



REPUBLIC OF KENYA
IN THE HIGH COURT AT MILIMANI
CRIMINAL DIVISION
CRIMINAL APPEAL 186 OF 2018

LIVINGSTONE ESHIKUMO KENNEDY.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Makadara Sexual Offence Case No. 135 of 2016 delivered on 18th May, 2018 delivered by Hon. J Kibosia, SRM.)

JUDGMENT

Background

1. The Appellant was charged with the offence of attempted defilement contrary to Section 9(1) as read with Section 9(2) of the Sexual offences Act. The particulars of the offence were that on diverse dates between 22nd and 24th day of May, 2016 at, Starehe Sub-County within Nairobi County, intentionally attempted to cause his penis to penetrate the anus of BN a child aged seven (7) years. He was further charged with committing an indecent act with a child contrary to Section 11(1) of the Sexual offences Act No.3 of 2006 in that he intentionally and unlawfully indecently touched the anus BN, a child aged seven years. On conclusion of the trial he was convicted of the main count of attempted defilement and sentenced to serve 10 years imprisonment.

2. Dissatisfied with the conviction and sentence he preferred the instant appeal. In a Memorandum of Appeal dated 26th October, 2018, he was dissatisfied that the prosecution evidence was contradictory, that the case was not proved beyond a reasonable doubt, that crucial witnesses and evidence were not availed and that his defence was not considered.

Summary of evidence

3. The Prosecution called a total of eight witnesses. The complainant **BN, PW1**, a minor aged seven years in his unsworn testimony stated that he went home after a visit to his aunt and found his father, the Appellant, watching pornography. The Appellant told him to lie on a seat. He then removed his clothes and defiled him repeatedly. The Appellant asked him whether he felt any pain which question was answered in the affirmative. He had a case of diarrhea after the ordeal. The Appellant continued defiling PW1 for a long time and would also leave him watching pornography on a computer. When he eventually left the house PW1 started crying. A lady found him crying and when she enquired as to the reason, he told her that he had been defiled. This ordeal happened when the Appellant's wife had gone to hospital to have a baby. Later, when the baby, a girl, was brought home the Appellant forced PW1 to insert his four (4) fingers into her vagina. He was further threatened by the Appellant using a knife warning him not to tell anyone about it.

4. **PW2, LKS**, PW1's mother confirmed that when she went to give birth, she left PW1 under the care of the Appellant. On returning home, she found PW1 with a case of diarrhea and was walking with his legs apart. He was sent to school but a teacher called and told her that PW1 was unwell. On 10/8/2016, PW1 finally disclosed to her what had been happening and that the sexual assault had been going on for three months. PW1 further told her that the Appellant had forced him to insert his fingers into the baby's vagina. She took him (PW1) and the baby to MSF Hospital and on examination she was found to have scratch marks.

5. **PW3 LN**, is a lady who on 10th August, 2016 found PW1 surrounded by a mob, apparently having gotten lost after he was abandoned by his father. She took him to the Chief's Camp where she found PW2 with her baby. PW2 was apparently reporting to the chief a case of neglect by the Appellant. PW3 took in both PW1 and PW2 into her house. Whilst there one day she heard the baby crying. She rushed to find out what was happening only to find her without diapers and bleeding from her genitalia. On interrogating PW1 she learnt that PW1 had been instructed by the Appellant to insert his fingers into the baby's genitalia until she died. He also told her in the presence of her mother, PW2, that he had been repeatedly defiled by the Appellant.

6. **PW4, CPL Richard Nyakundi** and **PW5, APC Alex** effected the arrest of the Appellant guided by PW2 who led them to his house. It was the testimony of PW5 that he did not see any pornographic material. **PW6, Dr. Joseph Maundu** of police surgery testified that PW's anal area was intact and there were no physical or genitalia injuries to be observed. It was his testimony that the examination was done two months after the incidence.

7. **PW7, Maurine Asembo Akenga** gave testimony on behalf of Suhalya About who prepared the medical report from MSF Clinic. PW1 was examined on 11/8/2016 upon a report that he had been defiled severally on unknown dates between three weeks to two months prior to the examination. There was no injury observed. She produced the medical report as Exhibit 2(a) and Post Rape Care (PRC) Form as exhibit 2(b) respectively.

8. **PW8, CPL Margaret Chepchumba** was the investigating officer. She summed up the prosecution case and produced the Birth Certificate of PW1 into evidence as Exhibit 8.

9. After the close of the prosecution case, the court ruled that the Appellant had a case to answer and accordingly put him on his defence. He gave a sworn statement of defence. In summary, his defence was that there was a grudge that made the family concoct the allegations of defilement. He explained that he had a dispute with his wife, (PW2), with regards to a complaint that he had neglected her and the family. This culminated into him being charged with the instant offence.

Determination

10. After re-evaluating the evidence on record and considering the respective rival submissions, I conclude that there is only one issue for determination, namely whether the prosecution proved the case beyond a reasonable doubt. In discharging its burden, the prosecution was enjoined to prove three key elements that constitute the offence of attempted defilement. These are; proof of the age of the minor, proof of attempted penetration and proof of the identity of the offender.

11. The issue of the identity of the Appellant is not in issue. He was/is the father of PW1, the minor complainant. Equally, the age of PW1 is not contested. PW2, his mother identified his birth certificate that was produced in evidence by PW8 which indicated that he was on 4th April, 2009. Thus, placing his age at seven years as at the time of the incident. What is in issue is whether the Appellant was culpable; that he attempted to defile his son, PW2.

12. The summary of the prosecution case is restated above. In corroborating the testimony of PW1, the prosecution called PW2, 3 and the medical evidence of PW7. Both PW2 and 3 were not present when the alleged defilement took place. They solely relied on what PW1 told them. Of importance to note is that PW3 was attracted to the house where PW1 was when she heard PW2's baby crying. She said she found PW1 had inserted his fingers into her genitalia. PW1 then told her that he was under the instructions of the Appellant to insert the fingers until the child died. He went ahead to state that his father had repeatedly defiled him. In the words of both PW2 and PW1 the defilement had taken place for close to two months.

13. Although the charge preferred against the Appellant was one of attempted defilement, the evidence adduced purely attempted to establish the offence of defilement. Either way, the medical evidence ought to have established elements of interference with PW1's genitalia. This statement is justified by the evidence on record that the defilement had taken place for close to two months. Even though actual penetration may not have occurred, the medical examination would have corroborated PW1's evidence of sexual assault more so having regard that at some point PW1 was found to have been walking with difficulty, his legs apart.

14. In contrast to the oral evidence, medical evidence established that there was entirely no assault on PW1's genitalia. I highlight the fact that the examination that was first done at MSF Clinic is attested by a medical report and PRC Form that were produced as exhibits 2(a) and 2(b) respectively. In both reports, PW1 was found to have normal genitalia, penis and scrotum, the anal opening had no fresh bruises or tears and there was normal anal sphincter muscle. The latter finding is totally inconsistent with a case of repeated attempted defilement.

15. I am alive to the fact that a court is enjoined to apply the proviso to Section 124 of the Evidence Act in that it can convict solely based on the evidence of the minor if it is of the view that the minor is speaking the truth. Nevertheless, where the prosecution chooses to call other evidence to corroborate that of the minor, the corroborating evidence must be consistent with that of the minor. Needless to state is that the evidence called in this case to support that of PW1 was a total contrast, thereby shredding the narration that PW1 was sexually assaulted. This renders me to cast doubt on the truthfulness of PW1's evidence that the Appellant sexually assaulted him.

16. With the above finding, I have no doubt in my mind that PW1 was neither defiled nor attempted to be defiled. Having regard to the fact that both the Appellant and his wife, PW2, had matrimonial differences revolving around alleged neglect of the family, there is likelihood that he was framed to force him to cow to maintaining his family. I am in the circumstances unable to make a finding that the Appellant was culpable.

17. More importantly is the fact that when PW3 went to take PW1 to the chief after he was found lost, she found PW2 reporting to the chief her case of neglect by the Appellant and not the defilement of her son. This sounds awkward. It begs how a mother with a sexually assaulted child forgets that her child's health is more important than that her husband is not looking after her. This ought to have raised an eye brow on the part of the learned trial magistrate as a pointer to doubt on the culpability of the Appellant.

18. Had the learned trial magistrate properly evaluated the Appellant's defence against the prosecution case that there existed a grudge between PW2 and the Appellant on the one hand and the fact that the medical evidence did not support the charge, she would have arrived at a different finding. I find that the Appellant's conviction was not based on any cogent evidence and was therefore not safe.

19. In the result, I find that the prosecution did not prove their case beyond a reasonable doubt. I quash the conviction, set aside the sentence and order that the Appellant be forthwith set free unless otherwise lawfully held.

Dated and Delivered at Nairobi This 29th day October, 2019.

G.W.NGENYE-MACHARIA

JUDGE.

In the presence of:

- 1. Appellant in person*
- 2. Mr. Momanyi for the Respondent.*