REPUBLIC OF KENYA

High Court at Kitale

Criminal Appeal 50 of 2012

ANTHONY ECHUTO LOYERI :: APPELLANT.

VERSUS

REPUBLIC :: RESPONDENT.

(Being an appeal from the original conviction and sentence of T. Nzioki – SRM. in Criminal Case No. 805 of 2010 delivered on 8th April, 2011 at Lodwar.)

J U D G M E N T.

This appeal arises from the decision and judgment of the Senior Resident Magistrate at Lodwar in CR. Case No. 805 of 2010 in which the appellant, **Anthony Echuto Loyeri,** was convicted and sentenced to ten (10) years imprisonment for attempted defilement contrary to section 9 (1) (2) of the Sexual Offences Act.

It was alleged that on the 20th November, 2010 at (particulars witheld) Turkana county, the appellant attempted to defile S.E, a girl aged seven (7) years.

Being dissatisfied with the conviction and sentence, the appellant preferred this appeal on the basis of the grounds in his petition of appeal filed herein on 4th April, 2012.

Basically, the appellant complains that the prosecution evidence was insufficient to convict him and was essentially from family members (i.e. PW1, 2 & 3). The appellant also complains that he was in police custody for a long period of time such that his constitutional rights were infringed. He appeared in person at the hearing of the appeal and presented written submissions which he relied on in support of his case.

The learned prosecution counsel, **Mr. Chelashaw**, appeared for the Republic and opposed the appeal on grounds that the appellant was caught by PW1, 2 and 3 in the act of attempting to defile the minor victim and that the fact that the said witnesses were family members did not prejudice the appellant as he was given opportunity to cross-examine them. The learned prosecution counsel contended that medical exhibit was unnecessary since the offence of defilement was not committed.

All considered, the duty of this court is to re-consider the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witness.

Briefly, the prosecution case was that on the material date at about 1.00 a.m., the child complainant **S.E (PW1),** was at home sleeping together with her sister, **S.E (PW2),** when the appellant appeared there and placed her (PW1) between his legs holding her tightly against him. She screamed for help and her sister (PW2) woke up. She (PW2) found the appellant in the act and asked him what he was doing. She then called her uncle **M.E (PW3)**, who woke up and found the appellant holding the complainant tightly

between his legs with the intention of defiling her. He (PW3) also asked the appellant what he was doing and he (the appellant) begged for forgiveness. He (PW3) called neighbours. They restrained the appellant and took him to Kalokol police post on the following morning.

P.C. John Njagi (PW4), based at Kalokol police post received the necessary report and preferred the present charges against the appellant after the completion of his investigations.

The appellant's defence was a denial. He said that he was arrested by two men after having sold his fish catch. He was taken to Kalokol police post and was kept there without food for two (2) days. He then demanded to be taken to court but the complainant's demanded Ksh. 1,000/= from him. He refused to part with the money and was taken to Lodwar police station where he remained for three (3) days before appearing before the mobile court at Kakuma where he denied the charge.

After considering the foregoing evidence, the learned trial magistrate was of the view that the offence which was disclosed was that of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act.

The learned trial magistrate noted that there was evidence that the appellant held the complainant tightly in between his legs thereby coming into contact with her breasts and buttocks. Accordingly, the learned trial magistrate invoked section 179 (2) of the Criminal Procedure Code and found the appellant guilty of indecent act.

The appellant was therefore convicted not for attempted defilement as charged but for indecent act with a child.

In this court's opinion, the learned trial magistrate was right in finding that the offence of defilement was not disclosed by the evidence adduced by PW1, 2 and 3.

Indeed, there was nothing to show that other than holding the complainant between his legs the appellant attempted to defile her. However, this court does not think that the appellant was driven by an unlawful intention of coming into contact with the complainant's genital organ, or breasts or buttocks. He acted more like a pervert who simply displayed his perverted tendencies. It would therefore follow that there was no need for the trial court to invoke section 179 (2) of the CPC and convict the appellant for the offence of indecent act with a child. The conviction was erroneous and is hereby quashed with the resultant effect that the appellant shall forthwith be released unless otherwise lawfully held.

[Delivered and signed this 14th day of May, 2013.]

J.R. KARANJA.

JUDGE.