



REPUBLIC OF KENYA

AT THE HIGH COURT OF KENYA IN BUNGOMA

CRIMINAL APPEAL 176 Of 2016

A M.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An Appeal from the Conviction and Sentence in original KIMILILI SPM CR. 44/2015 delivered on 18/7/2016 by D.O. Onyango (SPM)]

J U D G M E N T.

The appellant A M was charged with the offence of attempted defilement of a child contrary to section 9(1) (2) of Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on the 18TH day of July 2015 in Bungoma County he intentionally attempted to cause his penis to penetrate the vagina of H S1 a child aged 9 years.

He also faced an alternative charge of committing indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006 based the same facts. The particulars of the alternative charge were that on the 18TH day of July 2015 in Bungoma county he intentionally touched the vagina of HS1 a child aged 9 years with his Penis. The Appellant was convicted for the offence of attempted defilement and sentenced to 10 years imprisonment.

This being the Appellant's first appeal the role of this court is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further by the Court of Appeal in **Mark Oiruri Mose vs. R (2013)eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

Briefly the evidence before the trial Court was that Pw1 HS1 the complainant testified that on the material day she was at her grandmother place on certain date. She was with K and S. She recalls A M sent S to buy chips and A M called her to the bedroom removed her clothes and he also removed his clothes and then raped her. She went and stood at the door and when her mother came, she reported her. She was then taken to hospital and later to police. On cross examination she testified that K saw accused do bad things to her.

Pw2 HS2 the mother to the complainant testified that on 18.7.2015 at 2pm she arrived home and found two of her children A1 and A2 in the house while HS1 and S were missing, she went to their grandmother home to check on them and on arrival she saw HS1 standing by the door looking worried she tried talking to her but she did not answer thereafter she accompanied her back home and on their way home she noticed HS1 had difficulty with walking and she became suspicious and on arriving home she removed HS1 clothes and saw mucus substance like around her thighs and on further inquiry Pw1 said that A M tried to defile her. She informed the husband and village elder and on interrogating A M he admitted he had done bad things to HS1 and they reported the matter at Kimilili Police Station and they were also referred to hospital. She produced P3 form to that as MFI-1 and also notification of birth Exh 2.

Pw3 Zilda Kilele the police officer attached to Kimilili Police Station testified that on 18.07.2015 the Complainant Pw1 was brought by her mother who alleged appellant the cousin attempted to defile her and the suspect was escorted together with the minor Pw1, he recorded their statement and issued P3form.He also presented child health card showing complainant was 9 years.

Pw4 is clinical officer from Kimilili Sub county hospital. He produced P3 form for PW1 who she had treated with history for defilement. He recalls he examined her and hymen was intact but there was trauma and laceration on the labia majora and he concluded there was attempted defilement on the minor.

The appellant gave unsworn testimony and stated that on the material day as he was coming from games at Maeni School he met 4 men who demanded to know his name and escorted him to Kimilili Police Station took his fingerprints and later arraigned in court. He stated that he knew nothing about the charge.

It is upon the above evidence that the trial magistrate found the appellant guilty of the offence of attempted defilement and sentenced the appellant to 10 years imprisonment.

Being dissatisfied with that decision the appellant has preferred this appeal on the following grounds that: the sentence meted against him was excessive in the circumstance of this case; the trial court failed to consider his mitigation and that he was a first offender.

The appellant filed written submissions in court which briefly submitted that the prosecution did not prove its case beyond reasonable doubt as required by law; that the mucus substance found on Pw1 never underwent government chemistry test to prove it was from the accused person, he further submits that no evidence was tendered to show and prove the act of penetration on the complainant so as to prove the appellant defiled Pw1, he further submitted investigation was not properly conducted and that the sentence passed against him was heavy in weight as against the offence and he finally submitted that age of Pw1 was not proved.

Prosecuting Counsel Mr. Oimbo for the state opposed the appeal and submitted that the court considered the fact that he was a 1st offender. On the sentence he submitted that Section 9(1)(2) of the Sexual Offences Act provided minimum sentence of 10 years. That the evidence by the prosecution established attempted defilement and Pw1 identified the appellant as he is well known to him. On age the birth notification form was produced which showed the complainant was 9 years old.

The issue this court will determine is whether on the 18.7.2015 the appellant intentionally attempted to cause his penis to penetrate the complainant's vagina.

When a court of law is faced with any charge on an attempted offence, care has to be taken to ensure that the attempt, as opposed to mere acts of preparation, is proved since however strong the evidence may be if it only relates to actions in preparation to commit a certain crime, that cannot justify a conviction on an attempted charge. In the circumstance or clarity purposes, the evidence must be led which goes beyond the preparatory stages and right to the doorstep of possible commission of the offence. It ought to be demonstrated that the accused had committed the last act to the actual commission of the specific offence attempted. Likewise the intention to commit the crime must also be proved.

Section 388 of the Penal Code defines "**attempt**" as:-

"388 (1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, 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 fulfilment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.

(3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence."

The above section brings out the two main ingredients of an attempt offence; the ***mens rea*** which constitutes the intention and the ***actus reus*** which constitutes the overt act towards the execution of the intention. This court has carefully considered the evidence adduced by the prosecution to satisfy itself whether it was proved beyond any reasonable doubt that the appellant committed the offence of attempted defilement. There were two eye witnesses, the complainant Pw1 and her mother as Pw2. The trial court in dealing with their evidence against the appellant's defence had the following to say:-

"...I have carefully considered evidence on record by prosecution as well as statement of accused defence. There is no dispute from evidence that Pw1 was aged 9 years. The most crucial evidence implicating the accused is that of PW1. The proviso to section 124 of the Evidence Act allows the court receive the evidence of an alleged victim of sexual offence and convict on the basis of that evidence if the court is satisfied that such victim is truthful..."

The evidence of the complainant in her evidence was as follows;

Court: PW1 A MINOR MUSLIM SWORN STATES IN KISWAHILI

I am HS1. I am 9 years old. I go to [particulars withheld] Primary School in class 2. I go to Mosque and I know God. I will speak the truth. I was at my grandmother on a certain date. I was with K and S. A M sent S to buy chips. A M called me to his bedroom. I went to A M's bedroom. He removed my clothes. A M also removed his clothes. A M is the accused in the dock.

Court: Witness points at the accused in the dock.

A M raped me.

Court: Witness actually uses the word rape.

I went to the door and my mother came. My mother took me home. I told my mother what the accused had done. My mother examined me. I was escorted to hospital. I went to the police.

The evidence of the complainant was that the appellant actually raped her. The trial Magistrate specifically recorded what she stated. She stated in Cross examination that one K saw appellant do bad things to her. If the evidence of the complainant was that she was raped (or defiled) and is not supported by the evidence of the clinical officer who stated;

Court: PW4 ADULT CHRISTIAN SWORN STATES IN KISWAHILI:

I am George Koinange. I am Clinical Officer attached to Kimilili Sub-county Hospital. I have been a Clinical officer for 9 year. I have a diploma in Clinical Medicine from KMTC Mombasa. I have a P3 Form for HS1. I examined her. She had come with history of having been defiled by one known to her. I examined her and treated her. The hymen was intact. We gave her medication to prevent HIV and other infections. There was trauma and laceration on the labia majora. I signed the P3 Form.

P3 Form is PExh 1.

I concluded that there was an attempt to defile the minor.

From the evidence of the complainant and the conclusion by the Clinical officer in my view creates a doubt in the evidence of the prosecution as to what offence the appellant committed, defilement or attempt. The evidence of the complainant was of defilement and conclusion of the Clinical Officer is attempting based on his examination.

This discrepancy in my view raises a doubt as to the credibility of the prosecution witnesses. In the result I find the prosecution did not establish the charge beyond reasonable doubt. I find application appeal with merit. I allow the appeal, set aside the conviction and sentence of 10 years imprisonment imposed. The appellant to be set free forthwith unless otherwise lawfully detailed.

Dated and Delivered at Bungoma this 22nd day of **November, 2018.**

S.N. RIECHI

JUDGE