REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 67 OF 2018

PMK.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Kitui Chief Magistrate's Court Criminal Case No. 29 of 2016 of the learned Chief Magistrate – Hon. M. Murage Esq delivered on 8/6/2018)

JUDGEMENT

1. The appellant PMK was charged with the offence of defilement contrary to section 8(1) of the Sexual Offences Act No. 3 of 2006. In the alternative he was charged with committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006.

2. The facts thereof are well set out in the charge sheet dated 11/8/2016.

3. The prosecution's case was that the complainant JM who was 12 years was sent by his mother on 28/6/2016 to check on the cows near the river. He met appellant who is his uncle. Appellant removed his clothes and then sodomised him. He made him lie facing down and lay on his back. Appellant held his mouth so that he could not scream.

4. PW3 P came and found the appellant sodomising the victim. When he asked appellant what he was doing, appellant dressed and then ran away into the bush. Complainant put back his short and went home and informed his mother. Complainant was taken to hospital. Thereafter the matter was reported to police. Appellant had sodomised him before he had threatened to kill him if he ever reported. Later on after the investigation, appellant was charged.

5. Appellant denied the offence in his unsworn statement. He stated that he was framed by PW3 because the witness said that appellant had implicated him in a theft that had occurred in the area. He called no witness.

6. After full hearing appellant was found guilty, convicted and sentenced to serve life sentence.

7. He was unhappy with the trial court's decision that he appealed herein complaining –

(1) That he was framed up.

(2) Age of victim was not proved.

(3) Medical evidence did not support prosecution's case.

(4) Court relied on selective evidence.

8. Parties were directed to file submissions.

APPELLANT'S SUBMISSIONS

9. The appellant submitted that he was being framed for an offence he had not committed. This was also corroborated by the doctor in his findings after examining the complainant.

10. He further submitted that from the entire proceedings there is nowhere in the evidence of the parties where the actual age of complainant was ascertained. There was no age assessment report or birth certificate produced as an exhibit.

11. Without the production of these mandatory documents, the age of the complainant which is a crucial ingredient of the offence of defilement, then the charges could not stand.

12. Appellant further submitted that the conclusions of the doctor were that there was no penetration, trauma or tear on the complainant's anus.

13. Lastly, appellant submitted that from the totality of the evidence adduced, the trial court magistrate disregarded the exonerating evidence especially the medical evidence that clearly established that the complainant had not been sodomised. The appellant was not charged with attempted defilement nor was he convicted of such.

14. The appellant submitted that the entire appeal should therefore be allowed by the quashing of the conviction and setting aside of the sentence of life imprisonment meted on the appellant.

RESPONDENT'S SUBMISSIONS

15. The respondent submitted that at the conclusion of the prosecution's case, the appellant was found guilty and sentenced to life imprisonment.

16. The appellant has now moved this court that:-

1) That his defence of frame-up was not considered.

2) That the complainant's age was not proved.

3) That the medical evidence did not support the prosecution's case.

4) That the trial court magistrate relied on selective bits of evidence.

17. The respondent finally submitted that the prosecution proved its case beyond reasonable doubt as the appellant was caught while in action and there is no doubt the complainant was still in primary school when the incident took place. The doctor's findings were that the minor could not control passing stool an indication that he was indeed defiled.

18. This being the appellant's first appeal the role of this court is well settled. It was held in the case of ***Okeno vs Republic (1977) EALR 32*** and further in the Court of Appeal case of ***Mark Oiruri Mose vs Republic (2013) eKLR*** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

ISSUES, ANALYSIS AND DETERMINATION

19. After going through the evidence on record and the parties submissions, I find the issues are; ***whether prosecution proved its case beyond reasonable doubt? whether the trial court considered appellant defence ?***

20. The key ingredients of the offence of defilement include proof of the age of the complainant, proof of penetration and proof that the appellant was the perpetrator of the offence. On looking at those aspects in this judgment, this Court shall consider each of them.

(a) On the age of the complainant:

21. . The age of the complainant was not contested during trial but is being raised in this appeal. The prosecution produced the complainant's post rape care Report (PRC) as proof of age which indicated that the complainant was born on 6/6/06 thus on 11/8/016 he was 10 years old at the time of the commission of the alleged offence. The p3 form also the age of the victim to be 10 years of age at the same date of commission of the alleged offence.

22. During the trial the victim on the 27/3/017 stated that he was 12 years old and in class 6. The appellant did not cross-examine him on the age nor question the entries on afore-stated documents on age. The court finds that the ingredient of age was proved beyond reasonable doubt.

b) On whether the appellant was the perpetrator:

23. PW1 was informed by PW3 that he found appellant sodomising PW2.He PW1 said appellant was his uncle and PW2 his son. Later appellant was arrested and was escorted by the crowd to the chief and after interrogation he admitted and police were called.

24. PW1 said appellant one P whom he said was his grandfather, removed his clothes on the material day and defiled him. Appellant never challenged that piece of evidence in cross-examination or in his defence. The court finds that the perpetrator of the alleged offence was the appellant.

(c) On the issue of penetration:

25. Section **2 of the Sexual Offences Act** defines penetration as:

> ***"the partial or complete insertion of the genital organs of a person into the genital organ of another person."***

26. This position was fortified in the case of ***Mark Oiruri Mose vs R (2013) eKLR*** when the Court of Appeal stated thus:

> ***"…Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ…."*** *(Emphasis added).*

27. Later the Court of Appeal, then differently constituted, in the case of ***Erick Onyango Ondeng vs Republic (2014) eKLR*** held as such on the aspect of penetration:

> ***"In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured."***

28. Appellant submitted that the conclusions of the doctor were that there was no penetration, trauma or tear on the complainant's anus. That from the totality of the evidence adduced, the trial court magistrate disregarded the exonerating evidence especially the medical evidence that clearly established that the complainant had not been sodomised.

29. The doctor PW5 testified that, the doctor who examined pw2 could not attend court to testify as he was sick. Thus he testified on his behalf. There was finding in the p3 form that there were no bruises or tear though there was complaint of problem in controlling passing of the stool.

30. Also complaint of pain in anal region. However, he said there was no evidence of penetration, no trauma or tear yet examination was done the same day.

31. This court thus agrees with the appellant that the ingredient of penetration was not proved beyond reasonable doubt. PW2 says he was defiled but the doctor report states otherwise. PW3 saw the appellant in the act but he never witnessed the penetration other that appellant who was on top of the PW2 who dressed and ran away.

32. It would appear that the appellant was caught before accomplishing his mission. Thus the court finds that the offence of defilement was completed as PW3 interrupted the same.

33. In the case of ***Bernard K. Chege vs Republic*** [Criminal Appeal No. 120 of 2011-Nyeri] the court had the occasion to address its mind and to define in detail ingredients of incomplete offences also described as inchoate offences. Inchoate crimes are incomplete crimes which must be connected to a substantive crime to obtain a conviction. Examples of inchoate crimes are criminal conspiracy, criminal solicitation, and attempt to commit a crime, when the crime has not been completed. It refers to the act of preparing for or seeking to commit another crime.

34. An inchoate offense requires that the accused have the specific intent to commit the underlying crime. An inchoate crime may be found when the substantive crime failed due to arrest, impossibility, or an accident preventing the crime from taking place.

35. Strictly inchoate crimes are a unique class of criminal offences in the sense that they criminalize acts that precede harmful conduct but do not necessarily inflict harmful consequences in and of themselves.

36. It can thus be appreciated that it could extend the criminal law too far to reach behind those acts and criminalize behaviour that precedes those acts.

37. Every inchoate crime or offense must have the *mens rea* of intent or of recklessness, but most typically intent. Specific intent may be inferred from circumstances. ***[People vs Murphy, 235 A.D. 933, 654 N.Y.S. 2d 187 (N.Y. 3d Dep't 1997]*** it may be proven by the doctrine of *"dangerous proximity"*, and the presence of a *"substantial step in a course of conduct"*. *[James W.H. McCord and Sandra L. McCord, Criminal Law and Procedure for the paralegal: a systems approach, pp. 189-190, (3d ed. Thomson Delmar Learning 2006)].* The dividing line between legal and illegal conduct is whether there is a *"substantial step"* towards committing a specific crime.

38. When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, 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 said to attempt or to prepare to commit the offence.

39. The essential ingredients of an attempt to commit an offence have been laid down in the following words:- *[The Indian Penal Code (Act XLV of 1860), by Ratanlal Ranchhoddas &Dhirajlal Keshvalal Thakore.*

40. *(26th Edition (Reprint 1991), at page 517]*

> ***"In every crime, there is first intention to commit it, secondly, preparation to commit it, thirdly to commit it. If the third, that is, attempt is successful, then the crime is complete. If the attempt fails, the crime is not complete but the law punishes the act. An***

'attempt' is made punishable because every attempt, although it fails of success, must create an alarm, which, of itself, is an injury, and the moral guilt of the offender is the same as if he had succeeded"

41. Thus, for there to be an attempt to commit an offence by a person, that person must:-

a. Intend to commit the offence;

b. Begin to put his intention to commit the offence into execution by means which are adapted to its fulfilment. This means that the accused begins to carry out his intention to commit the offence in a way suitable to bring about what he intends to achieve;

c. Do some overt act which manifests his intention; that is, the accused performs an act which is capable of being observed by another (although it may not have been) and which in itself makes clear his intention to commit the offence,[7] But in fact he does not commit the whole offence. For the offence of or attempting to commit an offence to be proved, the prosecutor must prove each of those three elements beyond reasonable doubt.

42. The act relied upon as constituting the attempt to commit an offence must be an act immediately, not merely remotely, connected with the contemplated offence. This was enunciated in the case of ***Williams, Ex parte The Minister for Justice and A.G***. The act must go beyond mere preparation to commit the crime and must amount really to the beginning of the commission of the crime. But it is necessary that the accused should have done his best or taken the last steps towards the intended offence.

43. There can be an attempt to commit an offence where the failure to complete the commission of it is due to ineptitude, inefficiency or insufficient means on the part of the accused person. In fact, the fact that a person, having done something which amounts to an attempt, then voluntarily desists from continuing the attempt, does not relief him from criminal responsibility for the attempt which he made before desisting.

44. For the prosecution to prove the offence of preparation to commit a felony, they must establish that the accused had the intention to commit the offence.

45. It must be shown that the appellant had put in motion his intention by making preparations to commit the offence. The prosecution must establish that the appellant made the attempt to put into effect his intention. The question that calls for determination is whether or not the conduct of the appellant constituted an overt act sufficiently proximate to constitute preparation to commit an offence.

46. In our case the appellant denies the offence and only says that he is being framed. However, in appeal he contended that since there was no penetration, he cannot be convicted over attempted defilement as he was not charged on the same offence in the first place.

47. **Section 9(1) (2) of the sexual offences Act,** provides

"9(1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement. (2)A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years"

48. The prosecution in an offence of attempted defilement must prove the other ingredients of the offence of defilement except penetration; it must prove the age, of the complainant, positive identification of the accused, and then prove steps taken by the accused to execute the defilement which did not succeed.

49. Attempted defilement is as if were a failed defilement, failed because there was no penetration.

50. Under **Section 179 of the Criminal Procedure Code** (hereinafter referred to as 'the CPC') provides as follows: -

(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.

51. The reading of the foregone provision is clear that the offence on which one may be convicted of upon must be a minor and cognate offence to the main charge. The **Black's Law Dictionary** defines a '***cognate offence' as "a lesser offense that is related to the greater offence because it shares several of the elements of the greater offence and is of the same class or category."***

52. Attempted defilement is minor and cognate to defilement. Thus the court finds merit in appeal and succeeds to the extent that the appellant conviction and sentence are quashed and substituted with conviction with offence of attempted defilement and sentence of 10 years' imprisonment.

53. Thus the court makes the following orders;

i) The appellant is guilty and convicted of attempted defilement.

ii) The **appellant is sentenced to serve 10 years' imprisonment to run from date of arrest 1/8/2016.**

DATED, SIGNED AND DELIVERED AT KITUI THIS 7TH DAY OF JANUARY, 2020.

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C. KARIUKI

JUDGE