REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 106 OF 2016

BETWEEN

SLM ....APPELLANT

AND

REPUBLIC...RESPONDENT

(Being an appeal from original conviction and sentence by Hon. M. I. Shimenga, RM on 25th October, 2016 in Butere SPM Criminal Case (SO) no. 425A of 2015)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

Introduction

1. The appellant herein, Saida Lutta Mwande was charged with the offence of ***attempted incest contrary to Section 20 (2) of the Sexual Offences Act,*** particulars being that on the 7th day of August 2015 at Butere sub-county within Kakamega County he intentionally attempted to cause his penis to penetrate the vagina of EO, a child aged 10 years and also his daughter.

2. The Trial Magistrate convicted the Appellant of the offence of a***ttempted incest contrary to Section 20 (2) of the Sexual Offences Act*** and sentenced him to 10 years imprisonment.

The Appeal

3. Being dissatisfied with the conviction and sentence to 10 years imprisonment, the Appellant lodged this appeal. In his petition of appeal, the appellant raised eight grounds of appeal which are as follows:

> **1. That he did not plead guilty to the appended charges.**
>
> **2. That the learned Trial Magistrate grossly erred in law and in facts in convicting the Appellant without considering that there lacked conclusive medical evidence proving sexual indulgence on the part of the complainant.**
>
> **3. That the Learned Trial Magistrate grossly erred in law and facts in failing to observe that no medical examination or DNA was conducted on the part of the Appellant, thereby convicting [the appellant] on the basis of inconclusive medical investigation.**
>
> **4. That the Learned Trial Magistrate grossly misdirected himself in law and facts in basing her conviction on mere allegations and suspicion.**
>
> **5. That the Learned Trial Magistrate gravely erred in law in convicting and sentencing the Appellant to ten years imprisonment without observing that PW1 admitted to having been coaxed into implicating the Appellant.**
>
> **6. That the Learned Trial Magistrate gravely erred in law and in fact in basing the appellant's conviction on evidence based on shoddy investigation thereby excluding the possibility of doubt.**

7. That the learned Trial Magistrate erred in law and in facts in shifting the burden of proof to the Appellant, thereby rejecting his defence.

8.That in all the circumstances of trial, there arose material discrepancies, inconsistencies and suspicions which the learned trial Magistrate overlooked.

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,*** as well as ***Kiilu & Another Vs. Republic [2005]1KLR 174***, where 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."***

5. 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 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."***

The Prosecution Case

6. The Prosecution called five witnesses. Evidence was tendered that on the 7th August 2015 at 8.00 am while the complainant was sleeping on the floor in her grandmother's house, the appellant entered the house, carried her on his shoulders put her on her grandmother's bed facing up, took his trousers down and attempted to lie on her.

7. The complainant testified that she started screaming pushed him off and ran out of the door. She stated that she reported the incident to her grandfather who was standing at least 20 meters from the house and the Appellant was later arrested.

8. PW4 Cedric Wanyama a clinician at Butere County Hospital testified that he examined the complainant and found the complainant's hymen was intact and that she had no injuries on her vagina. He produced in evidence copies of treatment notes, P3 form and an age assessment report in evidence as Pexh1, 2 and 4 respectively.

Defence case

9. By a ruling delivered on the 12.8.2016 the appellant was found to have a case to answer and accordingly placed on his defence.

10. He testified that he did not attempt to defile his daughter and that the case against him was a plot by his father to keep him away as he had opposed. The father's plans to sell part of the family land. He stated that the complainant was being used by his father to bear false witness against him.

11. In his submissions the appellant submitted that the case was a fabrication aimed at keeping him away from home as he had a dispute with his father over land.

12. The state opposed the Appeal on grounds that they had proved the case against the appellant to the required standard and that the conviction was proper.

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 incest were proved.

14. ***Section 20(1) and (2) of the Sexual Offences Act*** provides that

> ***"Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:***

Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.

(2) If any male person attempts to commit the offence specified in subsection (1), he is guilty of an offence of attempted incest and is liable upon conviction to a term of imprisonment of not less than ten years.

15. In **GMM v Republic [2019] eKLR** the Court held that:-

"Under Section 20(2), if the offence is an attempt to commit the offence of Incest, upon conviction the offender is liable to imprisonment for not less than ten years.

5. The ingredients for the said offence – Incest and attempted incest – are

1. Knowledge that the person is a relative.

2. Intentional attempt of Penetration or Indecent Act"

16. Also see ***JNM v Republic [2019] eKLR*** where Odunga J held that:-

"35. In explaining the distinction between the offence of defilement and incest, Majanja, J in F O D vs. Republic [2014] eKLR held that:

"While in the case of incest, the prosecution was only required to prove either penetration or an indecent act, in defilement the prosecution was required to prove penetration. The additional element of the relationship between the accused and the child is what makes the offence incest."

36. It is therefore clear that in order to prove incest the evidence must prove that the accused committed an indecent act or an act which causes penetration. In other words once there is evidence of indecent act, penetration is not necessary. 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 organs of another person.

37. "Indecent act" on the other hand means an unlawful intentional act which causes-

(a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.

(b) exposure or display of any pornographic material to any person against his or her will.

38. The second ingredient of the offence of incest is that the accused ought to have the knowledge that the complainant is his daughter, granddaughter, sister, mother, niece, aunt or grandmother.

39. The last condition is that it must be proved that the indecent act or an act which causes penetration was caused by the accused."

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

1. **Whether the Appellant was a relative to the victim.**
2. **Whether there was an attempted intentional indecent act or penetration of the victim's genitalia by the appellant.**
3. **The age of the victim.**

a) <u>Whether the Appellant was a relative to the complainant</u>

18. It is the complainant's evidence that the Appellant is her father. This was not disputed by the Appellant as he confirmed that he was the complainant's father. Thus, the father/daughter relationship was proved.

<u>b) Whether there was an attempted intentional indecent act or penetration of the victim's genitalia by the appellant</u>

19. It was the complainant's case that the Appellant threw her onto her grandmother's bed and took down his trousers and attempted to lie on her .It was at that moment that she screamed and ran out of the house.

20. The P3 form and treatment notes produced in evidence show that there were no lacerations on the vagina and that the hymen was intact.

21. In her testimony, the complainant does not state whether or not she saw the Appellant's penis or whether he removed her clothes at the time of the incident and whether the Appellant touched her vagina, buttocks or breast area or whether indeed there was attempted penetration.

22. In ***David Aketch Ochieng versus Republic [2015] eKLR Makau J*** observed that:- **"……**

> ***the prosecution must adduce sufficient evidence to the required standard to prove an attempted penetration. This may in my view include bruises or lacerations on 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 inner wear without there being penetration. There was absence of penetration or evidence linking the culprit with the offence of attempted defilement."***

23. In ***Daniel Ombasa Omwoyo v Republic [2016] eKLR Okwany J*** held that

> ***"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, she 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."***

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

25. From the evidence adduced were no bruises or lacerations on the complainant's vagina. In fact the Appellant did not undress the complainant and this automatically rules out attempted penetration.

26. It was the Appellant's submission that there was no medical evidence and DNA proving that there was sexual indulgence between him and complainant. I hasten to say that this case did not require the type of medical evidence envisaged by the appellant. In any event, the law is clear that subjecting the appellant to a medical examination was a matter of discretion on the part of the trial court since the case herein was one of attempted defilement. The circumstances surrounding the offence did not warrant or necessitate DNA or any other medical testing of the appellant.

<u>Was there an attempted indecent act?</u>

27. An indecent act under ***section 2(1) of the Sexual Offences Act*** is defined as unlawful intentional act which causes;

> ***"(a) any contact which between any part of the body of a person with genital organs, breasts or buttocks of another but does not include an act that causes penetration." See SCG v Republic [2018] eKLR."***

28. Genital organs are defined in ***section 2 of the Sexual Offences Act No. 3 of 2006*** as to

> ***"Include the whole or part of female or male genital organs and for purposes of this act includes the anus."***

29. It was the complainant's evidence that the Appellant carried her and placed her on her grandmother's bed. She stated that she had a long blouse and a white petticoat. She stated that the Appellant pulled down his trousers and attempted to lie on her. She then screamed, pushed him off and ran outside.

30. From her evidence, there was no mention of where the Appellant touched her. Further during the ordeal the complainant had her clothes on and there is no mention of whether she saw the Appellant's penis or not. There was thus no contact between any part of the appellant's genitalia with the complainant's genital organs, breasts or buttocks or anus.

31. In the case of ***B S J V Republic [2016] eKLR*** Chemitei J held that since there was no contact between the complainant's body and the genital organs of the appellant, the offence of attempted defilement was not proved. A similar view was held by Majanja J in ***SBB versus Republic [2019]eKLR*** who also stated that in such cases, the prosecution must also prove the mental element on the part of the accused before the court can make a finding of guilty. It is thus accepted by courts that in cases of attempted crimes, the *actus reus* must go beyond mere preparation to commit the act. See ***Francis Mutuku Nzangi versus Republic [2013] eKLR.***

<u>Conclusion</u>

32. From all the above findings, I hold that the prosecution did not prove the charge of attempted incest against the appellant to the required standard. Consequently, I find there is merit in the appellant's appeal. The same be and is hereby allowed.

33. Unless there is any other valid reason for holding the appellant in prison custody, he shall be released forthwith therefrom.

34. It is so ordered.

Judgment written and signed at Kapenguria.

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned in open court at Kakamega on this 15th day of November, 2019

WILLIAM MUSYOKA

JUDGMENT

In the presence of:-

Said Lutta Mwande – Appellant in person

Ms. Omondi for the Respondent

Erick - Court Assistant