



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 95 OF 2017

(Appeal originating from the conviction and sentence by Hon. S.M MUNGAI C.M in Meru law Court, in Criminal Case No.6 of 2016)

JOSEPH LOKENO.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

J U D G M E N T

The Appellant was charged with the offence of defilement contrary to Section 9 (1) (2) of the Sexual Offences Act No.3 of 2006. The particulars were that on 20th October 2016 at Kambi Sheikh in Isiolo County the Appellant intentionally and unlawfully attempted to penetrate into the vagina of R R a child aged 16 years.

The alternative charge was the offence of committing an indecent act contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars were that on 20th October 2016 at Kambi Sheikh in Isiolo County the Appellant intentionally and unlawfully touched the vagina of R R with his penis.

The Appellant was convicted of the main charge and sentenced ten years imprisonment.

The Trial Court convicted the Appellant after full hearing. The prosecution availed 6 witnesses. In defence, the Appellant gave sworn statement.

The Appellant filed Amended supplementary grounds of Appeal which he relied on.

Grounds of appeal are summarized as hereunder:-

- That the prosecution failed to prove their case beyond reasonable doubt as there was no sufficient evidence to sustain conviction
- That the Court failed to note that there was bad blood between the Appellant and the complainants family
- That the Trial Magistrate failed to consider the Appellant has defence.

In his written submissions, the Appellant submitted that it is unlikely that a person could attempt to defile a child on a busy road in broad daylight.

He further submitted that the child testified that she was squeezed by the neck contradicting that of the doctor where he said he was injured with a blunt object.

In respect to Pw2's evidence, the Appellant submitted that she is the only eye witness never witnessed child being molested but only heard screams. He argued that she said she saw the suspect vanish.

In response, Ms. Namiti for the state opposed the appeal. She submitted that the complainant was able to identify the Appellant as the incident occurred at 6 p.m. He added that Pw2 saw the Appellant and identified him and that Pw1, Pw2 and Pw3 knew the Appellant prior to the incident. He submitted that the Trial Magistrate was right in convicting the Appellant and urged Court to uphold the conviction.

In rejoinder, the Appellant denied having committed the offence and requested Courts consideration and reduce the sentence if possible.

This being the first Appellate, the Appellant has the benefit of reevaluation of evidence by this Court for purpose of arriving at an independent decision. I am however not lost of the fact that this Court has not had an opportunity of taking evidence first hand and benefit of observing demeanor of witnesses unlike the Trial Court.

On perusal of the Trial Court record, I note that the complainant knew the Appellant. She said as she was going to a shop, the Appellant appeared and asked to escort her, which she declined. The Appellant followed her and at the fence near the shop, he got hold of her and started to undress her. The complainant said she screamed but the Appellant slapped her and covered her mouth.

Pw2 confirmed that the complainant screamed in a path near Pw2's fence. Pw2 confirmed that the complainant complained of neck pain. Pw3 the complainant confirmed that the complainant arrived home with swollen neck and bruises on her kness.she said before the complainant arrived home accused went to her house and told her to warn her daughter against abusing him. She said shortly after the complainant arrived in escort of a neighbor Pw4.Pw4 confirmed being asked by Pw2 to escort complainant to her home.

The Clinical Officer confirmed that the complainant sustained swollen and tender right cheek and injury to the chest and that a blunt object was used to cause the injury. He found that there was no vaginal penetration.

I have considered evidence adduced. I wish to consider whether the ingredients of the offence of attempted defilement have been proved.

On identification, there is no dispute that the incident occurred at 6p.m. There was therefore no issue in terms of ability to see the assailant. The Appellant has not also disputed the fact that the complainant and Pw2 are her neighbors and therefore knew him prior to the incident. Identification is not therefore an issue,

In respect of attempt to defile complainant, Pw2 confirmed hearing complainant scream and saw the Appellant running from the Scene. Even though the Appellant said it was on a footpath, there is no mention of another person at the scene apart from who passed without helping the complainant. There was also no reason for Appellant to run from the scene if he was not involved in the struggle to defile complainant. Injuries occasioned to the complainant is sign of attempt to defile her.

From the foregoing, I find that the Trial Court was right in concluding that an offence of attempted defilement on complainant was proved beyond reasonable doubt.

From the foregoing, I do uphold the Trial Court's finding on conviction.

In so far as sentence is concerned, I note that Section 9 (2) of the Sexual Offences Act provide a minimum imprisonment of 10 years of offence of attempted defilement. The Trial Court imposed the minimum sentence of 10 years. The sentence imposed is therefore legal. The sentence is therefore upheld.

FINAL ORDERS

Appeal on both conviction and sentence is dismissed.

Judgment Dated and Signed at Nairobi this 19th day of November 2018.

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RACHEL NGETICH

HIGH COURT JUDGE

Delivered at Meru this 23rd day of November 2018.

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JUDGE

IN THE PRESENCE OF

.....COURT ASSISTANT

.....COUNSEL FOR APPELLANT

.....STATE COUNSEL