



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CRIMINAL APPEAL NO 16 OF 2019

GABRIEL OGUTU OGOGO ALIAS JANDUN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the judgment, conviction and sentence dated 14th December, 2018

at Bondo in Bondo Principal Magistrate's Court Criminal Case No. of 2018

Hon M. Obiero, Principal Magistrate)

JUDGMENT

1. The appellant Gabriel **Ogutu Ogogo alias Jandun** was charged with the offence of attempted defilement contrary to **Section 8(1) as read with Section 9(2) of the Sexual Offences Act No. 3 of 2006**. Particulars of the offence are that on the 24th day of July, 2018 at about 6.00 p.m. at [particulars withheld] village in Bondo Sub-County within Siaya County, intentionally attempted to cause his penis to penetrate the vagina of LAO.,[full name withheld] a child aged 12 years.

2. The appellant also faced the alternative charge of committing an indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. Particulars are that on the 24th day of July 2018 at about 6.00 a.m. at [particulars withheld] village, in Bondo Sub-County intentionally touched the vagina of **LAO** a child aged 12 years with his penis.

3. The appellant denied the charge and the prosecution called four (4) witnesses who testified in support of their case.

4. After a full trial, the trial court found the appellant guilty of the main charge of attempted defilement and sentenced him to serve ten(10) years imprisonment.

5. Dissatisfied with the conviction and sentence, the appellant filed this appeal complaining that:

1. *That I pleaded not guilty to the charge.*
2. *That the trial Court relied on fabricated story to justify the case of attempted defilement.*
3. *That placing my penis in her vagina amounted to defilement not attempted defilement.*
4. *That the Medical Officer confirmed that there was no defilement.*
5. *That the trial Court fails [sic] to interrogate the teacher whom the confession was made to as to why she did not immediately take the complainant to the hospital to ascertain her claim.*
6. *That PW1 had been coming late to school and it's only on that day that the teacher decided to interrogate her to justify the charges.*
7. *That I had been having outstanding grudge with this teacher for a very long time.*

8. *That my defence in this case was ignored by the trial Court.*

9. *That Pw1 testify out of fear of the said the teacher.*

10. *That a case of this magnitude cannot be taken lightly without proper corroborative evidence.*

11. *That am disable in away, aged and cannot take the remaining part of my life on this earth to commit such serious offence of which am aware of its consequences.*

12. *I wish to be present during the hearing of this appeal to adduce more grounds.*

6. This being a first appeal, this court is expected to reassess the evidence adduced in the trial court and arrive at its own independent conclusion, bearing in mind the fact that it neither heard nor saw the witnesses as they testified. This is the principle espoused in the **Okeno v Republic Case [1972] E.A. 32**

7. Revisiting the evidence before the trial court, the prosecution's case was as follows. PW1, LAO, testified after voir dire examination that she was 12 years old and a class seven pupil at N. Primary School. [full name of school withheld] She recalled that on the 24th day of July 2018 at 6.00 a.m. she was on her way to school and that she was alone. On reaching near the appellant's home, she heard some commotion and when she checked behind she saw the appellant who caught her and took her to the bush where threatened to harm her so she did not scream. That he undressed his pair of trousers and also removed her pant. That he lay on her and put his penis in her vagina and took a piece of cloth and wiped her vagina. She explained that after the incident, he told her to put on her pant and skirt and gave her KShs.100 and she went to school.

8. PW1 reached School late but she did not disclose to the teacher what had happened. The teacher however observed that PW1 had been reaching school late and so he told her to inform her father to accompany her to school the following day. The following day, her mother went to her school and when she was asked as to what had happened, she did not say it.

9. She further stated that a teacher by the name Julia asked her whether the old man had done something to her and she explained to Ms. Julia what the old man had done. Ms. Julia called PW1 's father who went to school. In the evening, her mother took her to Usigu AP Camp where they reported the incident. She further explained that on the following day, when she was at school, police officers went and interrogated her and she explained what had happened. Later she was taken to Got Agulu hospital where she was examined. She was taken to Usenge Police Station where she recorded her statement.

10. On being cross examined by the appellant, PW1 stated that in July she ran into his home and told him that a boy was chasing her and that the boy went up to the appellant's home. She also stated that the appellant had a knife when he took her to the bush and that he threatened to stab her with the said knife. She was emphatic that she knew the appellant very well and that she could not mistake him for another person. She reiterated that the appellant gave her Kshs 100 and told her not to disclose to anyone.

11. In reexamination she reiterated that it was the appellant who took her to the bush but that on another day a boy followed her.

12. PW2 Juma Ondiek a teacher at N. Primary School testified that 25th day of July, 2018 they had some discipline case and among them was the complainant herein so the head teacher requested that her parents go to school.

13. He stated that the problem was that the Complainant had been reporting to school late so he interrogated the Complainant who explained to him that there was a man who had been defiling her and giving her money. PW2 called the Complainant's father who went to school and PW2 explained to him what he had discovered. He stated that he did not know the person who had been defiling the Complainant. He stated that when the parent went to school, the matter was handed over to him for further action. In cross examination, PW2 reiterated his testimony in chief.

14. **PW3 No. 67045 PC Charles Obade** attached to Usenge Police Station investigated the case. He stated that on the 27th day of July, 2018 he was briefed to go and collect the appellant from Usigu AP Camp. He stated that the Appellant was suspected to have defiled a girl who was learning at N. Primary School where they also collected the girl and they took both the girl and the Appellant to Usenge Police Station. It was his further testimony that he recorded the Complainant's statement and the Complainant explained to him that on the 24th day of July, 2018, when she was going to school she met with the Appellant who took her into the bush and undressed her and also removed his clothes. He stated that the Complainant was taken to the hospital and she was examined and it was **confirmed that there was no defilement**. He stated that the complainant told him that the appellant tried to insert his penis in her vagina but that he was unsuccessful. He also stated that the Age Assessment was done and he received the report dated 23.10.2018 which confirmed the Complainant's age to be 12 years and he produced the same as exhibit 1.

15. PW4 **TOO** testified that the Complainant was his daughter. He stated that on the 25th day of July, 2018 at about 10.am PW1 who had gone to school at 6am returned home and told him to go to school. That he went to school and met teacher Julia who questioned him why PW1 was going to school late. He explained himself and returned home. He left the teacher with his phone contacts. Later the teacher called him and told him that she had talked to the Complainant who informed her that the complainant had been to Jandun's house. He stated that he went to Usigu AP camp where he made a report and the Appellant was arrested. He further stated that later, the Appellant and the Complainant were taken to the hospital where they were examined. He identified the appellant and stated that he was his neighbor.

16. On being cross examined by the appellant, PW3 stated that he was annoyed that is why he never went to the appellant's home and instead called the appellant's brother. He stated that he did not know that the appellant's brother assaulted PW3. He added that the appellant's brother went to PW3 and asked PW3 to forgive the appellant.

17. In reexamination PW3 stated that he did not have any grudge with the appellant and that he had no reason to fix the appellant.

18. At the close of the prosecution case, the appellant gave sworn evidence and stated that on 24th July 2018 at 6.00am he was on his farm digging and that he dug until am and went home and that he did not see anybody and neither could he remember anything taking place. He stated that on 27th July 2018 Administration Police officers arrested him on allegations that he had defiled a girl.

19. On cross-examination, he stated that the Complainant was known as to him and that he used to meet and talk to her. He denied committing the offence and claimed that one day the complainant told him that the teacher at her school was talking ill of the appellant saying that the appellant used to call school children into his house. He stated that the complainant's home was far from his home so she could not have reached his home by 6am.

20. The appellant also stated that he knew the complainant and that she lived with him in the same village. He stated that the complainant also knew him by the name Jandun. He denied knowing the name of the teacher who was talking ill of him. He admitted that the complainant and other children used to pass near his house enroute to school but denied seeing her on the material day and admitted that it was the second time he was being charged with the same offence and stated that the other complainant child was also from the same school as the complainant in the instant case. He claimed that in the other case it was the village elder who framed him with the offence.

SUBMISSIONS

21. In his written submissions dated 12th October 2019, the appellant submitted that the complainant having testified that the appellant placed his penis into her vagina amounted to defilement and not attempted defilement because it caused penetration. He submitted that though the complainant was taken to hospital and treated, no medical report was produced by a medical officer and that the omission is fatal to the prosecution's case hence the appeal should be allowed and the appellant set free.

22. In his oral highlights the appellant maintained his innocence and urged the court to set him free because he was framed by the complainant's teacher. He denied meeting the complainant on 24th July 2018. He stated that he lived alone with no family and that in prison he had many issues with fellow inmates.

23. The prosecution left it to court to determine the appeal.

Determination

24. I have carefully considered the evidence on record as required in the case of **Okeno v Republic [supra]**. I have also considered the grounds of appeal and the submissions in support of the appeal herein.

25. The main issue for determination is whether the prosecution proved its case against the appellant beyond reasonable doubt and whether sentence meted out was appropriate.

26. It is not in dispute that the Appellant and the Complainant were well known to each other prior to the alleged attempted defilement incident. It is also not in dispute that the Complainant used to pass near the Appellant's house while going to school. It is not in dispute that the Appellant and the Complainant used to meet and talk frequently. According to PW1 and PW2, the Complainant went to school late on the 24th day of July, 2018. On whether the appellant met the complainant on her way to school on 24th day of July, 2018 and whether the evidence proved the offence of attempted defilement is what is in dispute.

27. According to the complainant, she was on her way to school on 24th July 2018 and that she was alone and that when she reached near the home of the appellant, she heard a commotion, on checking behind her, she saw the appellant who caught her hand and took her into the bush, undressed himself and undressed her then he took his penis and inserted it in her vagina then he removed it and wiped it using a piece of cloth then he told her to dress and go. She reached school late and was told to go bring her parents to explain her lateness. PW3 the complainant's father confirmed that the complainant had on the material day gone to school at 6am but returned home at 10am and told him that he was needed at school which he complied and went. He was questioned on his daughter's persistent lateness, he explained himself and went away, he was later called by the teacher Julia who informed him that the complainant had been interviewed by the teacher and she confirmed that she used to pass by the appellant's home where he used to defile her hence her lateness.

28. The matter was reported to the police and the appellant was arrested. The child was taken to hospital where she was examined and found not to have been defiled. She was also medically examined and found to be approximately 12 years old.

29. Section 9(1) and (2) of the Sexual Offences Act provides:

“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 conviction to imprisonment for a term of not less than ten (10) years”

30. From the above provision, the issue which arises is in respect of what constitutes an attempt to commit an offence.

31. The prosecution in the charge of attempted defilement must prove all other elements of defilement except penetration namely, the age of

the complainant must be under 18 years, the perpetrator must be positively identified and the steps taken by the perpetrator to execute the defilement which did not succeed. This is because attempted defilement is a failed defilement for want of penetration.

32. Under section 388(1) (2) of the Sexual Offences Act, attempt to commence an act is defined as:

“388(1) when a person intending to commit an offence commits begins to put his intention in execution, by means adopted 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 deemed to have attempted 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 his offence or whether the complete fulfillment of his intention is prevented by circumstances independent of his will or whether he desists of his own notion for the further prosecution of his intention.

(3) It is immaterial by reasons of circumstances not known to the offender it is impossible to commit the offence.”

33. Therefore, to prove attempted to commit an offence, the prosecution must establish the *mens rea* and the *actus rea* beyond preparation to commit the offence. See **Abdi Ali Bere v Republic [2015] e KLR**.

34. I have considered the evidence of the Complainant vis-à-vis the evidence of the Appellant. It is clear that the evidence available against the Appellant is the evidence of the Complainant only. I am alive to the fact that evidence of a single witness can be relied upon to prove the existence of a fact with exceptions. Under Section 124(1) of the Evidence Act, the evidence of a victim who is a child of tender age in a Sexual Offence may not require corroboration provided that the Court is satisfied that the minor is saying the truth.

35. In this case, just like the trial court, I have noted that there was uncalled for questionable familiarity between the Appellant and the Complainant child. I have also noted that the Appellant was well known to the Complainant and there could be no possibility of mistaken identity.

36. The trial court had the opportunity of observing the demeanor of the Complainant during her testimony and stated that he did not note anything that would have suggested that she was not saying the truth. He found that the Complainant actually met with the Appellant on the 24th day of July 2018 at 6.30 a.m. when she was going to school.

37. In **Michael Lokomar v Republic (2016) eKLR Justice S.N. Riechi** observed as follows:

“In proof of an attempted commission of an offence the prosecution must prove mens rea which is the intention and actus reus which is the act which constitutes the overt act which is geared to the execution of the intention. The actus reus must be more than the mere preparation to commit the act as there is a difference between preparation to commit an offence.”

38. In **Charles Nega Vs. Republic eKLR Justice A.C. Mrima** J observed as follows:

“The following analysis is sound and logic hence accept it and further add that the intention on the appellant’s part to commit defilement was already demonstrated when he pulled M.M. to the ground and stuffed her with his shirt and embarked on undressing her skirt. It is clear that the appellant’s interest was only on M.M.’s private parts otherwise he would have not centered all his effort to reveal M.M.’s lower abdomen.”

39. In this case, the complainant explained that the appellant took her to the bush and undressed her and also removed his pair of trouser. The appellant lay on her, took his penis and put it in her vagina and after that the appellant used a piece of cloth to wipe her vagina. He then told her to dress and go and she went to school. The appellant denied having taken the Complainant to the bush and removing her pant.

40. The trial court believed that PW1 was telling the truth and stated:

“My humble opinion is that the Complainant’s evidence was firm and consistent and the same demonstrates that the appellant took her to the bush and removed her pant and also removed his pair of trousers. As such, I am of the finding that this is a clear demonstration that the appellant had the intention of defiling the complainant which he put into action by taking her to the bush and removing her pant and he also removed his pair of trouser.”

41. Based on the above analysis and findings. I am persuaded that the prosecution proved beyond reasonable doubt all the elements of attempted defilement against the appellant. There was proof of the age of the complainant to be 12 years. There was also proof that the complainant attempted to defile the complainant but he did not succeed. In addition, there was evidence that the perpetrator was known to the victim and that there was no possibility of mistaken identity. I find no reason to interfere with the findings and holding by the trial court. I uphold the appellant’s conviction and dismiss this appeal against conviction.

42. On sentence, the appellant was handed 10 years imprisonment which was minimum sentence. However, he admitted that he had been charged with a similar offence against a student of the same school as the complainant only that he claimed that he was framed. The trial court sentenced the appellant after considering his mitigation and the fact that the appellant was a repeat offender. Although the appellant maintained his innocence, I find that the sentence which was lawful was merited in the circumstances where grown-ups take advantage of young children and defile them. Defilement is a heinous offence which traumatizes the victims. Nonetheless, as the appellant was handed a mandatory minimum sentence I would exercise discretion and resentence him to serve eight (8) years imprisonment to be calculated from the date of his conviction on 14/12/2018.

43. To that extent, the appeal against sentence succeeds.

44. Orders accordingly.

Dated, Delivered and Signed at Siaya this 3rd Day of December 2019

R.E. ABURILI

JUDGE

In the presence of:

The appellant in person

Mr. Okachi Senior Principal Prosecution Counsel for the Respondent State

CA: Brenda and Modestar