



REPUBLIC OF ENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NUMBER 158 OF 2019

JOSEPH WANJALA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal arising from judgement of C. Menya RM, Kimilili Principal Magistrate's Court

in Criminal Case No.356 of 2014)

JUDGMENT

The appellant Joseph Wanjala was charged with the offence of attempted defilement contrary to section 9(1) (2) of the Sexual Offences Act. No. 3 of 2006. The particulars of that offence were that on the 9th day of March, 2014 [particulars withheld] Bungoma County, intentionally and unlawfully attempted to cause his penis to penetrate the vagina of AW a child aged 14 years.

He also faced an alternative count of committing indecent act with a child contrary to section 11(c) of the Sexual Offences Act. The Particulars of the alternative charge were that on the 9th day of March, 2014 [particulars withheld] Bungoma County, intentionally and unlawfully attempted to cause his penis to penetrate the vagina of AW a child aged Fourteen years.

The evidence before the trial court was that on 9/3/2014 at around 4pm Pw1 ANW was going to fetch firewood with her siblings when 2 boys appeared the accused and another boy. The accused held her from behind and placed her on the ground and she had skirt and blouse on. She recalled that the accused friend attempted to rape me and they attempted to remove her inner wear. She testified that her siblings M and A were screaming and Godwin Simiyu who takes care of my grandmother's sugarcane came and the boys ran away. She stated that her parents came when they heard her screaming and her father took her to Naitiri Hospital and matter reported to Wabukhonyi police station.

Pw2 GW father of the complainant testified that on 9/3/2014 at around 4pm he sent complainant and her siblings to go collect firewood in the adjacent farm. After they left, he heard screams. His wife and some neighbors rushed to the scene and thereafter his wife returned and informed him that it was his daughter screaming. He rushed to the scene and found people gathered and complainant crying. Complainant informed him that the boys had attempted to rape her by removing her inner clothes. He reported the incident to the police and took complainant to the hospital.

Pw3 Godwin Simiyu, a security guard testified that on 9th March 2014 at around 1600 hours, he was taking care of a sugarcane plantation, when he saw complainant pass nearby in company of two boys. Shortly thereafter he heard some noise. He rushed to the scene where the noise was coming from and saw complainant lying on the ground fighting off the accused who was trying to undress her. He stated that the accused and other boy fled upon seeing him and complainant ran home screaming. He testified that he knew the assailants very well as they were neighbors and incident occurred around 100 meters from complainant's house.

Pw4 the investigating officer, P.C. Jacob Mureithi Ndegwa received complaint at the police station on 10th March 2014. He testified that she was just from the hospital and he could see her eye was injured. He told the court that he conducted investigations and managed to arrest the accused after finding him culpable.

In his defence the appellant chose to give sworn statement where he told court that on 9th March 2014 at around 4pm, he arrived home from school and found many children outside their home and he saw complainant fighting with his younger brother S. He testified that he separated the two and later complainant and her father visited him and he narrated to him what had happened. He testified that he was reported to the police that he defiled complainant.

It is upon this evidence that the trial court convicted the appellant. on the 1st count and sentenced him to serve a term of 10 years

imprisonment.

Being dissatisfied with that decision the appellant has preferred this appeal on grounds that; the evidence adduced by the prosecution was not sufficient to lead the conviction of the appellant; the conviction was unsafe since it was based on contradictory and uncorroborated evidence; material and documentary evidence were not adduced to support the conviction; the persons who should have been called as witnesses for prosecution were not called and no explanation was given.

The appellant also filed his written submissions through Mr. Khakula Advocate. He submitted that prosecution evidence was insufficient to convict the appellant. He submitted that in order to secure a conviction the prosecution must prove the mens rea which is the intention and the actus reus which constitute the act which is geared to the execution of the intention. He relied on in ***Douglas Nyambane V. Republic [2018]Eklr.***

He submitted that the conviction was based on contradictory and uncorroborated evidence, that the material and documentary evidence such as clothes that the complainant was wearing at time of the incident were not produced in court. He submitted the key witnesses who were with Pw1 were not called by the prosecution to testify and no explanation was given on the same.

The state opposed the appeal. Learned prosecution counsel M/s. Nyakibia submitted that the age of complainant was proved by baptism cards, she submitted that appellant made actual attempt and complainant was found with him at the scenes. He submitted that the appellant was identified and was well known to the complainant since they were neighbors. She submitted that the evidence of Pw2 and Pw3 corroborated the complainant's evidence.

This is a first appeal. The first appellate court is enjoined to review and reconsider the evidence and make its own conclusions but always bearing in mind that it did not have the advantage of seeing or hearing the witnesses (**See Ekeno – Vs – Republic 1972 EA32**).

The appellant was charged with the offence of attempted defilement contrary to **section 9(1) (2) of the sexual offences Act**. The section provides

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”

The prosecution in an offence of attempted defilement must prove the other ingredients of the offence of defilement except penetration; it must prove the age, of the complainant, positive identification of the accused, and then prove steps taken by the accused to execute the defilement which did not succeed. Attempted defilement is as it were a failed defilement, failed because there was no penetration. Attempt to commit an act is defined in Section 388(1) Penal Code.

388(1) where a person intending to commit an offence begins to put his intentions into execution by means adopted to its fulfillment, and manifests his intention by some avert 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 is prevented by circumstances independent of his will or whether he desists of his own motion from further prosecution of his intention”

In the prove of an attempt to commit an offence the prosecution must prove the **mens rea** which is the intention and the actus reus which constitute the avert 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 (**see Abdi Ali Bere – vs – Republic (2015) EKLr.**

It is the evidence of pw1 that the appellant caught her in company of another boy and placed her on the ground. She stated that they attempted to remove her inner wear and she struggled with them and screamed. She stated that Godwin Simiyu who takes care of her grandmother's sugarcane came and the boys ran away. It is equally the evidence of pw3 that while taking care of sugarcane plantation he saw complainant pass with two of her younger siblings. He testified that shortly he heard screams and when rushed to the scene he saw the complainant whose skirt had been removed and she was lying on the ground. He testified that when the appellant and another boy by name Amos who are well known to him as a neighbors saw him they took off.

The accused in his defence testified that on that material day he found the complainant fighting with his younger brother Stanley. He separated them. The complainant's father came and he explained what he happened and he left. The learned trial magistrate in his Judgment rejected the appellants defence stating;

Considering the totality of the evidence on record, it is patently clear that the accused's defence is an attempt to clutch at a straw to avoid drowning. He did not deny knowing complainant. He never denied meeting the complainant on the day and time of the alleged incident. His narration that he found complainant with his younger brother S is a blatant lie having realized that the evidence placing him at the scene of the crime is monumental. The least he could have done to vindicate himself was to call the so called Stanley to corroborate his defence. He failed to do so, either because Stanley is a fictitious character or if at all in existence, it was not willing to stand with the accused's lie.

I have considered the evidence and submissions. From the evidence it is clear the appellant was with one Amos Wanjala and the complainant was with her 2 siblings when Pw3 Godwin Simiyu heard screams he ran there and saw the complainant lying down while one was injuring her eyes and another trying to remove her skirt. He noticed that the complainant had a swollen eye. It is therefore true that both complainant and appellant admit that they were at the scene. The only issue is whether the appellant was trying to remove the complainant's skirt or was she fighting with Amos and the appellant separated them.

There is no doubt that there was a fracas at the scene and the complainant sustained injuries. That was the basis of appellant being charged with Count 3 of assault. The appellant's defence was that it was actually a fight between Amos and the complainant; which in my view supports the prosecution decision to charge appellant with assault. Even if we were to accept the complainant's assertion that they fell her down, I do not find that the intention was to defile her but as a fight between them. The trial magistrate considered the appellants defence, but rejected it on the basis that Amos his accomplice did not testify. If that were so, the fact that the 2 children whose ages were not revealed and were at the scene were never called to testify. Their evidence would have showed whether it was an attempt at defilement or the fight as the appellant stated in his defence.

This doubt as to whether it was a fight or attempted defilement was not conclusively addressed by the prosecution evidence. I therefore find that the prosecution did not prove the offence of attempted defilement beyond reasonable doubt. I consequently allow the appeal, set aside the conviction and sentence of 10 years imprisonment imposed. The appellant Joseph Wanjala to be set at liberty unless otherwise lawfully detained.

Dated at Bungoma this 10th day of March, 2020.

S.N. RIECHI

JUDGE