



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL CASE NO. 199 OF 2016

DANIEL SIMIYU WANYONYI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An appeal from conviction and sentenced in Original SIRISIA PMCR. 10/2016

delivered on 29th July 2016 by Hon. Kimani Mukabi – Resident Magistrate].

JUDGMENT

The appellant Daniel Simiyu Wanyonyi was charged with attempted defilement contrary to Section 9(1)(2) of the Sexual offences Act No. 3 of 2006. Particulars of offence were; on the 1st day of January 2016 at about 1300 hours in Bungoma West Sub-County within Bungoma County intentionally attempted to cause his penis to penetrate the vagina of AW a child aged 10 years.

He denied the charges and after five hearing the trial court on 29.7.2016 found him guilty of attempted defilement convicted and sentenced to serve 10 years imprisonment. The appellant was dissatisfied with the conviction and presented this appeal on the following grounds;

- 1) *THAT the lower court in law and fact by convicting I appellant in face of insufficient evidence.*
- 2) *THAT the lower court erred in law and fact by convicting appellant when prosecution evidence was fraught with inconsistencies and contradictions.*
- 3) *THAT the lower court erred in law and fact by convicting appellant by failing to put into consideration defence evidence Contrary to Section 169 of Criminal Procedure Code Cap 75 Law of Kenya.*

The appellant expounded on the grounds of the appeal in written submissions filed in court on 19/9/2018 which he adopted and relied on in this appeal. The appellant submitted that there were great inconsistencies and contradictions in the prosecution evidence, in particular the evidence of Pw1 and her sister Pw2 and their evidence therefore lacked credibility. Secondly Appellant submitted that there was no evidence to prove that his penis attempted to insert into the complainant's vagina; as there was no evidence of spermatozoa or semen in complainant's private parts. Thirdly appellant submitted that his alibi defence was not considered as if it was it would have introduced in the mind of the court a doubt which is not unreasonable.

Mr. Oimbo for the state opposed the appeal. He submitted that the offence of attempted defilement was proved by the presence of semen on the complainant's thigh as evidenced by the testimony of the doctor who found the same upon examination; counsel for state submitted that the complainant knew the appellant who was a neighbor and therefore was positively identified, the complainant's age was assessed at 9 years and finally that the court considered his alibi defence which was found without merit and rejected it.

The evidence in the trial court briefly was that AW the complainant was a pupil at [particulars withheld] Primary School in Class 4. The appellant is their neighbor at home. On 1.1.2016 at around 1p.m. she and her younger sister L met the complainant who asked her to go and fetch water from his house. Upon going to appellant's house to fetch water, the appellant followed her, forcibly undressed her and touched her chest, legs, buttocks and "slept on her". Her sister called E came and rescued her. The complainant's mother was informed, who raised alarm and members of the Public arrested the appellant who was taken to Sirisia Police Station and charged with this offence. Pw2 EN saw appellant going with complainant into his house. He followed them and on arrival found the appellant had undressed himself and the complainant. He interrupted them and took the complainant home and she inform their mother. Pw5 Simon Kasaya Kiveu the Clinical officer who examined the complainant testified that on examining her private parts she saw the hymen was intact but there was presence of semen. He formed opinion that there was an attempt of defilement.

The appellant gave unsworn evidence in his defence. He testified that on 1.1.2016 he was from Chwele on a boda boda (Motor cycle) going

home where on arrival he found many people including the complainant's mother who alleged that he had defiled complainant. The crowd present arrested him and the complainant was taken to hospital. He was later charged with present offence.

The appellant was convicted of the offence of attempted defilement Contrary section 9 (1) (2) of the Sexual Offences Act. Section 9 (1) (2) 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.

9 (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.

This Court when dealing with an appeal from a conviction of attempted defilement In **Bungoma Hc. Cri. Appeal No. 176 of 2016** stated; **when a court of law is faced with any charge on an attempted offence, care has to be taken to ensure that the attempt, as opposed to mere acts of preparation, is proved since however strong the evidence may be if it only relates to actions in preparation to commit a certain crime, that cannot justify a conviction on an attempted charge. In the circumstance or clarity purposes, the evidence must be led which goes beyond the preparatory stages and right to the doorstep of possible commission of the offence. It ought to be demonstrated that the accused had committed the last act to the actual commission of the specific offence attempted. Likewise the intention to commit the crime must also be proved.**

Section 388 of the Penal Code defines "attempt" as:-

"388 (1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil 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."

The above section brings out the two main ingredients of an attempt offence; the ***mens rea*** which constitutes the intention and the ***actus reus*** which constitutes the overt act towards the execution of the intention.

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 if were a failed defilement, failed because there was no penetration. Attempt to commence an act is defined as;

388 (1) where a person intending to commit an offence begins to put his intentions into execution by means adopted to its fulfilment, and manifests his intention by some avert act but does not fulfil 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"

To 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.***

The uncontroverted evidence before the trial Court was that the complainant knew the appellant as they were neighbours. Identification therefore is not an issue as the incident occurred at around 1 p.m. during daylight. The age of the complainant was proved by the age assessment report. The only issue that calls for determination is whether the appellant committed the offence of attempted defilement.

The complainant testified how the appellant instructed her to go and fetch water from his house to which she complied. On going to the house the appellant followed her. While in the house he caught her, removed her pants, touched her on the chest and buttocks and lay on her. Complainant's sister E (Pw2) who had seen them went and found the appellant had undressed the complainant and were lying on the bed. She screamed took the complainant away and informed the mother who screamed and appellant was arrested. There was no allegation penetration nor evidence of the same upon examination by the Clinical officer. The appellant defence is that he only came home and was arrested when the complainant's mother screamed.

Upon considering and re-evaluating the evidence, I am satisfied that the appellant intending to commit the offence of defilement instructed the complainant to go to his house; manifested his intention by following her into the house and did an overt act of removing her pants and touching her chest and buttocks but did not fulfil his intention to defilement because Pw3 Esther interrupted him. All the ingredients of the offence of attempt defilement was therefore proved and appellant properly convicted of the same.

In the result, I find no merit in this appeal. I uphold the conviction for the offence of attempted defilement Contrary to section 9 (1) as read with 9 (2) of the Sexual Offences Act, and affirm the sentence of 10 years imprisonment imposed. This appeal is hereby dismissed.

Signed and Dated at Bungoma this 31st day of January, 2019.

S.N. RIECHI

JUDGE.