



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL APPEAL NO 29 OF 2010

CHARLES KEITANY:..... APPELLANT

VERSUS

REPUBLIC:.....RESPONDENT

JUDGEMENT

The appellant, CHARLES KEITANY, was convicted for the offence of Attempted Defilement contrary to Section 9(1) as read with Section 9 (2) of the Sexual Offences Act. He was then sentenced to 10 years imprisonment.

When canvassing his appeal, the appellant submitted that there was no positive identification by the complainant. In his view, if there had been positive identification, the complainant would have either described him or would have given his name.

In any event, the complainant is said to have failed to specify whether the alleged identification was due to the appellant's facial or physical appearance, or if she had identified him by his voice.

Secondly, the appellant contends that the incident cannot have taken place, as there has been no explanation why it would then have remained un-reported for over one year.

The fact that the complainant only told her mother that she was the victim of an attempted defilement, by “someone”, led the appellant to submit that that proves the lack of identification by the complainant.

It was the appellant's contention that the neighbours who allegedly joined in the search for the assailant, should have testified. As they did not do so, the appellant argued that the family of the complainant simply framed him,.

Two essential witnesses are also said to have failed to testify. The appellant lists those persons as the brother of the complainant, and the alleged eye-witness to the incident.

Finally, the appellant expressed the view that she was prejudiced when the same trial magistrate tried him in this case together with other cases.

Ms. Ruto, Learned state counsel, opposed the appeal.

The Respondent submitted that the offence was proved beyond any reasonable doubt.

It was committed in broad day-light, thus enabling the complainant to clearly see her assailant. In effect, the Respondent submitted that there was positive identification.

That submission prompted the appellant to submit that if the complainant's father knew him, then the appellant would also have known him.

Secondly, if the assailant had already lifted up the girl's skirt, there would have been no reason why he did not actually defile the girl. The appellant said that the contention that there was an attempt to defile the girl was not realistic.

But the Respondent was of the view that the case was proved beyond any reasonable doubt.

It was pointed out that the assailant attacked the complainant in broad daylight.

Ms. Ruto submitted that the intentions of the appellant were obvious, as the assailant lifted up the skirt of the complainant, and he then threw her down.

Being the first appellate court, I have re-evaluated all the evidence on record, and drawn my own conclusions. Of course, I have taken into account the fact that I did not have the benefit of seeing any of the witnesses when they gave their evidence.

PW1 is the complainant. She had gone down to the river to fetch water. Whilst there, she decided to wash her legs and face.

As she was doing so, the appellant appeared and talked to her. He asked her if she had seen C. The complainant answered in the negative.

The appellant then inquired from the complainant about the identity of her parents. However, before PW1 answered, the assailant pulled his shirt over her head, covering her face.

PW1 screamed as she struggled to break free.

The assailant held her by her throat and shoved her to the ground. He strangled PW1, and tried to lift up her skirt.

As PW1 continued to struggle with her assailant, both her skirt and her blouse got torn. And when she was shoved to the ground, her said clothing got soiled.

The torn and soiled clothing was exhibited before the trial court.

According to the complainant, the assailant only left her when he heard the voice of a man. The assailant fled from the scene.

Thereafter, PW1 went home, where she informed her mother about what had transpired.

PW1's mother mobilised the neighbours to search for the assailant, but they did not get him.

PW2 is the girl's father. At the time his daughter was going through the nasty experience, PW2 was in church, whilst his wife was still at home.

As soon as PW1 had told her mother about the incident, her mother rushed to the church, where she informed PW2 about what had happened.

PW2 mobilised people to search for the assailant, but they did not find him.

Both PW1 and PW2 said that they had known the appellant prior to the incident.

According to PW2, the appellant hailed from their area. Meanwhile, PW1 said that she used to see the appellant within the area known as S. However, PW1 did not know his name.

In the circumstances PW1 could not have given the appellant's name to his parents or to anybody else.

When PW1 set off to go to the river, she was in the company of her younger brother, who was 10 years old. However, the brother did not get to the river.

Therefore, when PW1 was being assaulted, her brother was not present. The brother cannot, therefore be said to have been a material witness.

PW1 also made reference to hearing “the voice of a man nearby”.

PW1 did not see the man. Also, PW1 did not say that the man saw what the assailant did to her. Accordingly, the man whose voice prompted the assailant to flee the scene cannot be said to have been an eye-witness to the incident.

In my considered view, the complainant had an ideal opportunity to positively identify the assailant. He did not just attack her in a sudden manner. He first talked to her. Whilst he was doing so, I find that the complainant positively identified her assailant.

PW4 is a clinical officer. He testified that the complainant had tenderness on her neck. She also had bruises on her chest wall, tenderness and bruises on her left shoulder, and bruises on both knees.

At the time the complainant was being examined, her injuries were only about one day old.

The P3 Form was signed on 20th January, 2009. The medical officer who examined the complainant noted that she told him that she was able to identify her assailant

“on appearance.”

It is thus clear that PW1 did specify that she could identify her assailant through his physical appearance.

Part 1 of the Form 3 is filled in by the police officer requesting that the victim of an offence (or even the suspect) be examined by a medical practitioner.

In this instance, the police officer who filled the P3 Form for the complainant, indicated that PW1 had reported to him that the person who assaulted her was

“someone known to her by appearance”

Therefore, PW1 was very consistent about her contention that she was able to identify her assailant, by his appearance.

The incident took place on 30th November, 2009, but the appellant was not arrested until 21st January, 2009. His arrest was not because of his case. He was arrested because of another offence.

PW3 is the police officer who arrested the appellant, in relation to this case. PW3 got the appellant from other police officers who had arrested him for another offence.

As PW3 said in his evidence, PW1 had reported to the police before 19th January, 2009.

The point I am emphasizing is that the appellant erred when he submitted that the complainant only reported the incident after more than one year.

I find and hold that the evidence adduced, proved beyond all reasonable doubt that it is the appellant who attempted to defile the complainant on 30th November, 2008.

I also find no reason in law or in fact for finding fault with the learned trial magistrate for having tried the appellant in two similar cases, at the same time. That fact alone cannot be the basis for quashing a conviction which was otherwise sound.

As regards the sentence, Section 9 (2) of the Sexual Offences Act stipulates that those convicted for attempted Defilement should be sentenced to imprisonment for not less than 10 years.

Considering that the appellant was not a first offender, the sentence of 10 years imprisonment was reasonable.

Accordingly, the appeal has no merit. It is therefore dismissed.

I uphold both the conviction and the sentence.

DATED, SIGNED AND DELIVERED AT ELDORET

THIS 23RD DAY OF OCTOBER, 2013

FRED A. OCHIENG

JUDGE