REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 208 OF 2019

JULIUS KIPSANG ARAP ROBON.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. At Trial, the prosecution's case was that Georgina Chepkirui (PW 1) was defiled by one Julius Kipsang Arap Robon (the Appellant). The Appellant was charged alongside Shadrack Kiplagat Arap Nyango (Accused 2) who is said to have conspired with him to commit a felony.

2. More specifically the charge faced by the Appellant was that:-

> "On the 19th day of September 2016 at [particulars withheld] village within Nandi County in association with Shadrack Kipragat Arap Nyango intentionally caused his penis to penetrate the vagina of GJ a child aged 16 years."

3. On 19/9/2016, PW 1 visited a posho mill to sale maize. Her testimony is that whilst there, the Appellant closed the front door of the mill. At this point Accused 2 left the scene and so she was left alone with the Appellant. Her testimony was that the Appellant held her hand, wrestled her to the ground, removed her pant and grabbed her on the neck. That he slept on top of her but she resisted. He attempted to penetrate her vagina using his penis but she pushed him back and made noise. At this juncture, one Kiprobon kicked the door open and the Appellant fled.

4. EC (PW 3) is the mother of PW 1. After the alleged incidence, she took her daughter to Kaptumek and for examination at Kaptumo Hospital. A Police Form 3 was accordingly filled. She said she saw the clothes of her daughter and that her pant was torn.

5. The clinical officer who examined PW 1 is Joan Chelagat Kitur (PW 2). The examination was on 20/9/2016. The major finding of the examination were:-

> "labias normal, vagina wall warm and moist. CX- NAD. Hymen broken longstanding."

She may have found evidence of penetration.

6. The Appellant denied the offence. But he is well known to the complainant as the two are neighbours. That on that day, at about 6.20pm, the Complainant went to the posho mill to sell maize. He was at the mill with Accused 2. At weighing the maize, the Appellant's father came and asked what they were still doing at the shop. That the Complainant then left crying. He says that he did not know why.

7. Upon analyzing the evidence, the Court found that there was sufficient evidence to convict the Appellant of the offence of attempted defilement as there was no evidence of penetration.

8. The Appellant, through counsel, raised 12 grounds of Appeal but the same can be considerably collapsed to the following heads:-

> i. The Trial Magistrate erred in law and in fact in concluding that the testimony of the Complainant had been corroborated when in fact a crucial witness, one Kiprobon, was not called to testify.
>
> ii. The Trial Magistrate erred in law and fact by convicting the Appellant on evidence of PW 1 but failed to note that her age was not proved in the evidence.

iii. The Trial Magistrate erred in law and fact in convicting and sentencing the Appellant on an offence he was not charged without any basis.

iv. The Trial Magistrate erred in law and fact in failing to properly evaluate the evidence before him thus reaching erroneous decision.

9. This Court receives and considers this Appeal as a first Appellate Court and its duty is to evaluate the evidence as though it was a trial Court with a view to drawing its own conclusion with the caveat that unlike the Trial Court it did not hear and see the witnesses testify and due allowance should be given because of that.

10. It is common cause that the Appellant was charged with the charge of defilement contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act No. 3 of 2006 but was convicted of the offence of attempted defilement. In his submissions counsel for the Appellant argues that the charge of attempted defilement is not a lesser charge than that of defilement as the punishment is the same sentence as when the victim is found to be between 16 years and 18 years.

11. A lesser offence is the same thing as a lesser charge. In Black's Law Dictionary Tenth Edition a lesser included offense meaning:-

"A crime that is composed of some, but not all, of the elements of a more serious crime and that is necessarily committed in carrying out the greater crime."

12. However, my understanding of the law is that there is a difference between conviction of a minor offence and that of an attempt to commit an offence. Section 179 and 180 of the Criminal Procedure Code differentiates them as:-

"Section 179. When offence proved is included in offence charged;

(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.

Section 180. Persons charged with any offence may be convicted of attempt;

When a person is charged with an offence, he may be convicted of having attempted to commit that offence although he was not charged with the attempt."

13. The conviction of the Appellant was for the attempt to commit an offence of defilement under section 180.If there was sufficient evidence to sustain that conviction, then it did not matter that the sentence was just as severe as the offence itself. That argument is just as weak as the argument that he needed to be charged with the offence of attempted defilement as that is not necessary.

14. Another argument is that the age of the Complainant was not proved. A child health card was produced as proof of the age of the victim. Case law has held that such evidence can be used to sufficiently establish the age of a victim. And I do not think the Appellant doubts that.

15. What the Appellant argues is that the details appearing on the card do not support the contention that the card belonged to the Complainant. The details are:-

"Childs Name: AJ

Mother's Name: EJ"

16. The evidence is that in the charge sheet, the Complainant is named as GJ. Although the common name is J, the difference is between G and A. Things are not helped because the name of the mother is also different. In evidence the mother introduced herself as EC and not as EJ. While it is possible that a person can have more than one name, there is some merit in the argument of the Appellant that the differences in name should have been at least explained to Court. This was not done and the Trial Magistrate did not in fact discuss this aspect of the medical evidence.

17. The State on the other hand urged this Court to find that discrepancy in name was not fatal. This may perhaps have been overlooked if the other evidence was sufficiently strong. It is to this other evidence that the Court turns to.

18. The only direct evidence of the attempt at defilement is that of the Appellant. It is of course true that, in sexual offences, the evidence of the victim, by itself, can be sufficient to support a conviction.

19. That said there are two disturbing aspects of the prosecution's case that have been raised by this Appeal.

20. The evidence of the victim was that in the course of the offence she ...;

"screamed and mzee of the shop called Kiprobon came and made noise after kicking door open and entered then Kipsang ran out."

21. The Appellant beseeches this Court to infer that the evidence of this uncalled witness would have been adverse to the prosecution. The importance of the possible evidence of Kiprobon cannot be discounted. His evidence would have established whether or not the victim screamed, whether or not he found her in distraught, whether or not the front door to the posho mill was locked. His testimony would have either corroborated the story of the Complainant or destroyed it. He was therefore a crucial witness and it must be asked why he was not called to give evidence or in the very least why his absence from trial was not explained by the prosecution.

22. The prospects of the prosecution's case are not helped when the pants of the Complainant were not produced. The evidence of PW 1 the Appellant removed her pant forcefully. Her mother (PW 3) then said:-

"I saw the clothes. The panty was torn."

23. For some reason, which was not explained, that pant was not produced in evidence. It has to be asked whether, if indeed there was a torn pant, it would not have helped complete the picture of case painted by the prosecution.

24. In the end, this Court cannot help but reach a decision that the conviction is unsafe. On this occasion the uncorroborated evidence of the Complainant is rendered so tenuous by the lack of crucial evidence of a witness, non-production of an important evidence and somewhat shaky evidence of age.

25. The upshot is that the Appeal is allowed and the conviction and sentence dated 10th December 2019 is quashed. The Appellant is hereby set at liberty unless held for some other lawful reason or reasons.

Dated, Signed and Delivered in Court at Nairobi this 1ST Day of February 2021

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Judgment has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Julius Kipsang Robon (the Appellant) present in person.

Miss Muhonja (D.P.P) for the State.