



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO. 140 OF 2016

M KAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal arising from conviction and sentence in Chief Magistrate's Court (Mombasa) in criminal Case No. 11 of 2015 dated 31st October 2016 by Hon. V. J. Yator RM.)

JUDGMENT

1. M K 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 were that the appellant on the 2nd day of July, 2015 in Changamwe Sub-County within Mombasa County, willfully and intentionally attempted to cause his penis to penetrate the vagina of A.K.N a girl aged 6 years old.

2. He faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2016

The particulars being that the appellant on the 2nd day of July, 2015 in Changamwe sub-county intentionally and unlawfully caused his penis to rub the vagina of A.K.N a girl aged 6 years old.

3. The case proceeded to full hearing and he was found guilty, convicted and sentenced to ten (10) years imprisonment.

4. Being dissatisfied he filed this appeal citing the following grounds:

(i) That the Hon. Learned trial magistrate erred in law and fact in convicting and sentencing him to 10 years imprisonment without noting that the charge facing against him was totally defective contravening section 214 of the Criminal Procedure Code.

(ii) That the Hon. Learned trial magistrate erred in law and fact in convicting and sentencing him to 10 years without noting that the findings of the doctor as per the P3 form and the evidence adduced in court did not support the alleged act of defilement.

(iii) That the Hon. Learned trial magistrate erred in law and fact in convicting and sentencing him to 10 years imprisonment without noting that the evidence adduced by the prosecution witnesses casted doubt on the whole prosecution case.

(iv) That the Hon. Learned trial magistrate erred in law and fact in convicting and sentencing him to 10 years imprisonment without noting that section 150 of the Criminal Procedure Code was not adhered to.

(v) That the Hon. Learned trial magistrate erred in law and fact in convicting and sentencing him to 10 years imprisonment without noting the defence he gave out was strong enough to water down the prosecution side.

5. A summary of the prosecution case is that PW1 A.K.N the complainant in her evidence told the court that she was at home playing with C, sister C and some boys while C was in his Auntie's house. She entered the said house and C sent her to buy some cigarettes at a shop right behind the house.

6. On taking the cigarettes, C removed her panties, then his trousers and lay on top of her. After that she went home. She felt pain on her vagina and informed her grandmother. Her grandmother and auntie took her to hospital. She identified the Appellant in court as the C she was talking about. On cross examination, she revealed that the incident happened on 2nd July 2015.

7. PW2 L.W. who is PW1's sister recalled that on 2nd July 2015 which was on a Friday, she asked PW1 why she was not playing. PW1 in turn told her that Uncle A had touched her in her vagina and warned her that if she told anyone, he would kill her.
8. She then took PW1 to her grandmother whom she found in the company of A mother. The Appellant was in turn called and he came. Afterwards, PW1 was taken to Coast General Hospital.
9. She identified Uncle A as the Appellant. On cross examination, she confirmed that she did not see PW1 enter the Appellant's house.
10. PW3 **L W** who is PW1's grandmother stated that on 2nd July 2015 which was a Thursday while PW1 was being washed by her auntie, she started complaining that she was feeling pain in her private parts. She in turn instructed her auntie to use coconut oil on her.
11. On 3rd July, 2015 PW1 complained again of feeling pain in her private parts. On 4th July 2015, PW1 and Pw2 and one Caro told her that PW1 had been defiled. PW1 showed her the house where the said defilement happened though they did not find the Appellant but instead found the Appellant's sister.
12. The Appellant was then called and he came. PW1 fearfully looked at her and told her that the Appellant had threatened her that he would stab her with a knife if she told anyone about the incident.
13. She took PW1 to a private clinic where she was examined and they were advised to take her to Coast General Hospital. At the hospital, PW1 was given medicine and they also went to the Gender office where some papers were filled for her.
14. She confirmed that this was her first time to see the Appellant and she did not have any differences with him. On cross examination, she confirmed that PW1's auntie complained that PW1's panty was dirty on the material day, but no blood was seen in the panty.
15. PW4 Dr. **Fatuma Omar** a medical doctor based at Coast General Hospital, testified that upon observing PW1 she noted that her general physical examination was good, her hymen was intact though there were lacerations on her vagina. The probable type of weapon used was a blunt object. She produced PW1's P3 form (PEXB.1) PRC form (PEXB.2), and her birth certificate (PEXB.3). She clarified that abrasion meant that there was attempted penetration. She also confirmed that no semen was found in PW1's genital, and there had been no penetration.
16. PW5 **Sergeant Josephine Mwangemi** the investigating officer in this case told the court that the Appellant was arrested by the members of the public. She later called PW1 and her witnesses and recorded their statements.
17. She interviewed PW1 after 3 days of the incident after she had recovered from the trauma. She also stated that she escorted PW1 to hospital but she was not able to take the statement of M W (PW1's auntie) as she was in Dubai. She confirmed that she established the age of PW1 from her birth certificate (PEXB.3).
18. She testified that the incident occurred in the Appellant's sister's home on 2/7/15 between 6p.m.-7p.m. That PW1 used to go school in the morning and return at 4 p.m. She explained that the Appellant worked at Diamond Industries upto 5.45 pm per day and he used to frequent his sister's house.
19. The Appellant gave a sworn statement for his defence and called two witnesses. He testified that on the material day, he was at his place of work until 6p.m. After work, he went to his sister's place and upon arrival, he found many people at the sister's door shouting 'beat him' 'beat him'. He was then beaten up and injured on the head.
20. He denied the charges facing him and stated that his name was M and not C. He accused PW5 of being biased in her investigations.
21. On cross examination, he stated that he left work at 4:30p.m, and does not take alcohol nor smoke and he did not know PW1 but only saw her when she came to testify.
22. DW1 **P K K** is the Appellant's sister. She told the court that on 3rd July, 2015, she was in her house when PW3 came and told her that the Appellant had defiled PW1. Meanwhile, she saw a mob and shortly thereafter, she saw the Appellant coming to her house and before reaching her house, he was attacked by the mob.
23. Upon Appellant's attack, they intervened and suggested that he be taken to hospital. They called the police and he was taken to Coast General Hospital.
24. DW2 **M A M** is Appellant's colleague at Diamond Industries Limited. He told the court that on 4th July 2015, in the evening they were from work with the Appellant when they passed by his house (Appellant) then went to DW1's house.
25. Soon thereafter chaos erupted and the Appellant was beaten by members of the public. He confirmed that the Appellant was beaten up at about 6:00p.m. He further stated that the Appellant was at work on 3rd July 2015.
26. When the appeal came for hearing, the Appellant chose to rely wholly on his written submissions in which he stated that the evidence presented by the prosecution did not prove the charge of attempted defilement against him.
27. He further submitted that the police delayed in arraigning him in court since he was in custody as from 4th July, 2015 and only taken to

court for plea on 8th July, 2015.

28. He further contended that the trial court failed to consider his defence.

29. M/s Maina for the Respondent opposed the appeal submitting that the Appellant was given the minimum sentence as provided for under section 9(1) & (2) of the Sexual Offences Act. She said the minor was aged 6 years and the charge was proved by the prosecution.

30. Counsel further submitted that the complainant explained exactly what took place and the P3 confirmed the attempted defilement. Counsel thus urged the court to uphold the conviction.

DETERMINATION.

31. This is a first appeal and this court has a duty to re-evaluate and re-consider the evidence adduced and arrive at its own independent conclusion. See **Okeno v Republic 1972 E.A 32. Pandya v Republic [1957] E.A 336 and Kariuki Karanja v Republic [1986] KLR 190.**

32. I have considered the evidence on record, the grounds of appeal, the submissions by counsel and the cited authorities. The Appellant has raised a total of 5 grounds of appeal. Upon considering all I have stated above, I will narrow them to four issues which are:-

a) Whether the ingredients of attempted defilement were proved.

b) Whether the trial court considered the Appellant's defence.

c) Whether the Appellant was identified.

d) Whether the Appellant's sentence was lawful.

33. Section 9(1) & (2) of the Sexual Offences Act 3 of 2006 provide for attempted defilement 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.

34. In **David Ochieng Aketch v Republic[2015]eKLR Makau J** explained the ingredients of attempted defilement as follows:-

“The appellant was charged and convicted with attempted defilement contrary to Section 9(1) of the Sexual Offences Act No. 3 of 2006. What is attempted defilement? For a successful prosecution of an offence of attempted defilement, the prosecution must adduce sufficient evidence to the required standard to prove an attempted penetration . This in my view include bruises or lacerations from complainant's vagina and/or bruises or lacerations of culprits genital organ and finding male discharge such as semen or spermatozoa outside the complainant's vagina or innerwear without there being penetration.”

35. In the instant case, I have carefully gone through the evidence and the exhibits produced by the prosecution. First of all the birth certificate (EXB3) confirmed that PW1 was aged 6 years. Her evidence was that (C) whom she identified as the appellant removed her panties, then his trousers and lay on top of her. Pw3 the complainant's grand mother stated that while PW1 was being washed by her auntie, she started complaining that she was feeling pain in her private parts. PW4 (the doctor) who produced the P3 form (PEXB.1) noted upon her examination, of PW1 that there were lacerations on her vagina and these were caused by a blunt object.

36. She confirmed that most of the time when such injuries are found on the vagina the probable weapon used is the penis. I find that PW1's evidence was supported by the medical evidence of PW4 the (doctor). There was no penetration of her vagina but there was an attempt to do so.

37. On whether the trial court considered the Appellant's defence my answer is yes. She weighed it against the prosecution evidence and found that the Appellant, DW2 and DW3 simply narrated the events of the day the appellant was arrested. DW2 talked of 3/7/15 and while DW3 talked of 4/7/15. The offence complained of took place on 2/7/15. The Appellant himself said he was at work upto 6pm on 2/7/15 and left for home then for his sister's home when he was attacked and beaten by a mob and taken to the Police Station. He does not say why the mob beat him.

38. The evidence of PW5 and even the charge sheet confirms that the Appellant, was arrested on 4/7/15. The evidence of the Appellant was not consistent and could not be relied on, and was rightfully rejected.

39. On whether the Appellant was identified, I find the evidence to be sufficient. The appellant used to visit DW1's home and was known by PW1 and PW3. Pw1 knew him as C while PW2 knew him as uncle A. Both identified him in court. A is their neighbour's daughter.

40. When asked who had injured her she took her grandmother (PW3) to the house where the offence had been committed. This was the house of DW2. She then pointed out the appellant as the culprit and told PW3 how he had threatened her if she told anyone what he had done.

41. I am satisfied that the Appellant was well known by the witnesses who had no reason to lie against him. He was therefore well identified.

42. Section 9(2) Sexual Offences Act provides for a minimum sentence of ten (10) years for the offence of attempted defilement. This is the sentence the Appellant was given. It is a legal and lawful sentence.

43. In conclusion I find that the Appeal lacks merit and I dismiss it. The conviction and sentence are upheld.

Orders accordingly.

Signed and delivered this 26th day of October 2018 in open court at Mombasa.

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HEDWIG. I. ONGU'DI

JUDGE.