



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CORAM: D. S. MAJANJA J.

CRIMINAL APPEAL NO. 04 OF 2019

BETWEEN

SBB.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. R. M. Oanda, PM

dated 14th September 2016 at the Magistrates Court in Kilgoris in Criminal Case No. 621 of 2016)

JUDGMENT

1. The appellant, **SBB**, was charged and convicted of the offence of attempted defilement contrary to **section 20(2)** of the **Sexual Offences Act** (“the **Act**”). It was alleged that on 7th May 2016 at 2200HRS within Kisii County, he attempted to commit an act which could cause penetration with his male genital organ into the female genital organ of AB, a child aged 15 years who was to his knowledge his daughter.

2. The appellant was sentenced to 10 years’ imprisonment and now appeals against the conviction and sentence on the ground that the prosecution did not prove the offence beyond reasonable doubt. Learned counsel for the respondent conceded the appeal on the ground that the prosecution failed to prove the elements of the offence.

3. Notwithstanding the concession by counsel for the respondent, I am required to satisfy myself that it is well taken and that the conviction is not well founded. I remind myself that the duty of the first appellate court is to re-appraise the evidence afresh and reach an independent decision as to whether to uphold the conviction all the time bearing in mind that I neither heard or saw the witnesses testify. In dealing with this task, I shall outline the evidence before the trial court.

4. The prosecution called three witnesses while the appellant opted to remain silent in his defence. The complainant (PW 1) told the court that she was the appellant’s daughter and she was aged 15 years. PW 1 recalled that on the material night the appellant came home and demanded to be served in his house. While there he locked the house as they ate supper. After eating, he wanted the PW 1 to accompany him to his bedroom but she refused. She narrated what happened as follows:

He removed a knife and got hold of me. He threatened to stab me in case I refused. I got hold of the knife and started to scream. I was calling for help my step brother came to my rescue.

When PW 1 was questioned by the trial magistrate, she stated that she feared that the appellant was going to rape her.

5. A son to the appellant, PW 2, recalled that on the material night, he arrived home in the evening and found many people gathered. When he inquired about what had happened, he was told that the appellant wanted to rape PW 1. The appellant was then arrested and taken to the police station where they were received by the Investigation Officer, PW 2.

6. The question for the court is whether the prosecution proved attempted incest. Under **section 20(1)** of the **Sexual Offences Act, 2006** which states as follows:

20. (1) Any male person who commits an indecent act or an act which causes penetration with a female person who is to his

knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:

Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.

(2) If any male person attempts to commit the offence specified in subsection (1), he is guilty of an offence of attempted incest and is liable upon conviction to a term of imprisonment of not less than ten years. [Emphasis mine]

7. An “indecent act” under **section 2(1)** of the **Act** is defined as an unlawful intentional act which causes, “(a) any contact between any part of the body of a person with genital organs, breasts or buttocks of another, but does not include an act that causes penetration.” “Penetration” under **section 2** of the **Act** means, “the partial or complete insertion of the genital organs of a person into the genital organs of another person.” The import of these provisions that the offence of incest is proved either by establishing penetration or an indecent act.

8. Apart from the age of the complainant and positive identity of the accused, in order to succeed, the prosecution must prove the steps taken by the accused to execute the defilement which did not succeed. For all intents and purposes attempted defilement is a failed defilement which failed because there was no penetration.

9. An attempt is defined under **section 388** of the **Penal Code (Chapter 63 of the Laws of Kenya)** as follows:

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 overt 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.

10. The prosecution must prove the mental element, the *mens rea*, which is the intention and the *actus reus*, which constitutes the overt act showing the execution of the felonious 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 v Republic NRB CA Crim. Appeal No. 588 of 2010 [2015] eKLR** and **Francis Mutuku Nzangi v Republic NRB CA Crim. Appeal No. 358 of 2010 [2013] eKLR**).

11. In this case, it is clear that the issue of rape arose from examination of PW 1 by the court. She believed that the appellant was going rape her. PW 2 was merely told what people heard that the appellant had done. There is no evidence that the appellant took steps to effectuate an intention to commit an act of penetration. He did not tell PW 1 that he was going to commit an act of penetration, he did not remove her clothes or remove his trousers. In fact, he did not touch her genital organs breasts or buttocks which would actually complete the offence as it would constitute indecent assault. The evidence was of a threat to kill her as he dragged her to his bedroom. It cannot be inferred from this evidence that he intended to commit an act of penetration. Perhaps there was mere preparation to commit an offence rather than an attempt to commit the offence of incest. The prosecution therefore failed to prove its case.

12. I allow the appeal and quash the conviction and sentence. The appellant is set free unless otherwise lawfully held under a separate warrant.

DATED and DELIVERED at KISII on this 12th day of April 2019.

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Otieno, Senior Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.