REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 74 OF 2012

BETWEEN

MARTIN SHIKUKU……APPEALLANT

AND

REPUBLIC……..RESPONDENT

(Being an appeal from the original conviction and sentence in Butali Senior Resident Magistrate's court Criminal Case No. 83 of 2011 delivered on 17.5.2011)

JUDGEMENT

Introduction

1. The appellant herein, Martin Shikuku, was arraigned before the Butali Senior Resident Magistrate's Court on one count of the attempted defilement contrary to section 9(1) and (2) of the Sexual Offences Act, No. 3 of 2006. The particulars of the offence were that on the 4th day of February, 2011 at Kakamega North District within Western Province, he intentionally and unlawfully attempted to cause his penis to penetrate the vagina of A.S a girl aged 10 years.

2. The appellant was charged in the alternative with committing (an) indecent act with a child contrary to section 11(1) of the Sexual Offences Act, No. 3 of 2006. It was alleged that he committed the offence at the same place and same time by touching the buttocks and vagina of A.S, a child aged 10 years. He denied both counts and the case went to trial.

The Prosecution case

3. The prosecution called 5 witnesses whose evidence was as follows;- The complainant herein, A.S who testified as PW1 told the court that she was a class 2 pupil at [particulars withheld] Primary School. On 04.02.2011 at about 6.00pm, she was going to the shop when the appellant pulled her into the sugar cane plantation and ordered her to lie down. The appellant who had a knife showed it to her as he told her to lie down. He proceeded to lie on her after removing his own clothes. The appellant did not remove PW1's clothes. Just then, PW1's kid brother by the name M came by and that made the appellant to flee. PW1 went home and told her mother about the incident. Her mother took her to the area chief before going to Malava police station to make a report.

4. PW2 was E N, the mother of PW. She stated that at about 7.00p.m. on 04.02.2011, she had come from

work and sought to know where pw1 was. Her little son M reported to her that PW1 had been taken to sugar cane plantation by the appellant. She rushed to the scene as PW1 screamed. She went to the area Chief and made a report of the incident that same night. Later the matter was reported to the police.

5. When PW2 was cross-examined by the appellant, she testified that the appellant was still armed with a knife, when he was found but he threw the knife down. She also testified that she screamed with PW1.

6. Chebui Kangani Mulupi testified as PW3. He was Chief of Butali Location. He told the Court that on 05.02.2011 at about 6.00am, one woman by the name E (PW2) and her daughter A.S (PW1) went to his home and reported that the appellant had attempted to defile PW1. The appellant was a workman at the home of one Laban Mutili Lavaa's home. When PW3 and with PW1 and PW2 went to the home of the said Laban Mutili Lavaas home they found the appellant at home cutting nappier grass for the cows, when they asked PW1 whether she could identify the person who tried to defile her, PW1 pointed at the appellant who was thereafter arrested. The appellant took PW3 PW2 and PW3 to the scene. At the scene, the appellant told PW4 that he did not know what caused him to do what he did. Thereafter, the appellant was taken to Kabras Police Station. PW4 recorded his statement with the police on that same day and handed the appellant to the police.

7. PW4 was Henry Shilibwa from [particulars withheld] Village and a student at Malava Polytechnic at the material time. He stated that as he left a shop in the village at about 7 00pm he heard the complainant screaming. When he asked her why she was screaming, the complainant told him that the appellant who was in the sugar cane plantation had wanted to fall on her. PW4 proceeded to the sugar cane plantation and when the appellant saw him, he (appellant) tried to flee but PW4 managed to escort the appellant to the sub-chief, PW4 stated that he knew the appellant as a worker at Laban's home.

8. Doctor David Wainaina of Malava District Hospital testified as PW5. He told the court that on 05.02.2011, the complainant was escorted to the hospital by police officers with a history of having been defiled on 04.02.2011 by a person who was known to her, on observation the complainant's clothes were intact and there was no blood on the clothes. On examination, Dr. Wainaina said he did not find any marks on the complainant's body. Her private parts were also found to be normal. There were no sperms inside her vagina and no disease was found. Dr. Wainaina also testified that he examined the appellant but found nothing abnormal about his private parts. He had no disease. Both the complainant and the appellant were HIV Negative. He told the court that the complainant was 10 years old. The P3 form in respect of the complainant was produced as P exhibit 1.

The Defence case

9. At the close of the prosecution case, the appellant was put on his defence. The appellant gave sworn evidence but called no witnesses. It was the appellant's testimony that on a date he could not remember, the complainant's mother went to his place of work and asked him why he had defiled her daughter. On the following morning the area assistant chief went to the appellant's place of work handcuffed him and took him to Malava Police Station. The complainant's mother had also come along. Later he was taken to the hospital and his blood taken for HIV test. He was informed by the doctor that he was HIV negative. During cross examination, the appellant stated that his boss's home was about 50 metres away from the home of the complainant.

Judgment of the trial court

10. After a careful analysis of the evidence that was placed before him, the learned trial Magistrate was satisfied that the prosecution had proved its case against the appellant beyond any reasonable doubt. The appellant was therefore found guilty as charged, convicted and sentenced to 10 years imprisonment. The learned trial Magistrate was satisfied that the appellant was clearly and positively identified by PW1 considering the fact that the appellant worked as a herd's boy at a neighbour's home which was only 50 metres away. The trial court also found that there could have been no mistaken identity at about 6.00pm when it was still broad daylight.

The appeal.

11. Being aggrieved and dissatisfied with both conviction and sentence the appellant filed this appeal on the following homemade grounds of appeal;-

1. THAT;- I pleaded not guilty to the above offence.

2. THAT;- The learned trial Magistrate could not (sic) consider the adolescent stage we were with the complainant.

3. THAT;- Honourable Magistrate did not consider the standard of illiteracy that I could not understand the charges tabled against me.

4. THAT;- I didn't understand the language used by the learned magistrate and the prosecutor which led to misunderstanding between the prosecution witnesses and I the appellant.

5.THAT;- I am the only breadwinner and the only son of my parents who are now too old.

6. My lordships with the grounds labeled I pray that you consider reducing my sentence and set me free.

The appellant prays that his appeal be allowed and sentence reduced.

The Submissions

12. This appeal came up for hearing before me on 19.2.2015. The appellant told the court that he was appealing only against sentence. He submitted that he suffers from asthma and as such he would want the sentence reduced.

13. Mr. Nge'tich prosecution counsel from the ODPP submitted that the appeal on sentence should be dismissed because the same was meted out in accordance with section 9(2) of the Sexual Offences Act No. 3 of 2006 The section reads as follows;-

" 9(2) A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for term of not less than ten years."

Section 2 of the Act defines "child" in the following terms. "Child" has the meaning assigned thereto in the children Act." The Children Act No. 8 of 2001 defines child as follows;- "child" means any human being under the age of 18 years."

14. In the instant case the complainant was said to be 10 years old on the material day and she fits into the category of human beings defined as children under both the Sexual Offences Act and the Children Act (Supra).

15. In concluding his submissions Mr. Ng'etich submitted that all that the appellant has done on this appeal is to mitigate against sentence, something the appellant should have done upon conviction by the trial court. Mr. Ng'etich urged the court to dismiss the appeal.

Duty of this court

16. As the first appellate court, this court is under a duty to critically reconsider and evaluate the evidence afresh with a view to reaching its own conclusions in the matter, bearing in mind that it is only the trial court which had the singular advantage of seeing and hearing the witnesses as they testified before it. This court therefore cannot rule on matters of demeanor of the witnesses. In this regard this court is guided by the decisions in cases such as Okeno –Vrs – Republic (1972) EA 32; Mwangi – Vrs – Republic (2004)2 KLR 28, Ngui – vrs – Republic (1984) KLR 729 and Kinyanjui – vrs – Republic

(2004) 2KLR 364.

17. In all above cases, the courts held the widely accepted requirement that "the first appellate court must reconsider the evidence, evaluate it itself and draw its own conclusions in order to satisfy itself that there was no failure of justice (and that) it is not sufficient for it to merely scrutinize the evidence to see if there was some evidence to support the trial court's findings and conclusions."It is therefore behoues this court to go into the whole of the evidence that was placed before the trial court, and to establish whether the conviction of the appellant was safe in the first place and then consider the issue of sentence raised by the appellant herein.

Analysis of the evidence

18. The evidence that is relevant to the charge against the appellant in that of the complainant herself PW1 and Henry Shilibwa PW4. According to the complainant, the appellant accosted her as she walked to the shop and pulled her into the sugar cane plantation and told her to lie down. Though the appellant had a knife he did not point it at her, but still told her to lie down promising to give her money. Then, according to PW1 the appellant lay on her after he removed his clothes. He did not remove her clothes and at that very time M came by and the appellant fled.

19. According to the information given to the complainant's mother by M, he (M) heard the complainant crying and saying that the appellant wanted to pull her into the sugar cane plantation. The evidence of Pw3, Chebui was that PW2 informed him that the appellant had raped the complainant.

20. The testimony of PW4 is to the effect that the complainant told him that the appellant was in the sugar cane plantation and that he wanted to fall on her. It is not clear from all these testimonies whether the appellant indeed pulled the complainant into the sugar plantation because if he had the complainant would have spoken to PW4 pointing to the sugar cane plantation where the appellant was said to be when according to the complainant, when M appeared the appellant fled from the sugar cane plantation where he was supposed to have been lying on the complainant.

Findings

21. The upshot of the above analysis is that the prosecution did not clearly show whether indeed the appellant dragged the complainant into the sugar cane plantation as alleged and whether infact he removed his clothes, forced the complainant to lie down and he lay on her. The doubt in my mind is so strong that the benefit of it must go to the appellant.

Conclusion.

22. Before I conclude this judgment. I wish to say something on whether or not this court would have interfered with the sentence imposed by the trial court if the conviction had been upheld. As provided under section 9(2) of the Sexual Offences Act the minimum sentence for the offence of attempted defilement is "not less than ten years". There would therefore have been no cause for this court o interfere with the sentence as it was the minimum provided in law.

23. Even if this court had the discretion to review a sentence such interference would only happen where the court finds that the sentence is either excessively harsh or in ordinately low. In **Griffin –vrs-Republic (1981) KLR (14),** it was held at holding number 2 that "the court of appeal cannot interfere with the sentence solely on the ground that it was heavy unless it was also manifestly excessive. In sentencing the court must exercise its discretion depending on the circumstances of the case." In the instant case the trial court had no discretion in the matter of sentencing and this court would have had no such discretion on appeal.

Conclusion

24. In conclusion I find and hold that there was no sufficient evidence to support the charge of attempted

defilement against the appellant. His appeal is therefore allowed. The conviction is quashed and the sentence of ten years imprisonment set aside. Unless he is otherwise lawfully held, the appellant shall be released from prison custody forthwith.

Orders accordingly.

Judgment delivered, dated and signed in open court at Kakamega this 31st day of July 2015

RUTH N. SITATI

JUDGE

In the presence of

…present in person ……..…….for Appellant

…Mr.Orwenga (present)……..…….for Respondent

…Mr. Okoit……..Court Assistant