



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL NO. 26 OF 2016

(Being an appeal arising from conviction and sentence in Kitale Chief

magistrate's court in Sexual Offence case No. 97 of 2015 delivered

by M.I.G. Moranga Principal Magistrate on 3/2/2015)

RICHARD KHACHEGE TEMBELELA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. Richard Khacheche Tembelela “the appellant” was convicted of the offence of **attempted defilement contrary to Section 9(1) as read with Section 9 (2) of the Sexual Offences Act and sentenced to ten (10) years imprisonment.**

2. He was aggrieved and filed this appeal citing the following grounds:

i) That the learned trial magistrate erred in law and facts to convict the appellant without evidence to prove that the appellant occasioned the alleged attempted defilement.

ii) That the learned trial magistrate erred in law and in fact to rely on the evidence of a single witness which was not supported at all and where PW1 was found completely untruthful in her evidence.

iii) That the learned trial magistrate erred in law and in facts to rely on Section 179 of Criminal Procedure Code and also Section 180 of Criminal Procedure Code yet the charge sheet herein itself is fatally defective under Section 214(1) (2) (3) of Criminal Procedure Code as evidence adduced in court negates both section 179, 180 of Criminal Procedure Code.

iv) That the learned trial; magistrate erred in law and in fact to convict the appellant without recognising that clinical officers evidence created suspicion about the evidence of PW1 that she was unworthy.

v) That the learned trial magistrate erred in law and facts to rely on The evidence of the investigating officer who failed to carry out enough investigations to unearth the falsehood and lies from the prosecution side witnesses.

3. During the hearing of the appeal the appellant relied on his written submissions. He argues that PW1 did not have any marks to prove that she struggled with someone. She had also not informed her parents of anything unlawful done to her. The examination was done after 5-7 days of the incident.

4. It was his submission that the reason behind all this was a debt arising from the sale of tomatoes by the appellant to PW1's parents. He argued that age was not proved as no official documents were produced. Further that PW5 the Investigating officer had not conducted any investigations that could assist the court.

5. Mr Kakoi for the State conceded the appeal saying there was no evidence to confirm any defilement or an attempt. He referred to the evidence of PW1 and PW2.

That the basis of the conviction was the doctor's evidence that the hymen was torn and fresh. This runs contrary to the evidence of PW1 and PW2. He submitted that since it was not clear what happened in the maize plantation, the appellant could benefit from doubt.

6. The prosecution called five (5) witnesses.

PW1 who was a minor aged 7 years testified on oath. She stated that on 25th May 2015 4 pm she was sent by her mother to get vegetables from their shamba, and she went alone. As she passed by the side of the maize, the appellant whom she knew well emerged from the maize. He called her and she went. He told her they go do "tabia mbaya kidogo" which she did not understand.

7. He held her hand/cheeks by force and she screamed loudly. On screaming he left her and went away. She told her parents what had exactly happened. She described to them the man who usually sells tomatoes, as the culprit. She was taken to hospital and treated the next day. She explained that the appellant never touched or put anything in her genitals and she never saw him naked or his genitals.

8. **PW2 Abraham Wamugunda Waburiri** heard commotion and screams outside and he went. This was on 27th May 2015 4pm. PW1 reported to him what had happened. She described the man who sells tomatoes to have been the culprit. He found him seated at a certain shop and PW1 identified him. The person is the appellant. When confronted the appellant denied ever seeing PW1. He was given a few blows by members of the public. The administration came in and he was arrested and taken away. He was clear that PW1 was not defiled.

9. **PW3 Pharis Silali** assessed PW1's age at 8 years.

PW4 Kirwa Labbat a clinical officer examined PW1 on 28th May 2015 after taking a history of defilement. She had no visible injuries, but her hymen was freshly broken. All other systems were alright. He produced the report (Exhibit 2) and treatment notes as PExhibit 3.

10. **PW5 PC Mary Umazi** testified that a case of defilement had been reported and she investigated it. She stated that she had confirmed from PW1 and PW2 that the former had been defiled.

11. The appellant gave a sworn statement in his defence. He denied the charge and stated that on 27th May 2015 3.00 pm he was at home after the day's work when he saw PW2 arrive with a Kenya Police Reservist (KPR).

PW2 said he had threatened him with his life and he had raped his daughter. In cross examination he said they disagreed over payment of tomatoes received.

12. This is a first appeal and this court has a duty to re-evaluate all the evidence afresh and arrive at its own independent conclusion. It has to bear in mind that it did not see or hear the witnesses. **See Okeno V Republic 1972 EA 32; Kiilu V Republic [2005] 1 KLR 174.**

13. I have considered the evidence on record, the grounds of appeal and the submissions by both parties. The only issue I have to determine is whether the offence of attempted defilement or any other offence was proved.

PW1 whose age was not an issue was aged 8 years. She explained in great detail what transpired between her and the appellant on 27th May 2015.

14. PW1 was categorical that all that the appellant did was to hold her hand and cheeks. She screamed so loudly until he had no choice but to leave her and take off. She also stated that she never saw the appellant's nakedness nor his male organ. Further that he did not try to put anything in her genitalia.

15. Under Section 2 of the Sexual Offences Act penetration is defined as:

“partial or complete insertion of the genital organs of a person into the genital organ of another person.”

Section 9(1) of Sexual Offences Act provides

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

What did the appellant do that would be considered as an attempt to cause penetration? I find nothing in the evidence of PW1 or Pw2 that would qualify for that.

16. The appellant was charged with the offence of defilement. He also faced an alternative count of committing an indecent act with a child. There was no evidence to support either of these two counts. If there was no evidence to sustain even an offence of an indecent act, how could the attempted defilement see the light of the day?

The learned trial magistrate correctly wondered aloud why the investigating officer could not have investigated further on the report by the clinical officer. This is because the P3 report (Exhibit 2) showed there was defilement and yet the victim stated otherwise. Could there have been child molestation from other quarters? That is what the trial court wondered aloud, about.

17. To turn round after this and convict the appellant for attempted defilement when there is no scintilla of evidence to support it was a serious error. The State has graciously conceded the appeal.

18. The upshot is that the appeal has merit and is allowed.

The conviction is quashed and the sentence set aside.

The appellant to be set free forthwith unless otherwise lawfully held under a separate warrant.

Orders accordingly.

Delivered, signed and dated on 30th day of August 2017.

H. ONG'UDI

JUDGE

In the presence of:

Ms Kagai for Mr. Kakoi for State

Appellant present

Kirong – Court Assistant

Court- Judgment delivered in open court.

Right of Appeal explained.

H. ONG'UDI

JUDGE

30/8/2017