



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT LODWAR

LODWAR HIGH COURT CRIMINAL APPEAL NO.32 OF 2016

PETER NDOLI ADISA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence from original Lodwar PM CR.A Case No.72/2014 delivered on 14/5/2014 by W Washira Senior Resident Magistrate)

JUDGMENT

The appellant **Peter Ndoli Adisa** was charged in the magistrate's court with the offence of attempted defilement contrary to section **9(1) (2)** of the sexual offences Act. **Act No.3 of 2006**. The particulars of the offence are that on the 12th day of February, 2014 at Lokoni trading centre within Turkana County intentionally attempted to cause his penis to penetrate the vagina of J N a child aged 16 years old.

The evidence before the trial court was that PW1 J N was a student in form two at [particulars withheld] when she boarded a motor vehicle driven by the appellant when she reached at the destination it was 11pm and since it was at night the appellant offered to give her a place to sleep. He took her to a house where she was given a mat to sleep. At around 2am, a person pushed the door and entered where she was sleeping. She noticed that it was the appellant. He told her he wanted her. He lay next to her and touched her legs. Complainant stoop up and went outside. He followed her and ran after her. The complainant was all the time screaming and people came to her rescue. They arrested the appellant. The complainant went to the home of the chief where she slept.

PW2 Achuka Samson was at Lokori Trading Centre when she heard a girl screaming for help. He went to the gate and saw it was the complainant who was screaming. Shortly later he saw the appellant who was chasing her. The appellant alleged complainant was his daughter who had run away from school. The chief was informed who arrested the appellant, **PW3 Joseph Achuka** was also in his house when he heard screams and went there. He saw it was the complainant who was being chased by the appellant. The chief was informed who then arrested the appellant.

The appellant gave unsworn statement of defence. He stated

“I live in Katitu. I worked as a driver. I am sorry for what I did. I will not repeat. I am guilty. That is all”.

It is upon the above evidence that the trial magistrate found the appellant guilty of the offence of attempted defilement convicted him and sentenced him to serve 10 (ten) years imprisonment. Aggrieved by this conviction and sentence, the appellant filed this appeal. He faulted the trial magistrate for holding that the prosecution had established its case beyond reasonable doubt, that the complainant's age was not proved, that there were material contradictions in the prosecution evidence and that he was not given a chance to give his defence and mitigation.

The appellant filed written submissions. He submitted that his defence was omitted and that what is recorded is not the true record of his defence that is sorry for what he did related to a traffic offence and not this charge of attempted defilement. He invited the court to be guided by the decision in **Lenge Ngoje – v – Republic 1958 EACA 487**. Appellant further submitted that crucial witnesses who included the chief and investigating officer did not testify. Appellant further submitted that the age of the complainant was not proved as no birth certificate; baptismal card or age assessment report was tendered. In his oral submission the appellant stated that his motor vehicle had been involved in an accident and was supposed to be charged with a traffic offence as the passengers had demanded to be compensated for the minor injuries sustained.

Mr. Gikunda for state opposed the appeal. He relied on the evidence on record which showed the charge was proved and that the sentence of ten (10) years was proper. He prayed that the appeal be dismissed.

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 – v – 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 from the age, of the complainant the 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.

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”

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 overt 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 between preparation mere preparation to commit an offence and attempting to commit an offence (**see Abdi Ali Bere – vs – Republic (2015) EKLK**).

The evidence of the complaint as stated in the trial court on the events of that evening as follows

“The driver said he can give me a place to sleep. I am seeing him in court (Accused is positively identified). I agreed we went. He took the vehicle home. I alighted one lady gave us a mat. Accused said I sleep outside. I insisted I sleep with the mother. I slept. Almost at 2.am my door opened it had no locks I refused to open. The door was pushed up; I woke up it was accused. He then wanted me. He slept next to me. He touched my legs. I woke up, pull on my legs (sic) and then went outside. He woke (sic) you followed me. He told me to go back and sleep. I refused. Later I went back to the mat”

From the evidence of the complainant, it is evident that what constitutes the overt act by the complainant is the touching of her legs, which advance the complainant declined and the accused left her. The touching of the complainant cannot by itself alone be said to constitute “an act which would cause penetration to a child” for it to amount to attempted defilement. The learned trial magistrate in her judgment stated

“ I also find attempted defilement occurred. Accused tried to touch PW1’s legs he ended up chasing her for refusing to comply claiming through lies that PW1 was his daughter a fact which was false”

For the appellant to have beenthe prosecution ought to have proved that he committed an act which would cause penetration which is defined as a partial or complete insertion of the genuine organ of a person into the genital organs of another person for these reasons I am satisfied that the evidence before the trial court did not prove an offence of attempted defilement. I consequently quash the conviction of the appellant **Peter Ndoli Adisa** and set aside the sentence of ten (10) years imprisonment imposed. I direct that the appellant **Peter Ndoli Adisa** be set at liberty unless otherwise lawfully detained.

Dated at Lodwar this 5th day of January, 2016.

S N RIECHI

JUDGE

Court – judgment read over and delivered in open court in the presence of appellant, Mr. Kimanthi for state and Araki interpretation English/Kiswahili this 11th day of January, 2017.

S N RIECHI

JUDGE