



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO 22 OF 2016

HAMISI JUMA SALIM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal against the original conviction and sentence of Hon. C. M. Njagi RM

delivered on 11th February 2016 in Criminal Case No. 1212 of 2015

in the Chief Magistrate's Court at Kwale)

JUDGMENT

The Appeal

1. The Appellant was convicted and sentenced to serve ten (10) years imprisonment for the offence of attempted defilement, contrary to section 9(1) and (2) of the Sexual Offences Act. The particulars of the offence were that on the 7th November, 2015 in Diani Location, Kwale County the Appellant unlawfully attempted to defile HO, a girl aged 12 years.
2. The Appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act, **based** on the same particulars.
3. The Appellant initially pleaded not guilty to the charge in the trial court on 12th November 2015, and later changed his plea to one of guilty on 8th February 2016. He was convicted of the main charge and sentenced on his own plea of guilty. The Appellant is aggrieved by the judgment of the trial magistrate and has preferred this appeal against the conviction and sentence. The Appellant's grounds of appeal as stated in his Petition of Appeal and Amended Grounds of Appeal that he filed in Court on 7th March 2016 are as follows:
 - a) That the learned trial magistrate erred in law and fact by failing to consider that the charges of defilement preferred against him by the prosecution was incurably defective.
 - b) That the learned trial magistrate failed to warn himself by convicting him without seeing that he was not subjected to any medical examination.
 - c) That the learned trial magistrate erred in law and fact by failing to note that he was not awarded fair trial.
 - d) That the learned trial magistrate erred in law and fact by convicting and sentencing him for 10 years imprisonment without considering that the charges of indecent act made by the prosecution against him were not proved beyond any reasonable doubt.
4. The appeal proceeded for hearing on 20th July, 2017, and the Appellant submitted that he would wholly rely on written submissions that he had availed to the Court. Mr. Fundi, the learned prosecution counsel, made oral submissions.
5. The contents of the Appellant's written submissions were in essence a mitigation against the sentence imposed on him by the trial Court. The Appellant expressed remorse for having caused trauma to the complainant and stated that he did the act out of peer pressure. That he is a class five (5) student at [Particulars Withheld] Primary School and was funded by well-wishers, and that he pleaded guilty so as not to waste judicial time. He urged this Court to give him a second chance and award him a non-custodial sentence or a reduction of his sentence.

6. Mr. Fundi gave a summary of the proceedings leading to the plea of guilty by the Appellant, and submitted that after the said plea was taken on 8th February 2016, an age assessment was done of the Appellant, which test established that he was aged 23 years. He stated that the Appellant was convicted on his own plea of guilty and given the minimum sentence, and that documents were produced to show the complainant's age and medical reports were produced to prove commission of the offence.

7. As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

8. I have considered the arguments by the Appellant and Prosecution, and I am alive to the provisions in section 348 of the Criminal Procedure Code that no appeal shall be allowed in the case of an accused person who pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.

9. I therefore find that the issues for determination by the court are firstly, whether the plea of guilty by the Appellant was unequivocal; secondly, whether the sentence meted out to the Appellant is illegal or unlawful, harsh or excessive as provided for under the Penal Code or in any other statute; and lastly, whether the said sentence is amenable to reduction and /or variation.

10. The procedure to be applied in taking a plea of guilty was well enunciated in the case of **Adan vs Republic, [1973] EA 445** where the Court held as follows:-

“(i) The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands.

(ii) The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded.

(iii) The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts.

(iv) If the Accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered.

(v) If there is no change of plea a conviction should be recorded and a statement of facts relevant to sentence together with the accused's reply should be recorded.”

11. The procedure as laid out in **Adan vs Republic** (*supra*) is also provided for under section 207 of the Criminal Procedure Code which provides as follows:

(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement.

(2) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:

Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.

(3) If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided.

(4) If the accused person refuses to plead, the court shall order a plea of “not guilty” to be entered for him.

12. Coming to the present appeal, the record of the trial Court shows that on 8th February 2016, the Appellant pleaded guilty to a charge of attempted defilement contrary to section 9(1)(2) of the Sexual Offences Act whose particulars were stated as follows:

“On the 7th day of November 2015 in Diani Location, Kwale County, unlawfully attempted to defile HO, a girl aged 12 years”

13. The proceedings continued with the facts being given as follows :

“On the 6/12/15, a minor H.O. left with her mother to a wedding ceremony where they danced upto 3 pm and H fell asleep and could not locate her mother as there were many people. She lay on a mat outside the house together with other children for her mother to pick her. She woke up a few minutes later to find her lessa being pulled, she screamed and people came to her rescue . 2 people were arrested and taken to Diani Health Centre. The 2 suspects were charged with the offence before the Court. The minor was treated and discharged. She was taken to Msambweni County referral for age assessment and found to be 12 years. P3 Form filled at Diani Health centre and treatment notes and taken to Diani Police Station. The P3 form is PEX 1, treatment notes as PEX 2 and age assessment as PEX 3”

14. The Appellant then stated in Kiswahili language that the explanation given by the police was true, whereupon he was convicted of the main charge on his plea of guilty.

15. The first observation by this Court is that the charge to which the Appellant pleaded guilty was defective in light of the requirements of the law as regards the framing of charges, as stated in section 134 of the Criminal Procedure Code which provides as follows:

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences 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.”

16. In addition it was held in Sigilani vs Republic, (2004) 2 KLR, 480 that:

“The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence.”

17. While the charge sheet in the present appeal did clearly indicate that the Appellant was charged with the offence of attempted defilement, contrary to section 9(1) (2) of the Sexual Offences Act, the particulars of the offence did not disclose the elements of the offence. Section 9(1) of the Sexual Offences Act refers to an attempted defilement as an act which would cause penetration. It states as follows:

“(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.”

18. The key element of the offence of attempted defilement is the attempt to commit an act which would cause penetration which is not stated in the particulars of the charge.

19. In addition the facts adduced before the trial Court did not disclose the offence of attempted defilement. Section 2 of the Sexual Offences Act in this respect defines penetration as “the partial or complete insertion of the genital organs of a person into the genital organs of another person”, while section 388 of the Penal Code defines an attempt as follows;

“ (1) 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 overt act, but does not fulfil 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 fulfilment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.

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

20. In Francis Mutuku Nzangi v Republic [2013] eKLR, the Court of Appeal explained these provisions as follows;

“Our understanding of this provisions is that if a person conceives an idea or plan to commit an offence and sets out to effectuate the intention by taking definite steps or puts in motion a chain of events or state of things calculated to attain that objective as manifested by some open and discernible act or acts but fails to achieve his objective, he will be guilty only of an attempt to commit the offence. The attempt is proved whether or not that person did all the acts necessary to perfect the offence and quite irrespective of what intervening act or change of heart may have aborted the fulfillment. It also matters not that circumstances did in fact exist, unbeknown to the person, that would have rendered his success impossible.”

21. There was no evidence adduced of any acts of attempted penetration of the complainant by the Appellant, and in particular no evidence was given as to any attempt by the Appellant to insert his genital organ in any part of the complainant’s body. The P3 form and treatment notes that were referred to in the facts were also never produced by the prosecution as evidence as was noted by the trial magistrate in a ruling that he delivered on the 24th March 2016 in which he discharged the Appellant’s co-accused.

22. The Court of Appeal in Yongo vs Republic [1983] KLR, 319 did hold that a charge that is not disclosed by evidence is defective under section 214 of the Criminal Procedure Code and stated as follows in this regard:

“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.”

23. I therefore find for the above reasons that the charge sheet was defective and the conviction of the Appellant for attempted defilement on the basis of the charge sheet before the trial Court was not safe. In addition, to the extent that the facts that are on the trial record show that the elements of the charge were not met, no offence was disclosed to which a conviction and sentence could be based, and the Appellant's plea of guilty was also unequivocal.

24. I accordingly quash the conviction of the Appellant for the offence of attempted defilement, contrary to section 9 (1) (2) of the Sexual Offences Act. I also set aside the sentence of ten years imprisonment imposed upon the Appellant for this conviction, and order that he be and is hereby set at liberty forthwith unless otherwise lawfully held.

25. It is so ordered.

DATED AND SIGNED THIS 16TH DAY OF APRIL 2018

P. NYAMWEYA

JUDGE

DELIVERED AT MOMBASA THIS 7TH DAY OF JUNE 2018

D. O. CHEPKWONY

JUDGE