dr Shiko testified that, the tears were highly suggestive of penetration.

29. Pursuant to the evidence above, it is difficult to agree with the appellant's evidence that, the charges have been planted on him due to a grudge between him and the complainant's father. In fact, it is noteworthy that, the appellant does not state that, he had a grudge with the complainant. To the contrary he exonerated the complainant by testifying as follows; "on Tuesday I went to school. I was approached by a child who told me that, her father wanted me arrested and I should run away. This version of evidence is not consistent with a child who has colluded with the father to fix the appellant.

30. A further analysis of the defence's case reveals that, the appellant did not, through-out in his evidence in chief, testify to any grudge between him and the complainant or her father. The allegation was introduced during the evidence of; DW2 EO who testified of the differences between the appellant and the complainant's father, over sums of money the Governor was to give the school where, the appellant was a school teacher and the complainant's father who was the chairman.

31. Furthermore, after the appellant testified, the prosecutor asked him whether he had a grudge with (PW2), the complainant's father and he responded that, "we have no grudge with the victim's father". That response negates the evidence of the village elder of differences between the two.

32. Be that as it were, the next issue to consider is whether, the appellant committed the offence he has been convicted of. I find that the appellant and the complainant were well known to each other. They had a relationship of a teacher and student. In fact, as Head-teacher and Head girl respectively. As such the issue of mistaken identity does not apply. The appellant has confirmed the same in his evidence. He has also confirmed that, on the material date, both of them were at the school, albeit that, he left early. The evidence of having left the students in the company of another teacher however, was not corroborated.

33. In addition, the evidence of; Tony Justice, corroborated the complainant's evidence that, the appellant, whom the witness called teacher Joseph, gave the students Kiswahili papers. In cross examination the witness stated, "we did exam from 2pm. Joseph gave us the paper. Daniel came later".

34. In conclusion, I find that, the prosecution adduced adequate evidence that, the appellant attempted to defile the complainant. The complainant's evidence is supported by the medical evidence produced and/or lack of evidence to support the alleged grudge between the appellant and the complainant's father. I therefore find that, the learned trial Magistrate properly arrived at the right decision in convicting the appellant as charged and hold that, the conviction is safe. I therefore, will decline to quash it.

35. As regards the sentence, I find that, the provisions of section 9(2) of the Act provides as follows:

(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"

36. The appellant was sentenced to serve the minimum period of; ten (10) years imprisonment, as such the sentence is lawful and therefore, there is no reason to upset it. However, the trial court did not indicate whether it considered the period (if any) when the appellant was in custody. I note that, he was arraigned in court on; 27th May, 2014, and released on cash bail on; 22nd June, 2014. He was in custody twenty-five days. That period should be taken in account.

37. The Upshot of all said herein is that, the appeal on conviction is dismissed and sentence, save for the period in custody to be considered.

It is so ordered.

DATED, DELIVERED VIRTUALLY AND SIGNED ON THIS 23RD DECEMBER, 2021.

GRACE L NZIOKA

JUDGE

In the presence of;

Mr Ario for the appellant

Ms Chege for the Respondent

Appellant present in person

Edwin: court assistant