



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL CASE NO. 62 OF 2012

(Being an appeal arising from conviction and sentence in Kitale Chief Magistrate's court criminal case No 2541 of 2011 delivered by M.N. Gicheru Chief Magistrate on 26/4/2017)

SOLOMON KIBOI JUMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. **Solomon Kiboi Juma** was charged with the offence of **attempted defilement contrary to Section 9(2) of the Sexual Offences Act No. 3 of 2006**. The particulars being that the appellant on the **21st day of October 2011** at [Particulars withheld] village within **Trans Nzoia County unlawfully and intentionally attempted to cause his genital organ namely penis to penetrate into the genital organ namely vagina of one S N M a girl aged 17 years.**

2. He denied the charge and the matter proceeded to full hearing after which he was convicted and sentenced to 10 years imprisonment. Being aggrieved with the judgement he filed this appeal against both conviction and sentence citing the following grounds:

i) That the learned trial magistrate erred in law and facts when she concluded that the prosecution had proved their case beyond all reasonable doubts.

ii) That the learned trial magistrate did not notice the contradictory evidence while convicting the appellant.

iii) That the learned trial magistrate erred in law when she rejected his defence without giving cogent reasons.

3. When the appeal came for hearing the appellant relied on his written submissions, in which he stated that PW1 gave contradictory evidence. The rest of the submissions are infact a mitigation by the appellant.

4. The state through Mr Kakoi has conceded the appeal on the ground that the offence was not proved. He referred to Page 9 of the proceedings where PW1 said the appellant tried to pull down her skirt, and she made noise and he ran away. It was his submission that this act by itself did not prove that he attempted to defile her.

5. The case before the lower court was that **PW1 (S N M)** then aged 16 years was a student at [Particulars

withheld] secondary school. On 21st October 2011 7 pm she was on her way from school heading home when she met the appellant whom she knew. He worked as a guard of Muganda's maize. He wore a jacket which was unusual, and his face was not hooded. He held her hand and vocal cords which made it difficult for her to scream.

6. The path she used passed through the forest, she pulled her towards the bush. The appellant tried to pull down her skirt but she struggled with him and overpowered him. It's then that she screamed and he escaped. Douglas responded to her screams and she told him what had happened. She explained that it was not very dark and one could see though not clearly. They heard the appellant run through the maize plantation. A report was made at the AP Camp on the same day and the appellant was arrested.

7. **PW2 James Ebei Agole** met PW1 and Douglas after the incident had occurred. It was a dark night, he said.

PW3 Phoebe Maneno is an assistant director of the children's home where the appellant used to stay. She was informed of this incident.

PW4 APC Josephat Kipchirchir confirmed receipt of a complainant from PW1 of an attempted defilement, on 21st November 2011. She had no injuries.

PW5 N N was a schoolmate of PW1 and they stayed at the same orphanage. On 21st November 2011 he was with PW1 from school and they went to the market and lost each other. He arrived at home but PW1 was not there. She later came and explained how a man who guards maize had wanted to rape her. This witness knew the person who guarded the maize as the appellant.

8. **PW6 Joshua Ng'ang'a** was at Sibanga police patrol base on 26th November 2011 when the appellant was brought to the post. He was accused of attempted defilement. The complainant was a form 3 student at [Particulars withheld] Secondary school and she was based at [Particulars withheld] Children's home. He re-arrested him and placed him in cells. He produced her birth certificate confirming her age as 17 years .

9. When placed on his defence the appellant elected to make an unsworn statement in which he stated that he was harvesting maize when he was called to the road, and he went. He was then told of a girl who alleging that he attempted to defile her which he denied. He was asked to go back at 4 pm which he did and he was set free and went home. Later he was called to Maili nane from where he was charged with a sexual offence. He denied the charge.

10. This is a first appeal and this court has a duty to reconsider the evidence and arrive at its own independent conclusion while bearing in mind that it did not see nor hear the witnesses. **See Okeno Vs Republic 1972 EA 32, Soki Vs Republic' [2004] 2 KLR 21.**

11. The case of the prosecution was that the complainant was aged 17 years and was in school. A birth certificate produced herein confirmed that fact.

12. The next issue for determination is whether there was any attempted defilement against PW1.

I wish to restate the facts in the charge sheet. They are as follows:

“unlawfully and intentionally attempted to cause his genital organ namely penis to penetrate into the genital organ namely vagina of one (S N M) a girl aged 17 years.”

13. The evidence adduced by PW1 herself amounts to preparation to commit an offence. He was preparing and was repulsed by PW1 and he ran away. He only tried to pull the skirt. She states at Page 6 lines 10-11.

“The accused tried to pull down my skirt. I struggled with the accused. I overpowered him.”

14. It is clear that the man never pulled her skirt down.

Does what he did amount to attempting to put his penis into her vagina? I am afraid not. A distinction must be made between attempting to do something and preparing to do the same thing. It is very unfortunate that though this appeal was filed in May 2012 it is being heard over 5 years down the line.

15. The State has graciously conceded the appeal.

I find the appeal to have merit and I allow it. The conviction is quashed and sentence set aside. The appellant to be released forth with unless otherwise lawfully held under a separate warrant.

Orders accordingly.

Delivered, signed and dated this 25th day of August, 2017 at Kitale.

H. ONG'UDI

JUDGE

In the presence of :

Ms Kakoi for the Respondent present

Appellant – present

Kirong – Court Assistant

Court: Judgment delivered in open court.

H. ONG'UDI

JUDGE

25/8/2017