REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO.30 OF 2016

P C……………………………………………APPELLANT

VERSUS

REPUBLIC…………..…………………………RESPONDENT

(Appeal from the conviction and sentence in Kericho S.O. No. 55 of 2015 (Hon. L. N. Kiniale (SRM) dated 21st June 2016)

JUDGMENT

1. The appellant was charged with the offence of incest contrary to section 20 (1) of the Sexual Offences Act, No. 3 of 2006. The particulars of the offence are that on the 18th day of November 2015 at [particulars withheld] Location in Kipkelion West Sub-County within Kericho County, unlawfully and intentionally caused penetration of his penis into the vagina of his daughter, M C, a child aged 12 years.

2. The accused faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars of the offence were that on the material date, place and time, the accused person intentionally and unlawfully with his penis touched the vagina of M C, a child aged 12 years.

3. The prosecution called 3 witnesses in support of its case. PW1, the complainant, M C, was a child aged 13 years. On 18th November 2015, she was at home with her siblings, all of whom are younger than she is. About 4.00 p.m., two of them went to play at a neighbour's, D's house. A third went to herd cattle while the complainant took maize to take to the posho mill. On the way, she met her father, the accused, who told her not to go to the posho mill. He then asked her to give him lunch and she went to light a fire in the kitchen. While she was lighting the fire, he asked her why she was lighting the fire to warm food for a dog. He then took her hand and pulled her to his bedroom and removed his clothes and did 'bad manners' to her. He lay on top of her and his pubic area touched her private parts. She tried to scream as he lay on top of her.

4. Shortly, PW1's mother (PW2) arrived and found the accused on top of PW1. She screamed and locked them inside the house. The accused got out through a window, took a stick and threatened PW1's mother. Her mother opened the door and PW1 came out of the house, still without her clothes. Her mother was still screaming, which attracted their neighbour, D. When D came, the accused went away. PW1 went to Kipkelion Police Station with her mother and D, then they went to Kipkelion Sub-District Hospital where she was examined. PW1 stated that the accused was her father.

5. In cross-examination by the accused, PW1 stated that she was not hurt when her mother came; that her mother had come before anything happened but the accused was on top of her.

6. PW2, B K, was the mother of PW1 and the wife of the accused. She stated that PW1 was born on 6th June 2003. On 18th November 2015, at around 1.00 p.m, she had left to pick coffee berries. She then went to look for money at a brother in law's house, then went back home. On the way, her neighbour, D, told her that PW1 had left maize, at her home as the accused had called her back while she was on the way to the posho mill. D also told PW2 that she had heard PW1 screaming and she was not sure whether her father had caned her.

7. PW2 rushed home and found the door locked. She opened the door and went to her bedroom, which was also closed. She opened it and found PW1 lying naked on it, the accused standing over her. He had removed his trousers and inner pants halfway. He still had his shirt on. She had asked him what he was doing to their child, then ran outside and locked the door from outside and raised the alarm. The accused jumped out through the window and started chasing her with a stick. Her neighbour, D responded and asked the accused why he was chasing PW2 with a stick. He dropped the stick and ran away, but was arrested later by neighbours. PW2 stated that they took the child to hospital where the doctor said there was no penetration but the accused had attempted to defile PW1.

8. PW3, Weldon Mitei, was a clinical officer at Kipkelion sub district hospital. He produced the PW3 form in respect of PW1, aged 12. She had been taken to the hospital by police and her mother. PW3 did not find any tears or laceration on physical examination of PW1 and there was also no spermatozoa. He concluded that there was an attempted defilement.

9. PW4, PC Faussy Kayon, was assigned the matter by the in-charge, crime, in Kipkelion Police Station. She had gone to the station and found PW1 and PW2. The accused had also been arrested. She had taken the child to the hospital for examination and visited the scene, then recorded witness statements and charged the accused.

10. After the prosecution case, the court found that the accused had a case to answer and placed him on his defence. He elected to keep quiet.

11. In her judgment, the court (Hon. L. Kiniale) found the accused guilty of the alternative charge of attempted defilement. She reached this conclusion after making a finding that the complainant is a child under the age of 18 years, that there was no evidence of penetration before the court, but there was an attempt to defile the child from the history given and the presence of a whitish discharge on the child's vagina. The accused had, however, been found just before he was able to complete the act. The judgment was read on behalf of Hon. Kiniale by Hon. G.M.A Ong'ondo (as he then was) and after considering the accused's mitigation, sentenced him to 10 years' imprisonment.

12. The appeal was argued before me on 5th April 2018. The appellant filed written submissions which he relied on, while the state was represented by Ms. Keli.

13. I have considered the record of the trial court and the appellant's written submissions and the submissions in reply on behalf of the state. The appellant has argued in his submissions that the trial magistrate erred in reaching her decision on the basis of evidence from PW1 and PW2, whom he submits are from the same family. The response from the state is that under section 143 of the Evidence Act, the prosecution is allowed to call any number of witnesses, and it does not matter that they are from the same family as long as they are the witnesses required to prove the case. The case before the court is a case charging the appellant with defilement of his daughter. It is an offence that took place in the home. The appellant was caught in the act by the mother of the complainant, who was his wife. It is inevitable that most of the witnesses in such a case would be from one family. This does not, however, render their evidence weak or inadmissible.

14. In any event, there was independent evidence from the clinical officer who concluded that there was an attempt to defile the child, his conclusion based on the whitish discharge in her vagina as captured in the treatment notes produced in evidence. This ground of appeal as set out in the submissions has, in my view, no merit.

15. The appellant has also contended in his submissions that the trial court erred in convicting him when there was no evidence that he tried to defile the child. This ground is not entirely clear, but seems to suggest that there was no evidence that he was the one who tried to defile the child. However, the offence took place in the middle of the day. It involved the father of the complainant who was therefore well known to the complainant. He was caught in the act by his wife, the mother of the child. There can be no doubt as to the identity of the person who attempted to defile the complainant.

16. The appellant had raised several other grounds in his petition of appeal. He argued that the complainant had stated that she was not touched, the implication, I believe, being that since the minor had stated that she was not touched, he should not have been convicted. The response from the state is that the trial court considered the evidence and facts and reached the conclusion that the facts supported the offence of attempted defilement. The state's submission was that the trial court was right and had acted in accordance with section 180 of the Criminal Procedure Code by convicting the appellant of the charge proved by the prosecution.

17. I have considered this ground of appeal against the evidence before the court and the decision of the trial court. The evidence before the trial court was that the complainant had stated that she did not feel any pain. She had further stated that her mother came before anything happened to her. The complainant's mother had found the appellant standing over the complainant, with his trousers and inner pants half way down, but with his shirt on.

18. The evidence of the clinical officer was that he did not notice anything unusual and concluded that it was an attempted defilement. Taking all these matters into consideration, I am satisfied that the trial court properly reached the conclusion that the accused had attempted to defile the complainant, but was caught in the nick of time by the child's mother, his wife.

19. The appellant has complained in ground 4 of his petition of appeal that the complainant never raised the alarm. The response from the state is that the record indicates that the complainant stated that she tried to scream as the applicant lay on top of her. Her mother arrived shortly thereafter, and she is the one who raised the alarm.

20. I have examined the record of the trial court and noted that indeed the complainant stated in her evidence that she tried to scream as the appellant lay on top of her. Her mother had, however, come home shortly thereafter and found the appellant on top of the complainant. The evidence of PW2 was that her neighbour, D, had heard the complainant screaming and was not sure whether the child's father had caned her. This is what had caused PW2 to rush home and find the appellant in the act of trying to defile his daughter.

21. In any event, I do not believe that whether or not a victim of defilement or attempted defilement raises an alarm can be a ground on the basis of which a conviction for the offence can be overturned, if all the elements of the offence have been established.

22. Finally, the appellant urges the court to quash his conviction and set him at liberty. However, there is no basis on which the conviction and sentence against the appellant can be quashed or the appellant set at liberty. He was caught in the act of attempting to defile his 12 year old daughter. He was only prevented from doing this by the arrival of his wife, the child's mother. Section 9 of the Sexual Offences Act provides as follows:

> ***(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.***

23. Section 180 of the Criminal Procedure Code provides that:

> ***"When a person is charged with an offence, he may be convicted of having attempted to commit that offence although he was not charged with the attempt."***

24. In this case, the appellant was charged with the offence of defilement. The evidence showed that he did not succeed in carrying out his reprehensible act of defiling his daughter as he was caught in the act by his wife. In the circumstances, I am satisfied that he was properly convicted of the attempt, the conviction is safe and the sentence imposed on him legal as it is the one provided by law. The appeal therefore has no merit, and is hereby dismissed.

Dated Delivered and Signed at Kericho this 30th day of May 2018.

MUMBI NGUGI

JUDGE