



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 42 OF 2017

GEOFFREY SHIVONJI.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTOR

(Being an appeal from the original conviction and sentence in MC SOC. Number 7 of 2016 in the Senior Principal Magistrate's court at Iten – Hon. H. M. NYABERI (SPM))

JUDGMENT

1. The appellant herein **GEOFFREY SHIVONJI**, was charged with the main count of attempted defilement contrary to Section 9(1) as read with Section 9 (2) of the Sexual Offences Act. The particulars of the offence were that on 24th July 2016 at Elgeyo Marakwet County intentionally and willfully attempted to cause his penis to penetrate the vagina of MNN (*particulars withheld*) a girl aged 3½ years.

2. The appellant also faced the alternative charge of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. He pleaded guilty to the main count and was consequently convicted on his own plea of guilty and sentenced to 15 years imprisonment.

3. Aggrieved by both the conviction and sentence, the appellant filed the instant appeal in which he listed the following grounds of appeal:

1. That the trial magistrate erred in both law and facts by convicting on my own pleas without observing that I was not warned and explained of the elements that constitutes the offence of defilement.

2. That the trial magistrate erred in both law and facts by convicting on my own pleas without considering that I was not conversant of the court procedure, a fact which was complicated by lack of legal representation.

3. That the trial magistrate erred in both law and facts by convicting on my own pleas without observing that all the elements or essential ingredient of the offence were not explained to me in my own language or the language I understood.

4. That the trial magistrate erred in both law and facts by convicting me without rejecting my mitigation.

5. That the trial magistrate erred in both law and facts by convicting on my own pleas without observing that the facts read over me were doubtful and ambiguous.

4. At the hearing of the appeal the appellant expounded on the grounds of appeal through written submissions filed on 30th August 2018 which I have perused. The appellant prayed for a retrial while arguing that he was forced and/or misled into pleading guilty as he had been beaten by a mob and did not understand what was going on in court.

5. On her part, Miss Mumu, learned counsel for the state submitted that the sentence was legal in view of the fact that the appellant had pleaded guilty to the main count.

6. This is a first appeal. As the first appellate Court, I am duty bound to re-evaluate and reconsider all the evidence adduced during the hearing afresh and come to my own conclusions about all the elements of the crimes charged. This principle requires me to reach my own conclusions on the totality of the evidence as opposed to merely using the Trial Court's findings. See ***Okeno v Republic [1973] E.A. 32; Pandya vs. R (1957) EA 336, Ruwala vs. R (1957) EA 570.***

7. The law and practice related to the taking and recording of pleas of guilt was stated in the following iconic paragraph in the decision in ***Adan v Republic (1973) EA 445 at 446:***

When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilty, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must, of course, be recorded.

8. The first point for analysis is an important point of departure namely the trite law stated by the Court in **Ombena v Republic** 1981 KLR 450 to the effect that whether a guilty plea is unequivocal or not depends on the circumstances of the case. Differently put, an appellate or a revising court must take the totality of circumstances into account in determining the equivocality or otherwise of a guilty plea.

9. In the instant case, I note that the plea was taken/recorded on 29th July 2016 and that the substance of the charge and every element thereof was read to the appellant in Kiswahili language which he understood and when asked, whether he admits or denies the truth of the charge – he replied "Ni kweli" (It is true). A guilty plea was then entered after which the facts of the case were read out to the appellant by the prosecutor. The appellant confirmed that the facts were correct after which he was convicted before he was given an opportunity to tender his mitigation before he was sentenced to 15 years imprisonment.

10. For the purposes of this appeal, I find it necessary to reproduce the proceedings taken before the trial court for clarity purposes. The said proceedings were as follows:-

29/72016

Coram H. N. Nyaberi –PM

State Counsel – Chelashaw

C/C Maiyo

Interpretation Kiswahili/English

Accused present

Represented by – Nil

The substance of charge and every element thereof has been stated by the court to the accused person on –Kiswahili. The language that he under understands who being asked whether he admits or denied the truth of the charge replies.

Ni kweli (it is true)

Alternative charge –nil

Prosecution- On 24th July, 2016 at about 3.30 p.m. within Kipsoen, Elgeyi Marakwet County, the complaint "MM"(names withheld a girl aged 3½ years was with her sister L a girl ages eight years were sent by their mother namely BN to their uncles house, Geoffrey Shivonji who is the accused. At the accused's house he sent L to go and was utensils in another house while he remained with the victim 'MM'. L went and returned immediately and found the accused showing the victim girl some pornographic videos from his phone. She went and reported to her mother. The mother reported to her husband A I I who is a cousin to the accused. L went back to the house of the accused. She found the accused and the victim girl standing near the cupboard while promising to buy her a cake commonly known as "Kangumu" and left. Their parents came and interrogated her. She told them that the accused took her near a cupboard and spread a table cloth on the floor and made her lie down facing upward. He removed his long trouser belt, removed his penis and attempted to insert into her vagina and left some pain. She said to have felt some liquid on her vagina. The accused stood up, wore his long trouser and threatened her not to report to her mother so that he may buy some biscuits.

He mother inspected her private parts and noticed some whitish substance. On the same day at about 8.00pm the accused came home. The father and mother of the complainant interrogated him but he denied the allegation. He was further interrogated the following morning but he denied. At 5.00pm he locked the accused in the house and called the area Assistant Chief Kipsoen Location. When he came, he found the accused had escaped through the window.

On 27th July, 2016 at around 8.30 pm, the accused returned. He was locked inside a house without windows. The following morning he was reported to the village elder. He arrested him and escorted him to Iten Police Station while on company of the victim girl. Both were taken to Iten County Hospital. Their p3 forms were completed. The p3 form for the victim girl did not reveal penetration. I wish to produce the P3 form for the victim girl as P exhibit 1(a), Laboratory request form as P exhibit 1(b). P3 form for the accused as P exhibit 2. The investigation officer obtained a birth notification form S/No. 898644 showing the victim girl was born on 6/1/2013 (original seen) photocopy produced P exhibit 3.

H.M. NYABERI

SENIOR PRINCIPAL MAGISTRATE

Accused – all facts are correct.

H.M. NYABERI

SENIOR PRINCIPAL MAGISTRATE

Court – Guilty on plea and convicted.

Prosecution – He may be treated as a first offender.

Accused mitigation- I plead for forgiveness- I have never committed any offence.

H.M. NYABERI

SENIOR PRINCIPAL MAGISTRATE

SENTENCE- *The accused is remorseful and a first offender. Although he accused appears to be remorseful, the offence is serious and attracts a custodial sentence for a term not less than 10 years in prison. The court observes that the victim girl is extremely of tender age. The court hereby sentence the accused fifteen (15) years in prison. Right of appeal in fourteen (14) days.*

11. From the foregoing proceedings, it is clear that the appellant's guilty plea was properly recorded in line with the provisions of Section 207 (2) and (3) of the Criminal Procedure Code. Which stipulates as follows:-

“(2) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, the court shall convict him and pass sentence upon or make an order against him, unless there appears to be sufficient cause to the contrary.

Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline the facts upon which the charge is founded.

(3) If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as herein after provided.”

12. The appellant's claim that he was beaten or was in pain and not in a position to plead to the charges was not supported by any tangible evidence. I note that the appellant was examined on 28th July 2016 and a P3 form in respect to his condition was produced in court at the trial. The said P3 form does not show that the appellant had any injuries or was not in a position to understand the nature of the charges filed against him. I am therefore satisfied that the guilty plea was unequivocal.

13. Turning to the sentence, I note that Section 9(1) and (2) of the Sexual offences Act under which the appellant was charged stipulates as follows:-

9(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”

14. The prosecution in an offence of attempted defilement must prove the other ingredients of the offence of defilement except penetration; it must prove the age, of the complainant, positive identification of the accused, and then prove steps taken by the accused to execute the defilement which did not succeed. Attempted defilement is as if were a failed defilement, failed because there was no penetration. Attempt to commence an act is defined as

388(1) where a person intending to commit an offence begins to put his intentions into execution by means adopted to its fulfillment, 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 is prevented by circumstances independent of his will or whether he desists of his own motion from further prosecution of his intention”

15. In order to prove an attempt to commit an offence the prosecution must prove the **mens rea** which is the intention and the actus reus which constitute the overt act which is geared to the execution of the intention. The **actus reus** must be more than mere preparation to

commit the act as there is a difference between preparation mere preparation to commit an offence and attempting to commit an offence (see **Abdi Ali Bere – vs – Republic (2015) eKLR.**

16. In this case as I have already stated the appellant pleaded guilty to the offence of attempted defilement and was sentenced to 15 years imprisonment. I find that the sentence was lawful and well within the limits of the imprisonment term allowed by the law. Consequently I find that the conviction was lawful and I uphold it which means that the instant appeal is dismissed for lack of merit.

Dated

Dated and signed at Nairobi this 6th day of December 2018.

W. A. OKWANY

JUDGE

Dated, signed and delivered in open court at Eldoret this 19th day of December 2018.

OLGA SEWE

JUDGE

In the presence of:

Appellant in person

Ms Mumu for the state