REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 53 OF 2018

GUNGA NDORO SHARIF.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the Original Conviction and Sentence in Criminal Case No. 381 of 2015 of the

Principal Magistrate's Court at Kaloleni – R.K. Ondieki, PM)

Coram: Hon. Justice R. Nyakundi

Ms. Sombo for DPP

Appellant present in person

JUDGEMENT

The appellant **Gunga Ndoro** was indicted with the offence of attempted defilement contrary to Section 9(1) as read with Section 9(2) of the Sexual Offences Act No. 3 of 2006.

In the alternative was a charge of indecent act with a child contrary to Section 11(1) of the Penal Code.

The particulars of the charges were that on 26th November, 2015 at Kaloleni Location the appellant attempted to unlawfully and intentionally did commit an act which would cause a male genital organ namely penis to penetrate a female genital organ namely vagina of **AKH** a child stated to be 8 years.

The prosecution set down the matter for trial and at the end of it all the appellant was convicted and sentenced to 10 years imprisonment.

Being aggrieved with both conviction and sentence the appellant now appeals against the entire Judgment of the trial court.

Evidence at the trial

The prosecution case was based on the testimony of three witnesses. The evidence of PW1 – ARH testified that on the material day at about 11.00 a.m. she was in contact with the appellant when they entered into her mother's house PW2. Thereafter the appellant started touching her buttocks and breasts. At the same he pulled her towards the bedroom. She further subsequently testified that before long PW2 came in knocking the door of the house. The appellant who was still in the house informed PW2 that he had gone to the house to pick a CD device. According to PW1 the incident was taken over by her mother PW2 who in turn reported it to the police station as confirmed by **PW3 – Judy Nyambura**. The appellant did not seem to have cross-examined the complainant (PW1).

The second witness as identified above was PW2 the complainant's mother. In her testimony she narrated that on return to her house she knocked at the door which was opened by (PW1). On gaining entry he identified the appellant in company of PW1 attempting to tighten the belt of his trouser. On inquiry PW2 informed the court that the appellant just walked away from the scene.

According to **PW3 P.C. Judy Nyambura** on receipt of the report, investigations commenced which revealed that an offence of attempted defilement had been committed by the appellant. She produced a P3, birth certificate and treatment notes as exhibits in support of the prosecution case.

The appellant case

At the close of the prosecution case the appellant was placed on his defence. He denied the offence of attempted defilement save that his presence in the house was to look for a CD device. As such in the process PW2 came and found him in the house.

The trial Magistrate evaluated the evidence and made the findings that an offence of attempted defilement had been committed by the appellant. He convicted the appellant, sentenced him to 10 years imprisonment. The appellant's appeal is based on the following grounds: -

> ***1) That the learned magistrate erred in law and fact by convicting the appellant without considering that the charge sheet was falsely defective.***
>
> ***2) That the learned trial magistrate erred in law and fact by convicting the appellant without a proper voire dire examination being conducted.***
>
> ***3) That the learned trial magistrate erred in law and fact by convicting the appellant without considering invariances and contradictions in the evidence adduced in court.***
>
> ***4) That the learned trial magistrate erred in law and fact by convicting and sentencing the appellant on an offence not proved beyond reasonable doubt that the defence was never considered to give him a benefit of doubt.***

In support of the grounds was a brief written submission by the appellant.

On appeal, learned counsel for the State **Ms Sombo** submitted that the evidence of PW1–PW3 proved the elements of the offence beyond reasonable doubt. It was also submitted that the appellant had an opportunity to commit the offence when he was found in the house of PW2 with a loose trouser which he was tightening the belt. The prosecution counsel further submitted that there was no compelling reasons why the appellant had to lock the house and yet there was no inherent danger from outside.

Law analysis and Resolution

I have considered the charge sheet, evidence on record, the defence and final judgement of the trial court together with submissions of both parties. I hold in mind the enunciation of the principles in **Okeno v R 1972 EA – 32** and **Shantilah M. Ruwala v R 1975 EA 57.** It is against this background that the Judgment of the trial court will be tested and conclusion drawn by this court on points of law and facts to establish whether the prosecution discharged the burden of prove beyond reasonable doubt. The central issues in this appeal is whether the prosecution evidence before the trial court sufficiently proved the following elements:

> ***a) Attempted carnal knowledge of the victim.***
>
> ***b) The age of the female victim was under the age of 18 years.***
>
> ***c) The appellant was positively identified and placed at the scene.***

Section 9(1) of the Sexual Offences which creates the offence of attempted defilement reads as follows: -

> ***"A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed as attempted defilement."***

The ingredients of the offence contemplated by this provision which the prosecution must proof to sustain a conviction include: -

First any intentional and unlawful act of having carnal knowledge of a child aged under 18 years to attempt to penetrate her genital organs. Secondly, the child age must be proved to be below the age of eighteen years. Thirdly, the evidence must positively identify and or recognize the accused as the sexual assailant.

Section 388 of the CPC defines attempt in the following words: -

> ***"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 mental, but does not fulfill his intention to such an extreme as to convict the offence, he is deemed to commit the offence."***

The ingredients of the offence are considered complete where the mere acts establish the execution of the intention to commit a definitive offence of defilement under Section 8(1)(2) of the Sexual Offences Act.

On the issue of medical evidence this court is guided by the case of **Kassim Ali v R Cr. Appeal No. 84 of 2005** where the court stated: -

> ***"That absence of medical examination to support the fact of rape or defilement is not decisive as the fact of rape can be produced by the oral evidence of a victim of rape or by circumstantial evidence."***

From the record I find that through the medical evidence in respect to the examination of the complainant (PW1) was non-responsible. It did not weaken the probative evidence of PW1 on the offence of attempted defilement.

The case for the prosecution relied on the evidence of PW1 and PW2 to place the appellant on the scene. In this case there was nothing suspicious about the appellant being found in the house of PW2. After considering the testimony of PW1 the evidence points at the appellant criminal responsibility in respect of his intention to commit the offence of defilement from the following circumstantial evidence.

The appellant entered the house in company of the complainant with full knowledge that PW2 was not within the vicinity. It is clear from PW1 evidence that the appellant locked the door and moved to touch her buttocks and breasts. PW1 was also categorical that appellant was pulling her towards the bedroom when suddenly PW2 knocked the door bringing the completion of the act to a premature termination. The existence of an opportunity and appellant's mere act of indecent acts amount to corroboration of the offence in question.

I refer to the following cases a relevance of motive **Kabiru v R 2007** the court held that motive is a factor to be taken into account as part of circumstantial evidence on the culpability or otherwise of an accused person.

Libambula v R 2003 KLR the Court of appeal stated that motive is a factor to be considered in the chain of presumptive proof and where it is considered together with all other evidence on record. It would seem that from PW1 testimony that the evidence adduced point at the appellant motive to commit an act of defilement and execute it to its logical conclusion. The crucial evidence of PW2 corroborates that of PW1 that the appellant was in the process of tightening his belt when PW2 entered the house. With regard to the evidence of the appellant he was caught with pants down by PW2. He had no defence why his belt had been loosened requiring a fastener.

The prosecution further tendered evidence through PW1, PW2 and PW3 to prove that PW1 was a girl aged 8 years. Reliance was placed on the birth certificate of the complainant PW1.

There is therefore no dispute that the complainant was eight years old when the appellant attempted to have sexual carnal knowledge. The court will not lose sight to the provisions of Section 43 of the Sexual Offices Act on the intentional and unlawful acts to commit the offence of attempted defilement by the appellant. These ingredients were satisfied by the testimony of PW1 and PW2 which placed the appellant at the scene of the crime not as an innocent participant. What is required to proven by the prosecution was an intention to have sexual intercourse with the complainant which is clearly manifested in the evidence of PW1. The additional evidence of PW2 is in line with the principle in the case of **Katumba v Uganda 2002 EA 395** which confirmed material facts that the accused was in the house not for the best intention but to defile the complainant.

The appellant defence given in his sworn statement did not rebut the direct and circumstantial evidence of PW1, PW2 and PW3. The persistent acts of closing the door, caressing the breasts, buttocks, loosening the long trouser and moving the complainant towards the bedroom was an intention to have sexual intercourse. The prosecution witnesses PW1 and PW2 places the appellant in close proximity with the complainant and ample opportunity to commit the offence.

On the facts of this case the appellant was positively identified at the time of the commission of the offence. The principles of law in **Abdalla Bin Wendo v R 1953 20 EACA 106, Roria v R [1967] EA** where the complainant visually identified the appellant and has observed by PW2 there was no mistaken identity as to the person she found in company with the complainant. The quality of recognition evidence was therefore reliable and credible in the circumstances prevailing at a time. It was not evidence based on mere suspicion or falsehood. I have no reason to doubt the testimony and evidence of PW1 and PW2 as to the identity of the appellant.

In determining the overall evidence by the prosecution and the defence I am guided by the provisions in Section 119 of the Evidence Act which provides as follows:

> ***"The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."***

The so called doctrine of the ***res ipsa loquitur*** in civil cases applies Mutatis Mutandis in equal measure under criminal proceedings for the appellant to produce evidence showing the satisfaction of the court that what actually took place had nothing to do with the commission of attempted defilement.

It is useful in this case to bring forth what is considered a defective charge sheet. In Section 134 of the Criminal Procedure Code it states as follows:

> ***"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."***

Such a consideration on whether an accused person will suffer a justifiable of injustice due to a defective charge was addressed in the words of the Court of Appeal in **Yongo vs Republic [1983] KLR, 319** as follows:

> ***"In our opinion a charge is defective under Section 214 (1) of the Criminal Procedure Code where:***
>
> ***(a) It does not accord with the evidence in committal proceedings because of inaccuracies or deficiencies in the charge or because it charges offences in the charge not disclosed in such evidence or fails to charge an offence which the evidence in the committal proceedings discloses; or***

(b) It does not, for such reasons, accord with the evidence given at the trial; or

(c) It gives a misdescription of the alleged offence in its particulars."

From the facts of this appeal, there was no confusion as to the particulars of the offence as set out in the charge sheet dated 7 th December 2015. Notwithstanding, the complaint by the appellant the prosecution evidence recorded in the trial as a whole showed no signs of defects which were fatal to the fair trial of the appellant.

Under the circumstances of this case I am satisfied that the prosecutions discharged the burden of proof to establish the offence of attempted defilement beyond reasonable doubt. There is absolutely no evidence to render the charge sheet defective as submitted by the appellant. The strength of the prosecution case was not rebutted by the appellant defence.

Accordingly, the conviction and sentence by the trial court is hereby affirmed. The appeal on all grounds stand dismissed. The appellant be at liberty to apply.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 7TH DAY OF NOVEMBER 2019.

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R. NYAKUNDI

JUDGE