REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 109 OF 2016

BETWEEN

JOHNSTONE MUGAISI AMBUSO .....APPELLANT

AND

REPUBLIC .....RESPONDENT

(Being an appeal from original conviction and sentence by Hon. B. Ochieng, CM dated 2.11.2016 in Kakamega CMC Cr Case No. 63 of 2016(SO)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGEMENT

Introduction

1. The appellant herein, Johnstone Mugaisi Ambuso 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 27th day of June 2016 at Kakamega Central District within Kakamega County intentionally attempted to insert his penis into the vagina of CK, a child aged 11 years.

2. The Trial Magistrate convicted the appellant of the offence of ***attempted defilement contrary to Section 9(1) as read with Section 9(2) of the Sexual Offences Act*** and sentenced him to (10) Ten years imprisonment.

The Appeal

3. Being dissatisfied with the conviction and sentence, the appellant lodged an appeal vide his Petition of appeal. Filed in court on 16.11.2015. The appellant raised nine grounds of appeal which are as follows;

1. That the Learned trial Magistrate erred in law in unlawfully accepting medical evidence produced by an incompetent person as proof of attempted defilement.

2. That the learned trial Magistrate grossly erred in convicting the appellant when the prosecution had failed to prove it's case against him beyond reasonable doubt.

3. That the Learned trial Magistrate erred in law and in fact in failing to find that the evidence on record was not corroborated as he found it.

4. That the Learned Trial Magistrate erred in law and in fact in believing the complainant's testimony as a wholesale truth despite the glaring contradictions.

5. That the Learned trial Magistrate erred in law and in fact in convicting the appellant against the weight of the evidence on record.

6. That the Learned Trial magistrate erred in law and in fact in purporting to shift the burden of proof to the appellant contrary to the law.

7. That the learned Trial Magistrate erred in law in failing to find that the charge sheet was defective contrary to the weight of the evidence on record.

8. That the decision of the trial court was made without proper justification and the same was totally based on anticipation not warranted by evidence on record hence unsafe to make such a finding as it did which was contrary to the law.

9. That the learned Trial Magistrate erred in law and in fact in failing to discharge his statutory duty in evaluating the evidence on record and arriving at a wrong decision.

Duty of this Court

4. 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.***

5. 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."***

6. The same principle was reiterated in the case of ***David Njuguna Wairimu V – Republic [2010] eKLR*** where the Court of Appeal stated:

> ***"The duty of the first appellate court is to analyze and 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 appellate 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."***

The Prosecution Case

7. The Prosecution called 5 witnesses. It is the prosecution's case that on the 27th June 2016 while the complainant, a class 3 pupil and aged 10 years at the time was playing outside, the appellant who was the family's farmhand took hold of her hand and took her to his quarters where he pulled down her pair of trousers to her knees and promised to give her Ksh.15 and sweets. Evidence was led that the complainant started crying loudly which cries attracted her mother who rushed and found the complainant half naked with her trousers lowered to her knees and crying. The appellant was standing there rooted on the spot but later fled. He was later arrested by villagers and taken to Kakamega Police Station.

8. Number 86381 Corporal Phoebe Oluoch, PW4, testified that the report over the attempted defilement was made to her and that she investigated the matter. She produced in evidence copies of the complainant's birth certificate, P3 form and Post Rape care form as Exhibits 1, 2 and 3 respectfully.

Defence Case

9. By a ruling delivered on the 30th August 2016 the appellant was found to have a case to answer and accordingly put on his defence. The appellant denied the charges and testified that he was a fish monger and that he did not attempt to defile the complainant

10. In his submissions, the appellant submitted that the Prosecution's case was full of contradictions especially with regard to the age of the complainant stating the that the birth certificate showed that the complainant was aged 9 years 9 months at the time of the incident yet evidence was led that she was 11 years old.

11. The appellant further contended that the prosecution did not call three villagers who allegedly arrested him to testify on its behalf. He stated that the prosecution evidence was doubtful and not credible in the absence of the three crucial witnesses who were not called to testify.

12. The state on its part opposed the Appeal stating that the conviction was proper and that the evidence they adduced was sufficient to prove the offence of attempted defilement to the required standards.

Issues, Analysis and Determination.

13. The issue for determination is whether the case against the appellant was proved beyond reasonable doubt. In other words, whether the ingredients of the offence of attempted defilement were proved.

14. The appellant herein was charged with the offence of Attempted defilement contrary to ***section 9(1) as read with section 9(2) of the Sexual Offences Act.*** The section 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"***

15. In the case of ***Benson Musumbi V Republic [2019]eKLR*** in setting out the ingredients of the offence the court 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. Attempt to commit an act is defined as***
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> ***388 (1) where a person intending o commit an offence begins to put his intentions into execution by means adopted to its fulfillment, and manifests his intention by some avert 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 further prosecution of his intention"***
>
> ***22. In the orders 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. This was observed in the case of see Abdi Ali Bere v Republic (2015) eKLR."***

16. The above propositions were also reiterated in ***John Gatheru Wanyoike V Republic [2019] eKLR*** where 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."***

17. Thus in determining this Appeal, this court has to establish

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 accused was positivity identified by the minor as her assailant.

18. Also see ***Geoffrey Shivonji v Republic [2018] eKLR.***

a) <u>Whether the age of the complainant was proved.</u>

19. It is the prosecution case that the complainant was aged 11 at the time of the incident. The prosecution produced in evidence a copy of the complainant's birth certificate that indicated that the minor was aged 9 years 9 months at the time of the incident.

20. It is the appellant's contention that the evidence of the prosecution with regard to the age of the complainant was contradictory and thus insufficient.

21. According to the birth certificate produced in evidence as Pexhibit 1 the complainant was born on the 29th September 2006.

22. As stated above, it is important for the prosecution to prove the age of the complainant.

23. 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."***

Also see ***Douglas Nyambane v Republic [2018] eKLR.***

24. S***ection 2 of the Children's Act*** defines a child as follows:-

> ***"child" means any human being under the age of eighteen years;***

25. In ***Daniel Ombasa Omwoyo V Republic [2016] eKLR*** W. Okwany J observed that:-

> ***"On the issue of age of complainant, my reading of Section 9(1) and (2) of the Sexual Offences Act shows 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. "***

26. In the instant case, the Prosecution produced in evidence the birth certificate which was sufficient proof that the complainant was aged below the age of 18 years and that is sufficient to prove the charge.

27. With regard to the alleged contradictions as to the age, the law does not require the prosecution to give a specific age to prove the offence. So long as the age given falls below 18 years the same is sufficient. The prosecution did not have to give the exact age of the complainant by year, month and day.

b)Whether there was an act to cause penetration, which was not successful

28. As stated in the case of ***Benson Musumbi v Republic [above]***

> ***"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 constitutes 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."***

29. The above position was reiterated in ***Daniel Simiyu Wanyonyi v Republic[2019] eKLR*** where the court held, *inter alia*, that:-

> ***"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."***

30. In the ***Daniel Ombasa Omwoyo v Republic case [above]*** the court was of the view that:-

> ***"The mere action of attempting to remove clothes by the appellan in my humble view does not qualify to be attempted defilement 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***

31. In the instant case, the complainant stated that while she was outside at their home, the appellant who was returning from the shamba held her hand and took her to the kitchen which the appellant also used as his bedroom. The appellant promised to give the complainant cash Kshs.15/- and some sweets before pulling down her blue trouser to her knees. As he did so, the complainant sent out a loud cry which drew the attention of her mother HB, PW2, who rushed to the kitchen and found the appellant and the complainant alone together with the complainant's trouser pulled down to her knees. The complainant told her mother that it was the appellant who had pulled down her trouser.

32. From the above evidence, there is no indication that the appellant was found just about to get into the act for example by having removed the complainant's underpant and put her on the bedding or was fondling her in any way. According to PW2, she found the appellant standing fixedly near the complainant. All that the evidence reveals is that the appellant had just taken the first step in preparing to commit the act of defilement when the complainant's screams shocked him to stand still and brought PW2 to her rescue. The appellant is not said to have touched either the complainant's breasts or vagina or anus, nor was it indicated that he had exposed his penis to her, let alone unzipping his trousers. In the circumstances, I have come to the conclusion that there was no act on the part of the appellant which would have caused penetration at that point.

(c) **Whether the Appellant was positively identified as the assailant**

33. With regard to the identity of the appellant, the evidence adduced is clear that the appellant was working for the complainant's parents as a farmhand and thus he was well known to the complainant. The incident also took place in broad day light, thereby creating favourable conditions for identification. The complainant did not hesitate in telling PW2 that it was the appellant who had pulled down her trousers.

34. The appellant contended that the prosecution did not call three villagers who arrested him. It should however, be noted that these villagers did not witness the alleged attempted defilement.

35. With regard to the Prosecution's alleged failure to call crucial witnesses, in ***Benjamin Mbugua Gitau V Republic [2011] eKLR*** the Court of Appeal held that:-

"This court has stated severally that there is no particular number of witnesses who are required for proof of any fact unless the law so requires – see section 143 of the Evidence Act Cap 80 laws of Kenya. In the circumstances therefore we find that no prejudice was caused to the appellant or to the prosecution by failure to call the two boys"

36. In ***Sahali Omar V Republic [2017] eKLR*** the Court of Appeal stated that:-

"Section 143 of Evidence Act provides that:-

"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."

The principle used to determine the consequences of failure to call witnesses was succinctly stated in Bukenya & Others v Uganda [1972] EA 549; where the Court held that:-

"(i) The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

(ii) The Court has the right and duty to call witnesses whose evidence appears essential to the just decision of the case.

(iii) Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution."

The prosecution reserves the right to decide which witness to call. Should it fail to call witnesses otherwise crucial to the case, then the court has the mandate to summon those witnesses. But should the said witnesses fail to testify and the hitherto adduced evidence turn out to be insufficient, only then shall the court draw an adverse inference against the prosecution. This is because the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt (see. Keter v Republic [2007] 1 EA 135).In this case, the testimony and evidence adduced by the five prosecution witnesses was sufficient to prove that the complainants had been defiled by the appellant. As such, the situation hardly called for the drawing of an adverse inference with regard to the 'missing' witnesses."

Conclusion

37. The upshot of the above analysis is that though the appellant was positively identified by PW1 and PW2, the prosecution evidence fell short of proving the charge against him beyond reasonable doubt. I accordingly allow the appeal and unless there is any other lawful reason for detaining the appellant in custody, he shall be released therefrom forthwith.

38. It is so ordered.

Judgment written and signed at Kapenguria.

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned at Kakamega in open court on this 18th day of October, 2019

WILLIAM M. MUSYOKA

JUDGE

In the Presence of:-

Appellant present in person

No appearance for Respondent

Eric - Court Assistant