REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO 138 OF 2017

GOO..APPELLANT

VERSUS

REPUBLIC.............................RESPONDENT

(***Being an appeal from the Judgment delivered by F. Makoyo,Senior Resident Magistrate on 15th Nov, 2017 in Butere SRMCR'S (S.O.) No. 808 of 2016***)

JUDGMENT

1. The appellant herein, **GOO** was charged with the offence of attempted defilement contrary to Section 9(1) as read with Section 9(2) of the Sexual Offences Act. Particulars being that on the 23rd day of November 2016 in Kakamega County he intentionally attempted to insert his penis into the vagina of BA, a child aged 16 years.

He also faced an alternative count of committing an indecent act with a child Contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. Particulars being that on the 23rd day of November 2016 at Butere sub-county within Kakamega County he intentionally touched the vagina of BA, a child aged 16 years.

2. After a full hearing the learned trial magistrate convicted the appellant on the principal count and sentenced him to ten years imprisonment.

3. Being dissatisfied with the conviction and sentence, he lodged an appeal dated 27th November, 2017, raising the following grounds:-

i. That the learned trial magistrate erred in both law and facts in reaching the finding that the prosecution had proved its case against him on the required standard yet the elements of attempted defilement had not been proved in the evidence adduced.

ii. That the learned trial magistrate erred in law and fact in failing to warn himself of the dangers of convicting on the evidence of a single witness the complainant as is required in the criminal justice system.

iii. That the learned trial Magistrate erred in law in failing to consider at all the evidence adduced in defence by the appellant and yet the appellant had a well corroborated alibi in his defence.

iv. That the learned trial Magistrate erred in law and fact in failing to consider at all the authorities cited by the appellant.

v. That the learned Magistrate erred in law in failing to list and make a finding on the elements of attempted defilement in facts of the case vis-a-vis the evidence adduced before court.

4. The Prosecution called 4 witnesses**.** Evidence was led that on the 23rd November 2016 at about 1.00pm while PW1(BA) the complainant was cutting vegetables, the appellant who is her grandfather's cousin, went to her and put her legs between his. PW1 testified that she tried to escape but the appellant forcefully pulled her back, grabbed her by her neck while he struggled to unzip his trousers. She stated that she managed to escape and as she fled, he grabbed her and tore her skirt's back pocket. The incident was later reported at Butere Police station and the appellant was arrested.

5. PW1 stated that the appellant was like her grandfather and that it was not the first time he had groped her. Her evidence was corroborated by Pw3 who testified that PW1 had on the date of the incident reported to him that the appellant, his cousin had attempted to defile her. He stated that PW1 looked scared and some buttons of her blouse were missing while her skirt was hanging.

6. Pw2, Cedrick **Wanyama**, a clinical officer at Butere county hospital testified that he examined PW1 on the 27th November 2016. He

found PW1's vagina to be normal and had no discharge or blood. He noted that there was no penile penetration and that he made the impression of attempted defilement based on PW1's history. He produced the treatment notes and P3 Form as exhibit 1 and 2 respectively.

7. PW4 **Corporal Salima Ingohi** testified that the report over the attempted defilement was made and she investigated the matter. She stated that PW1 who looked disturbed at the time the report was made had a blouse with two missing buttons and her skirt was torn. She produced copies of PW1's birth certificate, the blouse and skirt as Exhibits 1, 4 and 5 respectfully.

8. When placed on his defence the appellant made a sworn statement and called one witness. He denied the charges and testified that on the date and time of the alleged incident, he was having lunch with some visitors at [particulars withheld] where he is a jumia head. He said the lunch was held at one Morris Olula's home and he was there up to 3.00pm.He stated that he had a land dispute with PW1's grandfather and denied attempting to defile the minor.

9. DW 2 **Jacob Ochieng** confirmed that he was with the appellant at the said residence from 1.00pm to 3.00pm when they parted ways.

10. The appellant in his submissions challenged the evidence adduced by the Prosecution stating that there was nothing connecting him to the offence. He contended that the prosecution did not prove their case to the required standard and that PW1was a single witness and her evidence was not corroborated.

11. Learned counsel for the State Mr. Mwaura opposed the appeal saying there was sufficient evidence to support the conviction. That the complainant was a minor and she struggled with the appellant who wanted to defile her. She escaped with torn clothes. He submitted that the doctor (PW2) confirmed there was no penetration.

12. He argued that PW1 had torn jeans pocket missing blouse buttons. PW1's certificate confirmed she was below 18 years of age.

13. This is a first appeal and the duty of the first appellate court is to re-analyze and re-consider the evidence tendered before the trial court with a view to arriving at its own independent conclusions. See **Okeno VS Republic [1972] EA 32.**

In **Kiilu & Another VS. Republic [2005]1 KLR 174**, the Court of Appeal stated thus:

> ***"1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.***
>
> ***2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses."***

14. The same was reiterated in the case of **DavidNjugunaWairimu V – Republic [2010] eKLR** where the court of appeal stated:

> ***"The duty of the first appellate court is to analyze the re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellant court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."***

Analysis and determination

15. I have duly considered the evidence, grounds of appeal and eh submissions by both parties. The issue I find falling for determination is whether the case against the appellant was proved beyond reasonable doubt. In other words, were the ingredients of the offence of attempted defilement proved?

Section 9(1) and 9(2) of the Sexual offence Act provides that:-

> ***"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"***

16. There are several decided cases on this subject the court in setting. In the case of **Benson Musumbi V Republic [2019]eKLR** out the ingredients of the offence held that:

> ***"21. 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 assailant, and then prove steps taken by the assailant to execute the defilement which did not succeed. Attempted defilement is as if it were a failed defilement, because there was no penetration."***

17. The same was reiterated in **John Gatheru WanyoikeV Republic [2019] eKLR** where the court held that:

> ***"It is clear that the elements of the offence of attempted defilement are similar to those of defilement save that there was no penetration. The prosecution must prove that the child was a minor, that there was an act to cause penetration, which was not successful, and that there was positive identification of the accused defiler."***

18. Thus In determining this Appeal, the court has to establish the following

> ***a) Whether the age of the complainant was proved.***
>
> ***b) Whether there was an act to cause penetration, which was not successful.***
>
> ***c) Whether the appellant was positivity identified by the minor as her assailant.***

Issue no. (a)Whether the age of the complainant was proved.

19. It is the prosecution's case that the PW1 was aged 16 years at the time of the incident. PW4 produced a copy of PW1's birth certificate that indicated that she was born on 3rd March 2000. She was therefore aged 16 years and 8 months at the time of incident.

In **Charles Nega V Republic Criminal Appeal No. 38 of 2015 [2016] eKLR** Mrima J stated that:-

> ***"I however wish to further state that from the wording of Section 9 of the Sexual Offences Act (and unlike in the offences of defilement and rape where the exact age of the victim must be proved bearing the weight it has in sentencing), in an attempted defilement charge the prosecution only has to tender evidence that the victim was below the age of eighteen years and not necessarily the specific age. Needless to say if the specific age is availed to a trial court it equally has a bearing in sentencing upon conviction."***

20. In **Daniel OmbasaOmwoyo v Republic [2016] eKLR**W. OkwanyJobserved that

> ***"On the issue of age of Complainant, my reading of Section 9(1) and (2) of the Sexual Offences Act show that age is not a factor for an offence under this Section other than the requirement that the victim of the offence be a child. To my mind, the only requirement of age is that the victim be under 18 years this being the definition of a child under the Kenyan Law. "***

My finding is that the age of PW1 was proved and she was a minor.

Issue no (b) **Whether there was an act to cause penetration, which was not successful.**

21. As stated in the case of **Benson Musumbi v Republic [2019]**

> ***"In order to prove an attempt to commit an offence, the prosecution must prove the mens rea which is the intention and the actus reus which constitute the overt act which is geared to the execution of the intention. The actus reus must be more than mere preparation to commit the act as there is a difference between mere preparation to commit an offence and attempting to commit an offence."***

22. This was reiterated in **Daniel Simiyu Wanyonyi v Republic[2019] eKLR** where Riechi J held that

> ***"This Court when dealing with an appeal from a conviction of attempted defilement In Bungoma Hc. Cri. Appeal No. 176 of 2016 stated; when a court of law is faced with any charge on an attempted offence, care has to be taken to ensure that the attempt, as opposed to mere acts of preparation, is proved since however strong the evidence may be if it only relates to actions in preparation to commit a certain crime, that cannot justify a conviction on an attempted charge. In the circumstance or clarity purposes, the evidence must be led which goes beyond the preparatory stages and right to the doorstep of possible commission of the offence. It ought to be demonstrated that the accused had committed the last act to the actual commission of the specific offence attempted. Likewise the intention to commit the crime must also be proved.***

23. Section 388 of the Penal Code defines " **attempt"** as:-

> ***388(1)***
>
> ***(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 fulfill his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.***
>
> ***(2) It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfillment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.***

(3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence.

The above section brings out the two main ingredients of an attempt offence. There is the intention (mens rea) and the execution of the intention (actus reus). The prosecution must among others prove the steps taken by the accused to execute the defilement which did not succeed.

24. In **David Aketch Ochieng [2015] eKLR** Makau J observed as follows on attempted defilement:

> ***"The appellant was charged and convicted with an attempted defilement contrary to Section 9 (1) of Sexual Offences Act No. 3 of 2006. What is attempted defilement? It can safely be stated to be the unsuccessful defilement. For a successful prosecution of an offence of attempted defilement, the prosecution must adduce sufficient evidence to the required standard to prove an attempted penetration. This may in my view include bruises or lacerations from complainant's vagina and/or bruises or lacerations of culprits genital organ and finding male discharge such as semen or spermatozoa outside the complainant's vagina or innerwear without there being penetration. There was absence of penetration or evidence linking the culprit with the offence of attempted defilement."***

25. In **Daniel Ombasa Omwoyo (supra**) the court observed as follows:-

> ***"In the instant case, can the encounter between the appellant and the complainant be defined as attempted defilement? I do not think so. I say so because from the evidence adduced by the complainant stated that the appellant merely tried to remove her clothes, she screamed and members of the public came to her rescue. The mere action of attempting to remove clothes by the appellant in my humble view does not qualify to be attempted defilement and neither does the and neither does the same even qualify to be deemed as indecent assault as the complainant, who was the only eye witness in this case did not state in her testimony that the complainant touched her breasts or buttocks as he attempted to remove her clothes. The complainant was categorical that other than attempting to remove her clothes, the appellant did not do anything else to her. She did not say how far the attempt to remove the clothes went."***

Same was adopted by Majanja J in **John Mokua Atandi v Republic [2018] eKLR.**

26. In the instant case, PW1 testified that the appellant grabbed her blouse and pulled her back by her neck. She further stated that her skirt was torn when he attempted to grab her. At no point in her evidence does she state that the appellant touched her private parts. It is also clear that the clothes were torn courtesy of the struggle between the appellant and PW1 who wanted to escape. PW1 also stated that the Appellant was struggling to unzip his trousers but she does not state whether he completed the unzipping or not.

27. The Medical notes produced by PW2 also show that PW1 was not in any way physically injured and that the hymen was intact. At no point in her testimony did PW1 state that she saw the appellant's penis. From the evidence it is clear that the appellant was preparing to commit the act but had not attempted to do so. Considering this evidence and the case law cited above I find that there was no attempted penetration.

28. Having found that there was no attempted penetration I find no need of determining issue no. c which would be an exercise in futility. The end result is that the prosecution failed to prove the ingredient of attempted defilement. I find that the conviction is unsafe. I therefore allow the appeal, quash the conviction and set aside the sentence. The appellant to be released forthwith unless lawfully held under a lawful warrant.

Orders accordingly

Delivered signed and dated this 13th day of September, 2019 in open court at Kakamega.

H.I. ONG'UDI

JUDGE