



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 82 of 2015

PETER KATEMBO NGAIRA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal arising from conviction and sentence in Senior Principal Magistrate's Court (ELDORET) in criminal case no 1693 of 2013 dated 25th June 2013 by Hon. C. OBULUTSA SPM.

JUDGEMENT

1. Peter Katembo the Appellant was charged and convicted of the offence of attempted defilement contrary to section 9(1) (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on the 10th day of May 2013 at Chekalini location in Lugari District within Kakamega County, intentionally attempted to cause his penis to penetrate the vagina of RK (particulars withheld) a child aged 15 years. The appellant also faced the alternative charge of indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2016 the particulars being that the appellant on the 10th May 2013 at Chekalini location District within Kakamega County, intentionally touched the breasts and buttocks of RK (particulars withheld) a child aged 15 years.

2. The appellant pleaded not guilty to both charges and a trial ensued which resulted in his conviction on the main count for which he was sentenced to 10 years imprisonment thereby triggering the instant appeal in which he has set out the following grounds of appeal:

i. THAT he did not plead guilty at trial.

ii. THAT the prosecution witnesses' testimony was unreliable since there were no eye witnesses in this case.

iii. THAT the learned magistrate erred in law and fact by convicting him without considering his defence.

iv. THAT the learned magistrate erred in law and fact in convicting him by relying on the testimony of PW1 who did not provide sufficient facts to warrant the conviction

v. THAT the learned trial magistrate erred in law and fact by convicting him without considering the fact that this case was not properly investigated.

vi. THAT there was a lot of disparity in terms of evidence adduced in court and his conviction was as a result of misconceived facts.

3. A summary of the prosecution's case was as follows:-

PW1, RK, the complainant herein, testified that she was on the material day at about 6:30 pm coming from school in the company of her class mate one JK (*particulars withheld*) when on reaching near one Mwalimu Hudson's home, the Appellant emerged from the bush, accosted them, grabbed her by her right hand and attempted to force her to the ground but she screamed for help and her companion managed to escape and also raised an alarm. The appellant then took off with the complainant's school bag. According to the complainant, the Appellant wanted to defile her but they managed to repulse him.

4. She produced her school uniform (green in colour with white collar PEXB.2) and identified her bag (PEXB.3). She also produced her birth certificate (PEXB.1) which indicated that she was born on 26th November 1998.

5. PW2 Hudson Nicodemus Murunga testified that on 10th May 2013 at 6:30pm, he was in his house when he heard a distress call and upon going outside, he saw JK and PW1. He then accompanied JK to where PW1 was and that PW1 informed them that Appellant tore her

uniform (PEXB2) and ran away with her bag. He added that he knew the Appellant as his tenant.

6. PW3 FNK the complainant's mother testified that she found PW1 with torn uniform and that she had bruises all over her body.

7. PW4, CPL Eva Cherop testified that she was on the material day on duty when she received the attempted defilement report. She recalled that the appellant was brought to the police station by members of the public who had already meted out mob justice on him. She then took Appellant to hospital and recorded witness statement before preferring charges against the Appellant.

8. When placed on his defence the Appellant elected to make a sworn statement and called no witnesses. He testified that he was on 12th May 2013 selling eggs at Kipkaren when he met police officers who asked him for his identification card and the sum of Kshs. 2,000 which he did not have. He stated that on failing to give the police the money that they had demanded from him, they arrested him and charged brought him to court on the allegation of attempted defilement.

9. At the hearing of the appeal, the appellant relied on his written submissions wherein he contends that the charge sheet was defective. He also took issue with the manner in which the trial court conducted the proceedings and submitted that the complainant's evidence was taken without a *voire dire* examination being done in order to establish whether PW1 could give a sworn or unsworn statement. He further stated that the prosecution's case was riddled with inconsistencies and that neither the main charge nor its alternative was proved to the required standards.

10. On her part, Miss Mumu, learned counsel for the state, opposed the appeal and submitted that the charges were proved to the required standards as according to the evidence of PW1, the Appellant held her breasts and buttocks. Counsel further submitted that when PW2 came to rescue PW1, the appellant tore her uniform and ran away with her bag.

DETERMINATION.

11. This is a first appeal and this court has a duty to re-evaluate a re-consider the evidence adduced before the trial court afresh in order to arrive at its own independent conclusion while bearing in mind that it neither heard nor saw the witnesses testify. In **Okeno vs Republic 1972 EA 32** where it was held:-

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandaya v R, [1957] 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, see Peters v Sunday Post, [1958] E.A 424.

12. In the case of **Muthoko & Anor [2008] KLR 297** the Court of Appeal held as follows:

“It was the duty of a first appellate court to analyze the evidence and come to its own independent conclusion bearing in mind that it did not hear or see the witnesses and making allowance for that”

13. I have considered the evidence on record, the grounds of appeal and the rival submissions presented during the hearing of the appeal. I note that the main issue for determination is whether the charge of attempted defilement was proved to the required standards.

14. The starting point is what amounts to attempted defilement. In **David Aketch Ochieng [2015] eKLR** Makau J observed as follows on attempted defilement:

“The appellant was charged and convicted with an attempted defilement contrary to Section 9 (1) of Sexual Offences Act No. 3 of 2006. What is attempted defilement? It can safely be stated to be the unsuccessful defilement. For a successful prosecution of an offence of attempted defilement, the prosecution must adduce sufficient evidence to the required standard to prove an attempted penetration. This may in my view include bruises or lacerations from complainant's vagina and/or bruises or lacerations of culprits genital organ and finding male discharge such as semen or spermatozoa outside the complainant's vagina or innerwear without there being penetration. There was absence of penetration or evidence linking the culprit with the offence of attempted defilement.”

15. In the instant case, can the encounter between the Appellant and PW1 be defined as attempted defilement? I do not think so. I say so because from the evidence adduced by PW1, she stated as follows:-

“He held my right hand, Jeridah managed to escape. Accused then held me by force and struggled to lay me down. We started raising distress calls and J was also shouting for help. He seemingly wanted to defile me. He then ran away with my bag.”

16. From the above extract of the complainant's testimony, I find that apart from the claim, by the complainant that the appellant wanted to defile, none of the alleged actions by the appellant show that there was an attempt at defilement or penetration for that matter. I further find that the in the circumstances of the case, it is not safe to conclude that the appellant's intention was to defile the complainant. In my humble view, the mere fact that the appellant allegedly held the complainant's hand does not qualify to be attempted defilement and neither does the same even qualify to be an act of indecent assault.

17. Furthermore, the complainant claimed that she was in the company of one J at the time the appellant allegedly attempted to defile her. It is however quite baffling that the said J did not come to court to testify even though she is a crucial witness who could have shed light on what transpired on the material day. Courts have held that where evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution. See **Bukenya & Others vs. Uganda (1972) EA 549.**

18. In the circumstances, I find that it was unsafe to convict the Appellant. Consequently, I hereby quash the conviction and set aside the sentence by the trial court. I direct that the appellant shall be set at liberty forthwith unless he is otherwise lawfully held.

Dated and signed at NAIROBI this 18th day of January 2019

W. A. OKWANY

JUDGE

Dated, signed and delivered in open court at Eldoret this 30th day of January 2019.

H. A. OMONDI

JUDGE

In the presence of:

Mrs Mumo for the state

Appellant present

Court Assistant – Ouma