



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL NO. 114 OF 2016

(Being an appeal arising from Conviction and Sentence in Kitale

Chief Magistrate's Court S.O. No. 209 of 2015 delivered by

P. Biwott – Senior Principal Magistrate on 9/12/16.

BENARD WANJALA WAFULA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The appellant was charged with the offence of **Attempted Defilement contrary to Section 9(1) (2) of the Sexual Offences Act No. 3 of 2006**. The particulars of the charge were that on the **8th day of December 2015 within Trans Nzoia County intentionally attempted to cause your penis to penetrate the vagina of MA a child aged 15 years.**
2. He was convicted and sentence to 10 years imprisonment hence this appeal. The grounds raised in his petition are general in nature but before dealing with the same it is necessary to summarise the proceedings at the trial court.
3. **PW1 the complainant** stated that she was 15 years old and a standard 7 pupil at [particulars withheld] primary school. That on 8/12/15 at 9 am she came from Kakamega to Kitale town to visit his father. At the stage, she alighted and being new in town asked the appellant for his phone so as to call her father. The appellant obliged. Her father told her to go to a round about. The appellant offered to take her using his bicycle. He however diverted and went to a forest not far from [particulars withheld] house. There he attempted to defile her but her screaming attracted members of the public who came to her rescue. The appellant was then arrested and taken to Kitale police station. The complainant was taken to Kitale district hospital where she was treated and P3 form filled as well as dental age assessment undertaken.
4. **PW2 Shem Kibitok Sawe Amad** the Senior Chief Kibomet location testified that he got a call that there was a woman who was screaming at the [particulars withheld] forest. They went to the scene and found the complainant who had sustained injuries in her hands and legs and appeared shaken. The appellant who was a boda boda rider was arrested.
5. **PW3 POO** the complainant's father came to the scene after he was called. He found the Administration Police and Kenya Police Reservist (KPR) having arrested the appellant.
6. **PW4 John Koima** the Clinical officer at Kitale District hospital examined the complainant e on 9/12/15 and filled the P3 form. He found her neck was tender and the genitalia had no bruises. Her hymen was absent having engaged herself in sexual intercourse in the year 2013. He also produced the P3 form.
7. **PW5 Protus Juma Katanda** a community police officer testified that at around 3.30 pm on 8/12/15 he was from the chief's office heading to [particulars withheld] house when he heard 3 screams from the nearby forest. He rushed to the scene and saw a bicycle down and a girl pinned down by a man. He arrested the man and rescued the girl. He then called APs officer from Kitale District hospital as well as the chief. He escorted the girl to Kitale district hospital. On cross—examination he said that the appellant was half naked and was sweating.
8. **PW6 Felicity Rono** carried out the investigations and preferred the charges against the appellant who had been brought by the chief Kibomet to Kitale police station. He recorded statement, produced the age assessment report.

9. When put on his defence the appellant gave unsworn evidence denying the charge. He said however that he indeed took the complainant using his bicycle to greenfield after he had borrowed the services of her phone. In the process of taking her through a short cut she had suggested they met 2 men whom she stopped and greeted briefly. The man went with her through a foot path in the forest. He followed her for she had not returned her phone and had not paid her fare. He was then attacked by one of them Protus and Moses who proceeded to handcuff him. They also took Kshs 10,340 from his pocket. Robert was called and he arrived with uniform and was armed with a gun. He was then accused of attempting to kill the girl. He was arrested and taken to Kitale police station and later charges preferred against him.

Analysis and Determination

10. I have read the entire submissions by the learned state counsel as well as those by the appellant. What is clear however is that the incident took place in the afternoon and thus the issue of identification was not disputed.

11. The arrest of the appellant is not disputed that it occurred in the forest. The defence by the appellant being unsworn may not have much probative values as the prosecution did not have the chance of cross-examining him.

12. Having read the entire prosecution evidence, I do not think that the appellant had any arguable defence. I do not see any reason why the witness who arrested him would simply accuse him of attempting to kill the complainant without any sufficient reason. He does not deny that he was arrested in the forest in the presence of the complainant.

13. The complainant said that she screamed 3 times which attracted PW5. PW5 found the appellant half naked, a fact which corroborates what the complainant stated. He was however unable to defile her as PW5 and the rest of the witnesses arrived at the scene.

14. For the above reasons I would have dismissed the appeal as being unmeritorious. What however catches my attention is whether indeed an offence of attempted defilement was proved or in other words were the necessary ingredients proved.

15. It is clear from the evidence of the Clinical officer and in the P3 form produced that the only significant injury was tenderness on the neck of the complainant. Save for the lab test that the hymen was missing courtesy of sexual intercourse she had with her boyfriend in 2013, there was no other significant findings.

16. At least for the offence of attempted defilement to be established some of the necessary elements could include bruises or lacerations on the victims thighs, labia, vagina or generally on the outer genital organs, discharge of semens or presence of spermatozoa on the victims undergarments or thighs without any penetration. Tearing of the victims inner clothing in particular could as well be a pointer to an attempted penetration.

17. In the case at hand I have not been shown any. It is true that the immediate arrival of PW5, Luckily forestall the appellants scheme. But can the facts as presented in this case be termed a complete spectra of an attempted defilement? I do not think so. Each case ought to be determined independently. The elements stated above need not be proved in totality. A single element could be sufficient in my view to convict. I respectfully do not find any of them. Although the appellant was found half naked, I do not think he succeeded in his evil mission.

18. For the above reasons I find that it would not be proper in the circumstances to hold that the charge was successfully proven. This does not therefore absolve the appellant from liability. I think the proper recourse is to reduce the same to Assault causing actual bodily harm. It is on record that the complainant was injured on the neck. She must have as expected in such circumstances suffered great trauma and stress.

19. Taking the totality of the fact herein I shall reduce the charge from Attempted defilement to Assault contrary to Section 251 of the penal code.

20. I note that the appellant was sentenced to a minimum period of 10 years. I shall proceed to reduce the same to a custodial sentence of 5 years from 14th March 2016 when he first appeared in court. I hold so since the appellant though granted bond was in custody all through.

21. The appeal is otherwise dismissed.

Delivered, signed and dated at Kitale this 20th day of March 2018.

H.K. CHEMITEI

JUDGE

20/3/18

In the presence of:

M/s Kakoi for the Respondent

Appellant – present

Court Assistant – Silvia

Judgment read in open court