



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

CRIMINAL APPEAL NO. 26 OF 2017

PAUL KOSKEIAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in PM's Court Sotik Cr. Case No. S.O. 64 of 2014 – Hon Oruo – RM)

JUDGMENT

The appellant was convicted and sentenced to ten (10) years imprisonment for the offence of attempted defilement C/S 9(1) as read with S.9(2) of the Sexual Offences Act No. 3 of 2006.

The particulars being that on the 6th day of August 2014 at Kinyolwet area in Sotik within Bomet County, intentionally attempted to cause his penis to penetrate the vagina of IC a child aged 5 years.

The prosecution called five (5) witnesses and the defence called two.

Brief facts

The complainant's mother (PW1) testified that the complainant is her first born daughter aged 7 years at the time. She was born in the year 2008. She told the court that on the 7th day of August 2014 she was in the kitchen preparing tea when her daughter informed her that there was something oozing from her private parts. She checked and saw mucous like substance on her private parts. She woke up her father who confirmed. Upon interrogation she said that it was Paul who had done that the previous day. She recalled that the previous day she had send her daughter to the posho mill at 2.00 p.m. and that she had returned home at around 6.00 p.m. She told them that at the posho mill she did not find Paul's brother who does the milling but found Paul who runs a shop next to the mill. That he defiled her at the posho mill. The complainant was taken to Kapkatet Hospital for treatment and examination.

The P3 form was later filled at Sotik Dispensary.

Robert Korir (PW2) testified that the complainant was his daughter and that she was born in the year 2008. That on the 7th day of August 2014 in the morning his wife (PW1) woke him and told him to go and check the complainant's private parts. He checked and saw a mucous like substance. Upon further inquiries it transpired that the previous day, the child had gone to the local posho mill which at the time was being operated by the accused.

He took the child to Kapkatet Hospital for treatment and examination. Matter was reported to police and a P3 form was issued and later filed at Sotik Dispensary.

The clinical officer who examined the complainant on 8/8/2014 observed that on her genitalia, the hymen was broken though not recently. He was of the view that there were attempts to penetrate. After a voire dire examination of the complainant was done, she testified that she was send to the local posho mill and found Paul the owner in his shop. She did not find Daniel who usually operates the mill. She entered in the posho mill while in the company of Paul. There was nobody else in the posho mill. Paul removed her trouser and her pants. He removed his trouser and placed her on the floor with her head facing upwards and he did bad manners using his thing which he placed into hers. He later told her to go and take tea and guavas in his house. She dressed up and saw Henderson who asked her what she was doing. Daniel ground her maize and she left for home. She had been told by Paul not to tell anyone of what had taken place. The following morning she saw a mucous substance in her private parts. She reported the matter to her mother who in turn reported to her father and the police.

Under cross-examination by counsel for the defence Mr. Birech she told the court that the accused was alone in his shop whereas Henderson and Daniel were in their neighbouring houses.

In his defence the accused told the court that he is a farmer/businessman and that on the 8th day of August 2014 he was at his shop at Kapkures from 8.00 a.m to 8.00 p.m. In the morning hours he was in the company of Daniel Koskei and Anderson Tanui till 1pm.

The issues for determination by this court are

1. Age
2. Penetration(attempted)
3. Identification

On the issue of age

The parents of the complainant PW1 and PW2 did testify to the effect that the complainant was born on 17/10/2008 and was at the time of the incident aged five years. A clinical card was produced as exhibit No. 1 but it has some legibility problems though it shows the date of birth as 17/10/2008.

There is a letter from Excel Vision Academy by the Head teacher which indicates that the complainant was a nursery calls pupil in their school aged five years.

The evidence of both parents and the school I find is sufficient for purposes of assessing the age of the complainant.

Penetration

S.9(1) of the Sexual Offences Act [provides:-

“A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement”.

In my view, in a case of attempted defilement, penetration per se does not have to be proved. What the prosecution has to prove is a set of circumstantial evidence which would lead to the inescapable conclusion that the accused intended to defile the complainant were it not for an intervening factor that prevented the actualization and or the completion of the act.

Identification

It is not in dispute that the appellant was well known to the complainant.

Analysis and conclusion

The appellant operates a shop, a posho mill a hotel and a barber shop at Kinyolwet –Sotik.

The alleged defilement is said to have taken place at the posho mill. This posho mill is said to be operated by one Daniel a brother to the appellant who was not present at the time. It is the evidence of the complainant that the appellant pushed her in the posho mill where he proceeded to defile her. The evidence by the Doctor/clinical officer was to the effect that upon examining the complainant's genitalia he found that the hymen was broken but this was not a fresh or recent occurrence. He found no pus cells. It was his evidence that there was no penetration.

What are the factors that lead to the conclusion that the complainant was defiled.

PW1 and PW2 had alleged that upon examining the complainant's genitalia there was some mucous like substance. When the doctor examined her there was no such evidence.

The alleged scene of the defilement is a posho mill. It is the same posho mill that she was sent by her parents for milling of flour.

In his defence, the appellant alleged that he was at his shop at Kapkures from morning till 1.00 p.m. Daniel Koskei and Anderson Tanui were present at the time. The operator of the posho mill went for lunch. The complainant found it locked. She waited for it to be opened. It was opened at around 3.00 p.m. She was attended to and she left. The defence called Byegon Anthony as a witness who testified to have been seated at the barber shop next to the shop Paul was operating. The father testified to have seen children at the posho mill for purposes of milling flour. It was Daniel who was operating the posho mill. It was his evidence that he did not see Paul leave his shop for the posho mill.

It is noted that the court was requested to visit the scene. Upon scene visit it was noted that there was a main road next to the posho mill and the slightest scream would have attracted a passerby. That the walls of the posho mill were made from off cuts and that it was possible for one to see through them especially DW2 who was at the barber shop next. It was also held that the floor was rough and would have caused injuries on the body. It was the prosecutor's contention that the area is a quiet one with houses far apart.

It is the evidence of the complainant that after she was attended to at the posho mill she went home and did not report the matter to her

parents.

I find the circumstantial evidence from the scene visit leaves a lot of glaring doubts on the mind of the court. The scene was not in a secluded area but in a small shopping centre next to a main road. The houses walls were constructed off with cuts whereby any screams would be heard in the nearby others stalls. The attempted defilement is said to have occurred during the day. DW2 evidence is that he could have heard or seen the alleged attempted defilement as he was next to the posho mill, sounds plausible.

The upshot is that the prosecution did not prove their case beyond reasonable doubt.

The conviction was not safe and the sentence was not lawful.

The appeal has merit and it is allowed. The conviction is quashed and sentence set aside.

The appellant is set at liberty unless otherwise lawfully held.

Judgment delivered dated and signed this 20th day of December 2018 in the presence of learned counsel for prosecution Mss Kariuki, learned counsel for defence Mr. Ngetich. Court assistant Rotich.

M. MUYA

JUDGE

20/12/18