



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU Criminal Appeal 254 of 2009

JARED KABAA MBECHÉ.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

***Sexual Offences Act - Attempted defilement of a girl under the age of 14 years - essential
elements to be proved - s. 9(1) & (2) Sexual Offences Act, 2006***

JUDGMENT

The Appellant was charged with the offence of **attempted defilement of a child** contrary to **Section 9(1)** as read with **subsection (2) of the Sexual Offences Act, 2006**. He pleaded not guilty and upon evidence being lead, he was found guilty and was convicted and sentenced to 30 years imprisonment.

The Appellant appealed to this court originally on seven grounds. He supplemented these grounds in his written submissions with two other grounds namely that his rights to the trial with the aid of an Advocate was violated to contrary to Section 77(1) of the Constitution and Section 193 of the Criminal Procedure Code, (Cap. 75, Laws of Kenya), and secondly that the trial court did not consider his sworn testimony.

I will deal with the first issue in the Supplementary Grounds of Appeal, namely that the Appellant did not have a fair trial as envisaged by Section 77(1) of the Constitution and Section 193 of the Criminal Procedure Code.

Section 193 of the Criminal Procedure Code does indeed say that a person accused of an offence before a criminal court or against whom proceedings are instituted under the Code in a Criminal Court, may of right be defended by an Advocate. Section 77(1) of the Constitution on the other hand lays down the principles of a fair trial and that a person charged with a criminal offence .. shall unless the charge is withdrawn be afforded a fair hearing within a reasonable time by an independent and impartial court and established by law.

Section 77(2) (d) states that every person who is charged with a criminal offence shall be permitted to defend himself before the court in person or by a legal representative of his own choice.

Section 193 of the Criminal Procedure Code compliments Section 77(2) (d) of the Constitution. Those provisions confer upon an accused person the right to either defend himself before court ("in person") or by a legal representative of his own choice. The provisions do not say that the prosecution shall hire an Advocate for every person charged with a criminal offence. Only persons charged with murder are provided with Advocates at the cost of the State. The reason for this is purely legal policy, that legal consequences of being found guilty of murder are so grave - the punishment is death, that society through the State deems it sufficiently important that before any person is convicted of the offence, his trial would have been conducted with the aid of legally qualified counsel.

It is not so in the case of other offences. Kenya being a capitalist and free economy, it does not have a legal corporation financed by the State from which to deploy counsel to advise and conduct the defence of every accused person. A person charged with a criminal offence is constitutionally empowered to the aid of counsel, but at his own expense, except for murder trial. There is no where on record from the lower court that the Appellant applied for an adjournment to enable him to hire counsel of his choice, and was denied that request. This ground of appeal therefore fails.

It remains to say that the other leg of that ground as to a fair hearing also fails because the Appellant was tried before a competent and impartial court established by law. He was not denied any of the rights set out in Section 77(2) of the Constitution. He was deemed innocent until proved guilty, the charges were read and explained to the Appellant in the Kiswahili language which he understood, he was given time to prepare his defence, and gave sworn testimony. He was at liberty to call any witness of his choice. He never asked the trial court to use its coercive powers to issue witness summons to any of his would be witnesses. The second leg of these grounds also fails.

Adverting to the Appellant's original seven grounds, they raise basically one question whether there was evidence to convict the Appellant. The Appellant submitted that the whole trial was a frame up because the complainant's mother used to be his lover and that she promised to teach him a lesson when he broke-up the affair because the complainant's mother (PW3) was a married woman.

The record of the evidence of PW2 and PW3 however speaks a different language. A language which prompted Mr. Omutelema learned Provincial State Counsel to say that there was evidence enough to convict the Appellant. It is to that evidence, which this court, as a first appellate court, must advert to, examine and evaluate it, and come to its own findings and conclusions.

PW1, was Dr. Daniel Wainaina. He had the treatment records of a girl J. K who was brought to him with a history of having been defiled by a person known to her. He examined her and found normal external genitalia, hymen was intact, with no discharge. She had negative HIV test results but urine analysis showed slight infections. There was no evidence of penetration, the history given to him showed there was an attempted defilement. He put her on analgestics and anti-biotics.

The Appellant cross-examined the doctor PW1. The Appellant did not shy away that medicine being a technical subject he had no capacity to cross-examine the doctor. He did not ask for an adjournment to hire an Advocate.

PW2 was the complainant's mother. She is a business woman. She deals in charcoal a precious source of energy for majority of urban dwellers. She stays at her location of work until about 7.00 p.m. every day. On the material day, she had her children J.K (PW3), together with little brothers aged 6 and 4 respectively. On her return home, PW3 informed her how the Appellant (like a serpent of old) went to the house and lied to the little girl (PW3) that she (the mother) had told him to go for the toilet key. The little girl innocently went to open the toilet, and she did so, and left the story at that. However in the night PW2, testified, the little girl started having nightmares, and at about 1.00 a.m. opened her soul to the mother and described to her in details what the Appellant had attempted to do to her;

"She went to open the toilet for the accused, accused held her, and pushed her to the bathroom which was near the toilet. He put his fingers into the vagina and tried to insert his thing, the penis into her vagina. The thing could however not enter."

PW2 then testified further that she rushed the daughter to the Nakuru Provincial General Hospital where she was treated.

The Appellant cross-examined PW2 at length. PW2 called the Appellant a liar. There was never any time when he wanted to have sex with her. She examined the child's private part and found a small injury a cut, a small cut which the little girl had informed her was caused by the Appellant. The little girl knew the Appellant - In answer to the Appellant's cross-examination PW2 told the court ***"You even came to ask me whether J knows you well. J identified you. We both knew you."***

PW3, was J.K, a minor was subjected to a "voir dire", and was found to be intelligent enough to testify. Her answers were both simple and clear matter of fact. After narrating the names of her parents and little brother - she testified

"While in the house, Jared came and told me that my mother had sent him to get toilet keys from me. I went with him so that I open the toilet. He, however did not get to the toilets. There were some bathrooms near the toilets. He grabbed me and forced me into one of the bathrooms. He then removed his clothes and removed mine also. He got his finger into my thing before he tried to put the thing he urinates with inside it. It refused to get in. He then put on his clothes when the thing refused to get in. He also ordered me to wear the clothes. I later started itching in my private part on that night ... I did not tell my mother. I feared Jared. On 6/04/2008 I told my mother and later went to the Police. I was seen by a doctor called Wainaina ... Jared is here (points to the accused). I knew him. He used to play with me."

When crossed by the Appellant, PW3 confirmed her testimony that she accompanied him to the toilet, he put his finger into her thing. She got injured, his finger hurt her although did not bleed. She felt pain when she went home. She confirmed PW2's evidence that she did not at first tell her mother what the appellant had done but when the itching became worse, she told the mother the entire incident, and that there was a wound in her thing.

PW4 arrested the appellant on reports of defilement of a girl of 8-9 years of age. The appellant was pointed out to the Police by both the mother and the little girl.

PW5 was the investigating officer. He together with PW4 arrested the appellant. He is a person PW5 used to know. In cross-examination, by the appellant, PW5 responded - ***"When I interrogated you, you asked for forgiveness and alleged that you were drunk at the time!! - and the appellant had disappeared after the incident. You were not framed up. The minor knew you very well."***

When the appellant was put on his defence he gave sworn evidence but said absolutely nothing about the incident. The appellant was in the company of his girlfriend Jane Kimaiyo, but never called her in evidence. He conceded that he knew Mama J (PW2) that she had an affair briefly with him but he had cut the relationship short because she was a married woman. She vowed to teach him a lesson. He denied committing the offence. That he was framed up.

I have set out at length the evidence above deliberately. There is no doubt in my mind that the learned trial magistrate came to a correct decision and found the Appellant guilty. Sexual Offences used to be part of the Penal Code (Cap. 63 Laws of Kenya). For instance Section 9(1) attempted defilement is similar to Section 141 of the Penal Code - any person who attempts to commit rape is guilty of a felony and is liable to imprisonment with hard labour for life. The definition of "attempts" contained in Section 388 of the Penal Code, applies to all offences of "attempt". Section 388 defines attempt as follows:

"388(1) when a person intending to commit an offence, begins to put his intention into execution by means adapted to its fulfillment, and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence he is deemed to attempt to commit the offence."

That definition fits the circumstances in this case. The Appellant in his weird mind determined that he would defile a little girl of 8 years. He concocted a story that the child would believe. The child's mother had asked him to collect the toilet keys. He knew the little girl would not disobey the mother's instructions. In any event the little girl knew the appellant and the appellant knew the little girl. The little girl was unsuspecting. The Appellant knowing he was safe, pushed the little girl into an empty bathroom. He forced her to undress. He explored her "**thing**" with his finger, pricked her causing a cut and injury. He attempted to put his thing (penis) into her thing (vagina) it did not enter (penetrate). He gave up his attempt, dressed up and ordered the little girl to do the same and took off. According to the evidence of PW5, the Appellant went underground after the incident, and had temerity to ask PW2 (the mother of J) whether J had told her anything? That anything must surely refer to the incident when he attempted to defile little J. That is the man J knew, and told her mother. There is no question of a frame up. Any alleged affair between the appellant and "Mama" J is merely a red herring, and has nothing to do with this incident. The evidence of J (PW3) was clear, and under Section 124 (PROVISO) of the Evidence Act (Cap. 80, Laws of Kenya) is admissible without the need for corroboration. Section 124 provides that where the evidence of an alleged victim is admitted, in accordance with Section 19 of the Oaths and Statutory Declaration Acts (Cap. 15, Laws of Kenya) the accused shall not be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him (the accused). The exception to that rule is however the proviso thereto-

".... that where in a criminal case involving a sexual offence the only evidence is that of a child of tender years who is the alleged victim of the offence, the court shall receive the evidence of the child and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the child is telling the truth."

The child was subjected to a voir dire. It was found intelligent enough to testify. The evidence upon affirmation is clear, simple and matter of fact. There is no evidence of guile in her. She wore a skirt on the material day. There was no question of her mother coaching her to say what dress she was wearing. She knew the Appellant, a neighbor who lived barely 200 metres from her own home. He used to play with her. There is therefore no question of frame-up.

Both the law and evidence converge to say that the appellant committed the offence of attempted defilement of the child. The punishment for the offence is imprisonment for the term of not less than ten years. The appellant was sentenced to 30 years. The learned trial magistrate erred in sentencing the appellant to the period of 30 years imprisonment. The sentence was contrary to the statute.

The punishment of ten years is mandatory. In exercise therefore of the discretion conferred upon this court by Section 354(3) (a) (ii) of the Criminal Procedure Code, (Cap. 75, Laws of Kenya), I hereby alter the finding by reducing the sentence from thirty (30) years to ten (10) years as provided by Section 9(2) of the Sexual Offences Act, 2006.

Thus, the appellant's appeal succeeds on the question of sentence, but is otherwise dismissed on all other grounds.

There shall be orders accordingly.

Dated, delivered and signed at Nakuru this 23rd day of July, 2010

M. J. ANYARA EMUKULE

JUDGE

