



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERICHO**

**CRIMINAL APPEAL NO.14 OF 2018**

**JOSPHAT KIPRONO...APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

(From the conviction and sentence in Kericho Sexual Offences Case No.5 of 2015 – B. R. Kipyegon SRM)

**JUDGMENT**

1. The appellant Josphat Kipkorir was convicted after a full trial in the magistrate's court at Kericho for attempted defilement contrary to section 9(1)(2) of the Sexual Offences Act and sentenced to serve 10 years imprisonment.
2. He has now come to this court on appeal through counsel Mr. Onesmus Langat on the following grounds –
  1. The learned magistrate erred in law and fact in convicting him for the offence of attempted rape (should be defilement) yet the testimony of the complainant explicitly proved the offence of assault.
  2. The learned magistrate erred in law and fact by convicting and sentencing him yet the medical report expressly proved the offence of assault.
  3. The learned magistrate erred in law and fact by failing to put weight on the defence of the appellant.
  4. The learned magistrate erred in law and fact by relying on uncorroborated evidence of members of the family with no independent testimony by an outsider.
  5. The learned magistrate erred in law and fact by failing to consider that these were members of the same family with possible intra family wrangles and could have been out to settle scores with one another.
  6. The learned magistrate erred in law and fact by failing to properly ascertain the complainant's case
3. The appellant's counsel also filed written submissions to the appeal; which I have perused and considered.
4. During the hearing of the appeal, Mr. Langat who appeared in court for the appellant relied on the written submissions filed. Mr. Ayodo for the Director of Public Prosecutions in response opposed the appeal and stated that attempted defilement, not assault, was proved by the prosecution evidence, and asserted that the prosecution evidence was clear that the appellant attacked the complainant and tore her biker and her screams attracted PW4 who intervened, and pointed out that the injuries on the P3 form was evidence of the attempt by the appellant to defile the complainant.
5. Counsel lastly, submitted that the age of the complainant was proved through the production of her birth certificate, and denied that there was evidence of a family dispute and added that the magistrate considered the defence of the appellant in the judgment.
6. This is a first appeal. As a first appellate court, I am required to re-evaluate the evidence on record and come to my own independent conclusions and inferences. See **OKENO – VS – REPUBLIC [1972] EA 32**.
7. I have perused the record on the judgment. I note first of all that all the prosecution evidence at the trial was recorded by C.K Mungania Senior Resident Magistrate while the defence was taken by B. R. Kipyegon Senior Resident Magistrate who also wrote and delivered the

judgment. Thus, just like this appellate court, the magistrate who delivered judgment did not hear and see the prosecution witnesses testify to determine their demeanor, as Hon Kipyegon who wrote and delivered judgment, only heard the appellant testify in his defence but not see any prosecution witness testify.

8. This being an attempt defilement case, the age of the complainant had to be proved to be below 18. With regard to the issue of proof of the age of the complainant who testified as PW1, the appellant's counsel submitted that her birth certificate, though referred to in evidence, was not produced in court, thus the age of the complainant was not proved by the prosecution to be 17 years as alleged in the charge sheet.

9. I have perused the record and exhibits produced. Though the complainant referred to her birth certificate which was marked as MFI 1, the record does not show that it was produced in court. The same witness PW1 also mentioned a dress MFI 2 and black bicker MFI 3, all of which were not produced in evidence as exhibits. Only the medical reports mentioned by her were produced as exhibits by the Clinical Officer PW 5 Alex Kipyegon Ngetich, while PW5 PC Rose Mwangi who testified in the place of PC John Kenga the investigating officer did not produce any exhibits.

10. The burden is on the prosecution in criminal cases to prove every element of an offence beyond reasonable doubt. In view of the standard of proof in criminal case requiring the prosecution to prove every element of an offence beyond any reasonable doubt, I find that the age of the complainant was not proved to be 17 years as the birth certificate relied upon was not produced in evidence. However, that lack of proof of age will not save the appellant as even if the complainant was above 18 years of age, if the other elements were proved, the incident could as well amount to attempted rape.

11. I now turn to whether the prosecution proved an attempt by the appellant to commit a sexual offence. The evidence of PW1 the complainant was that the appellant came to their homestead that night with his father; both of whom were armed. That both the appellant and the father ordered the sister Wilter chepkemoi to lie down for punishment, saying that they would discipline both of them. She testified that she got scared and ran towards the road and the appellant pursued and caught up with her, threw her on the ground and uncovered her dress and tried to pull her undergarment. It was her evidence that she screamed and an uncle ZC came to her rescue.

12. From the record, ZC testified as PW4 and said that when he arrived at the scene he saw the appellant and the complainant struggling. The appellant had no shirt and the complainant told him that the appellant wanted to rape her. According to him, he found said that the appellant and the complainant struggling and the complainant wanted to run away. That was when he intervened and took the complainant to her grandmother to sleep.

13. The allegation of the prosecution against the appellant was for attempted defilement on the complainant. An attempt to commit a crime has a statutory definition under section 388 (i) of the Penal Code which states 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 as to commit the offence, he is deemed to attempt to commit the offence.”**

14. In my view, the totality of the evidence on record did not show any attempt by the appellant to commit a sexual offence, but showed a physical battery or assault by both the appellant and his father on the complainant and her sister. Even assuming that the appellant said, “I will do it”, as the complainant said in evidence, which I doubt he said, the totality of the evidence on record merely shows physical rather than a sexual encounter. I also note that the evidence of the complainant PW1 that she was thrown down by the appellant was contradicted by PW4 who said that he met them struggling with the complainant trying to free herself to run away. In my view therefore, the allegation of an attempted penetrative sexual act by the appellant on the complainant was not proved by the prosecution beyond any reasonable doubt.

15. The evidence on record however established that the appellant attacked the complainant in order to discipline her and therein caused her actual physical injuries as testified to by PW2 Alex Kipyegon the Clinical Officer, who produced a P3 form in addition to hospital treatment notes. The injuries suffered by the complainant were classified as harm. Therefore in my view, the offence proved against the appellant by the prosecution was assault causing actual bodily harm contrary to section 251 of the Penal Code whose maximum sentence is 5 years imprisonment. I will thus substitute a conviction for assault, which seems to be supported by the appellant's counsel.

16. With regard to the ground that the trial court did not consider the appellant's defence, in my view that ground has substance because the magistrate merely said in the judgment that he put the circumstances against the defence. That in my view amounted to shifting the burden of proof to the appellant which was wrong. In accordance with the provisions of section 169 of the Penal Code, the trial court was required to have evaluated and given reasons for disbelieving the defence of the appellant, not to put the defence against circumstances. In my view had the magistrate considered the defence of the appellant which was clear, he would come to conclusion that the fracas was due to a family discord, and in the result the appellant and his father, who was not charged in court, took the law into their own hands to assault the two sisters, and that there was no intention or attempt by the two attackers to defile or rape any of the girls.

17. Consequently, I quash the conviction of the trial court for the offence of attempted defilement, and substitute a conviction for the lesser offence of assault causing actual bodily harm contrary to section 251 of the Penal Code. As the appellant has been in prison since 13<sup>th</sup> July 2018, almost two years now, I order that he serves the sentence he has already served.

18. In effect, the appellant will be released from custody forthwith unless otherwise lawfully held.

**Dated and delivered at Kericho this 12<sup>th</sup> March 2020.**

**GEORGE DULU**

JUDGE