



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CRIMINAL APPEAL NO. 135 OF 2017

DKC.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the Principal Magistrate's Court at Kabarnet Cr. Case no. 303 of 2015 delivered on the 9th day of October, 2017 by Hon. S.O. Temu, PM]

JUDGMENT

1. The appellant was on 9/10/2015 convicted of attempted defilement contrary to section 9 (1) as read with 9 (2) of the Sexual Offences Act and sentenced to imprisonment for 10 years, and being aggrieved by the decision of the trial Court has appealed to this Court against the both conviction and sentence.

2. The appellant filed amended grounds of appeal as follows:

“AMENDED GROUNDS OF APPEAL

1. *No proper evidence amounting to attempted defilement.*
2. *Identification of accused at scene of crime was not positive.*
3. *Charges were fatally defective beyond salvage.*
4. *Evidence of alleged victim was inconsistent and not corroborated.*
5. *Age of alleged victim was not established by credible evidence.*
6. *Defence tendered was not considered as required by the law.*
7. *Right of submissions was not granted as required under section 210 of CPC.*
8. *The case herein was grudge-driven allegations to implicate the appellant to secure illegal conviction.*
9. *Shambolic investigation, no scene of crime identified and visited to establish claims or truth of the matter.*
10. *Rights of section 211 CPC were not properly explained especially the right to call defence witness alleged section 2011 is nullify in the provision of the CPC. See page 19.”*

3. The appellant's written submission were as follows:

“WRITTEN SUBMISSIONS ON AMENDED GROUNDS

GROUND ONE: NO PROPER EVIDENCE AMOUNTING TO DEFILEMENT

My lord the evidence on record is far-below the threshold of proof. The complainant on page 7 line 4 – 9 “....accused had come

from behind while armed with a panga. He informed me that if I did not give him was to kill me. He had held me and I screamed. The accused hit me and pushed me to the ground and he held my neck while straggling with me. The accused's uncle had come and he had hit him and he got hold of him....”

The trial Court failed to elevate the above evidence and find nothing did the complainant disclosed to establish that there was something that the alleged perpetrator wanted. Even if the trial believed the allegations of the ordeal it was wrong to rule out the incident in favour of attempted defilement. My lord on page 8 line 1, 3, 10 and 14

“I don't know what the accused wanted from me....”

“...He did not touch my clothes....”

“...You had hit my mother with a fist....”

“...I did not have touch on the date of the incident....”

My lord mark the words “I don't know what the accused wanted” “He did not touch my clothes” The Prosecution case is not convicting. Pw2 also says on page 10 line 9.... The complainant stated that she was struggled by unknown person.

I contend that if the trial was convinced with the preferable charges could have been 250, 251, 253 of chapter xxiv – Assaults of the Penal Code and not attempted defilement.

GROUND TWO: IDENTIFICATION OF ACCUSED AT SCENE WAS NOT PROVED ON THE BASIS OF BEYOND REASONABLE DOUBTS

My lord the complainant had said it was at night when the incident took place. She said”...I had gone for milk at 7 pm. I did not have any torch...” (page 8 line 8)

Identification at night is devoid of merits and cannot sustain conviction. The identifying witness did not state any light at the scene to help them to identify the accused as the perpetrator. The burden of proving the identification was not discharged at all. At what time exactly after being sent at 7?

GROUND THREE: VARIANCE OR DEFECTIVE CHARGES

My lord I was accused under Sexual Offences Act contrary to section 9 (1) as read with 9(2) in which charges the Prosecution did not prove on the evidence tendered before Court. Pw1 claimed she was assaulted and was told to give out but did not state what she was required to give out. Its Pw3 who says at page 11 line 9 – 11, “...I had then met the accused on the child and he was saying that you either give me or I kill you. I thought the accused intended to defile the child...”

Line 14 – 15 “...I had then kicked the accused and he stood and he started to struggle with me I had had over powered him...”

My lord from the sentiments no evidence of attempt to defile these were fights which amounted to mere assaults. There are also identification that the mother of the minor was also part of the fight. See page 8 line 10 “...you had hit my mother with a fist...”

This was assault under section 250 of the Penal Code, sentence one year.

GROUND FOUR: AGE OF ALLEGED MINOR WAS NOT PROVED

My lord the birth certificate brought, its indicated to have been made some months later after the incident that on 27-07-2015 whereas the dated of the alleged incident was on 12-03-2015 four month ahead. I contend that the production of the document was made in bad faith not in the interest of justice but to conform the charges and implicate the accused with charges of defilement.

My lord how come that the girl did not have a birth certificate and yet she is school going in STD 7 at [Particulars Withheld]Academy? My lord it has been a routine since promulgation of 2010 constitution that all pupils attending school be registered by use of birth certificate. How come that she had none? The birth certificate brought as a prosecution exhibit should be declared incompetent thus the charges of attempted defilement dropped. Production of it was an afterthought. No age assessment done.

GROUND FIVE: EVIDENCE OF ALLEGED ASSAULT WAS NOT CORROBORATED

My lord the complainant only states to have been strangled she fell short to state where exact she was hit. No consistency on the alleged injuries. The P3 form brought is completely non-merituous its not complete. It is not disclosing any evidence which can bring inference of attempted defilement.”

4. At the hearing of the appeal, the appellant relied on his written submissions and the DPP made oral submissions as follows:

“I have written submission. The Investigating Officer did not investigate the matter. He relied on the prosecution witnesses. The Birth Certificate was taken out after the alleged defilement in March 2015. The Investigating Officer did not go to scene.

DPP

Appeal is opposed. Appellant was convicted of attempted defilement contrary to section 9 (1) (2) of Sexual Offences Act and sentenced to serve 10 years on 9/10/2015.

Pw1 testified that on the material date she had gone to the appellants grandmother’s house to take milk when the appellant came from behind while armed with panga.

At page 11 line 6 the complainant testified that “if I did not give him he would kill me.” Appellant then pushed the complainant to the ground and hold her neck while strangling her. He only left her when Pw3 appeared.

Pw1 was 15 years at the time of the offence. This was proved by a Birth Certificate showing she was born 8/2/2001.

The complainant sustained injuries and this was corroborated by evidence of Pw2, the Clinical Officer who examined her.

He testified that the complainant’s Right eye was reddish and had bruises on the Rib and it side of the neck.

Pw3 testified that the complainant is a distant relative when the appellant is his nephew. He testified that on the material day he heard a child screaming and ran to where the screams were coming from. He found the appellant red-handed on the ground and on the child and he was saying that “you either give me or I kill you.” Page 15 line 9 – 10.

Pw3 at line 13 page 15 stated that the appellant had refused to let go to the complainant and it was not told he kicked the complainant that the appellant stood up and started struggling with Pw3.

Pw3 was a relative to the complainant and appellant and he caught the appellant in the act and he had no reason to frame the appellant.

Appellant is sentenced to 10 years which is the minimum sentence under section 9 (2) of Sexual Offence Act.

Appeal should be dismissed.”

5. The evidence led by the prosecution’s main witnesses, the complainant Pw1, the appellant’s uncle Pw3 was as follows:

PW1

My name is S.K. for the complainants

I am resident of Kaptere Kabartonjo.

I am pupil at [Particulars Withheld] academy at Kabartonjo in class seven.

I was informed that I am 14 years old.

I know DKC. He stays near our home.

On 12/3/15 I had gone for milk at DK’s grandmother and when I was going back the accused had come from behind while armed with a panga.

He informed me that if I did not give him was to kill me.

He had held me and I screamed. The accused had hit me and pushed me to the ground and he held my neck while strangling me.

The accused’s uncle had come and he had hit him and he got hold of him.

The accused stated that he was to kill me so that people could know that he was bad. I had then gone home.

The accused’s uncle was the one who rescued me.

I had gone home and I had met my father on the road and he asked me what was wrong and informed him as to what had happened and we went to the police station and I recorded my statements.

I was issued with P3 which was filled by a doctor.

I don't know what the accused wanted from me. I had no differences with the accused.

He did not touch my clothes.

S.O. TEMU, PM

CROSS EXAMINATION BY ACCUSED

There was nothing that took place between me and you at the hotel.

It is my mother who operates the hotel.

I had gone for mild at 7 pm. I did not have any torch.

I have never differed with you.

You had hit my mother with a fist.

I am telling the truth and nobody asked me to come and say anything in Court.

I was never standing with KC in the date of the incident.

I did not have any touch on the date of the incident.

Prosecutor – No re-examination.

PW3

My name is CK.

I am a resident of Kabarnet and I have a hotel at Kabartonjo.

I work at [Particulars Withheld] District Hospital.

I know SK.

She is distant relative.

I know the accused herein he is son to my late brother.

On 12/3/15 I was at Kaptere Centre when I heard a child screaming from our land.

I had ran to where the screams were from.

On the way I had met accused's mother as I passed their home.

I had then met the accused and the child and he was saying that you either give me or I kill you.

I thought the accused intended to defile the child.

I had asked them what they were doing.

The accused had stuck on the complainant.

I had then kicked the accused and he stood up and he started to struggle with me but I had over powered him.

The accused had a panga then.

I took the accused to his home and I informed his mother.

The accused had asked for forgiveness and he started to fight.

His brother had come and I had left and I went home.

On the following day the child's father came and asked me to go to the police station and record my statements.

I had recorded my statements at the police station.

The child was taken to hospital by his father.

S.O. TEMU, PM

CROSS EXAMINATION BY ACCUSED

The centre is about 150 – 200 metres to where I had found you.

There were many people at the centre.

The complainant had screamed for help.

You had a panga and your brother had taken it away.

You will lie if you say that you did not have a panga.

The complainant had seen the panga.

The panga belongs to our mother.

I don't agree with you. I was paying for your school fees and we had received money from CDF but you had left school and went away.

S.O. TEMU, PM

PROSECUTION – No Re-Examination.”

6. When put on his defence, the appellant gave an unsworn statement set out in full as follows:

“DW1

My name is DC.

I am resident of Kaptere.

I am a masonary. The charges are not true.

On the date of incident I was at Kaptere after disappearing for about one month my grandmother had given me 20 kgs of maize to use as food.

I had taken the said maize to the complainant's mother at the hotel had met four people on the road. Two ladies and two men. The ladies were J and S.

The men were for KPLC.

I had asked the four what they were doing there and the men had informed me to go away as I had lost my network.

I had slapped S and one KPLC man and the men ran away.

I had asked S and J to go home and I went to the forest where I was given work to load a lorry.

I had done the work to 5 pm and we were paid Ksh.400/=.

I had gone to S's hotel.

S's mother had informed me that I had given her stolen maize and that I had chased the child from the forest so she did not take firewood home.

S's mother had poured my tea and I had hit her with my hand.

S was sitting there.

S had held my legs and I had fallen down and I had pushed her away.

CK had come into the hotel and he had stopped me and he asked for ropes.

I had managed to escape without any shirt.

At about 7 pm when I was going to meet my grandmother and tell her about the maize, I had seen two people standing at the road.

That was S and C.

When I reached there Chepoywa had hit me on the head.

I was annoyed and we had fought.

I had put C to the ground and went to call my wife I who was staying with her parents.

We had then boarded boda boda and we went to I's home.

I had asked [I]to stay at her home as I went to my rented house.

I continued with my work to 30/4/15 when my aunt came and stated that I had stolen her mother's maize.

I had informed her to leave me completely and she went away.

When I was asleep that night in my rented house. People came to call me and I had opened the door.

I had found C and three boys.

The three had attacked me but they did not tell me that I had raped the minor but because I had stolen the maize.

They had taken me to the police station and I was brought to Court where the charges were read to me.

I was shocked when I heard the charges.

The witnesses (PW2) stated that he was 200 metres when he heard the cry.

It is in doubt how he happened to hear the cry alone.

Other people should have heard.

S stated that I had threatened her.

It is not true that C had found me on the ground with PW1.

The complainant's father stated that she had met two women who had injured him that his child had been defiled but he did not indicate that on his statements.

C stated that I had a panga and that it was taken by someone else. That person who took the panga did not testify nor was the panga availed in Court.

PW2 had made me relocate from the area.

PW2 is my uncle. He was given a place to build his house and when my father died he took control of the family.

My mother has left for her home.

That is all I wish to say."

Determination

7. Having considered the evidence. I do not consider the acts of the accused hitting the complainant and pushing her to the ground and holding her by the neck while strangling her to be sufficiently proximate to the offence of defilement as to constitute attempt within the

meaning of the section 388 (1) of the Penal Code as follows:

*“when a person intending to commit an offence, begins to put his intention into execution by means adapted to its fulfillment and **manifest his intention by some overt act**, but does not fulfill his intention to such an extent as to commit the offence, he is decreed to attempt to commit the offence”.*

See also *John Mayonge Walunya v. R KBT HCCRA NO. 108 OF 2017 and Kennedy Temunge v. R, KBT HCCRA NO. 178 OF 2017.*

8. The complainant herself confirmed in her evidence in chief that the appellant had not touched her clothes. There was also no evidence that he had removed his clothes in readiness to defile the complainant. Other than hitting and strangling the complainant as alleged by the Pw1 and “*saying that you either give me or I kill you*”, by which Pw3 “*thought the accused intended to defile the child*”, there is no evidence to distinguish the case from one of simple assault to one of attempted defilement.

9. There was, in addition, evidence from the complainant herself of some incident at her mother’s hotel where the appellant “*had hit my mother with a fist*”.

10. Moreover, although the incident is alleged to have taken place, according to the appellant’s uncle (Pw3) about 150 metres from the Centre where there were many people and although the said witness testified that the appellant had a panga which curiously belonged to the witness’s (Pw3) mother, and of which the appellant was disarmed by his brother, there was no independent evidence from any of the many people at the Centre who could have heard her scream in the same way that her father (Pw4) who was at same Centre had heard the screams and went “*to see what was happening at home and met with [the complainant]crying*”, and the appellant’s brother who had disarmed him of the panga did not testify.

Age of the complainant

11. Pw1 testified that she was a class 7 pupil and had been informed that she was 14 years old. She was testifying on 10/8/15 when according to her Birth Certificate to which she did not refer but was produced by the Investigating Officer Pw5, she was 16 years having been born on 8/2/2001. It would appear that the class 7 pupil who had to be informed of her age at 14years only to be contradicted by a Certificate of Birth obtained by the Investigating Officer is not a witness of truth.

12. Pw6, the Clinical Officer attached at Kabarnet District Hospital who saw the complainant the day following the alleged assault found “*injuries to the neck and eye which was reddish*”. The injuries were categorized as soft tissue and classified as “*bodily harm*” on the P3 medical examination form.

13. In his defence, the accused gave unsworn statement that he had slapped the complainant upon finding her with another lady with two men who had insulted him and that a fight had ensued with the complainant’s mother who had accused him of giving her “*stolen maize and chased her child from the forest so she did not take firewood home. S’s mother had poured my tea and I had hit her with my hand....*”

14. The defence statement appears to agree with the evidence of Pw1 on cross-examination that there had been an incident at her mother’s hotel where the appellant t had slapped the complainant’s mother. The appellant also explained the role played by Pw3 in the incident.

15. I find the accused’s statement although unsworn and, therefore, not technically evidence (see *May v. R* (1981) KLR 129), raises doubt as to the evidence of the prosecution witness Pw1 and Pw3. There appears clearly to have been a scuffle which led to the injuries found on the complainant by Clinical Officer Pw2 and classified as harm. There is also admitted by Pw1 that her mother had been slapped by the appellant at her hotel lending credence to the version of events related by the appellant. There is a query as to why the appellant was not charged with assault of the complainant’s mother. There is also lingering a question why only the family members who had participated in the incident which allegedly occurred near a public Centre with many people testified and why the appellant’s brother who had allegedly taken a panga from him did not testify nor the said panga produced.

16. I do not find that the evidence before the Court is safe to convict on even on the lesser charge of assault causing actual bodily harm contrary to section 251 of the Penal Code, which the appellant may be convicted although not charged with, in accordance with section 179 (2) of the Criminal Procedure Code.

17. As regards the charge of attempted defilement there is simply no covert act for purposes of Section 388 (1) CPC, and the evidence is, in any event, shaky and shaken by the unsworn statement of the defence.

18. The appellant has been custody for over 4 years since 9/10/2015. He should not have convicted on the unsafe evidence before the trial Court. With respect, the trial Court fell into error in convicting the appellant and sentencing him to imprisonment for 10 years for the offence of attempted defilement, which conviction must be quashed and sentence set aside, respectively.

Orders

19. Accordingly, for the reasons set out above, the appellant is acquitted of the offence of attempted defilement contrary to section 9 (1) as read with 9 (2) of the Sexual Offences Act.

20. There shall be an order directing that the appellant be released from custody forthwith unless he is otherwise lawfully held.

Order accordingly.

DATED AND DELIVERED THIS 23RD DAY OF OCTOBER 2019

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent.