



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

Criminal Appeal No. 27 Of 2018

CORAM: D. S. MAJANJA J.

BETWEEN

JOHN MOKUA ATANDI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. S.N. Makila, SRM dated 27th April 2018 at the Chief Magistrates Court at Kisii in Criminal Case No. 3394 of 2014)

JUDGMENT

1. The appellant, **JOHN MOKUA ATANDI**, 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 *Act*"). The particulars of the offence were that on 20th November 2014 in Kisii County, he intentionally and unlawfully attempted to cause his penis to penetrate the vagina of SMO, a child aged 8 years. He also faced an alternative charge of committing an indecent act with a child contrary to **section 11(1)** of the same *Act*, where it was alleged that on the same date and at the same time, he intentionally touched the breasts of SMO, a child aged 8 years. He was convicted on the principal charge and sentenced to 10 years' imprisonment and acquitted on the alternative charge. He now appeals against conviction and sentence.

2. The thrust of this appeal as urged by counsel for the appellant is that the prosecution failed to prove its case beyond reasonable doubt. In considering whether the prosecution proved its case, this court is enjoined, as the first appellate court, to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see or hear the witnesses testify as to form its own opinion on their demeanour (see *Okeno v Republic* [1972] EA 32).

3. The prosecution evidence emerging from the trial was that on 20th November 2014, the complainant (PW 1) and her cousin, PW 2, were playing outside their grandparents' flat, when the appellant came and asked them to go to his place. Both PW 1 and PW 2 followed him and when they reached the house, the appellant gave PW 2 some money to go and buy bread and soda leaving him and PW 1 behind in the house. PW 1 narrated what took place as follows;

I remained with the said John in the house and he told me to undress but I refused. I was in a trouser and a blouse. I started crying and he stopped telling (me) to remove my clothes. When I stopped crying he insisted that I should undress. He was comforting me to stop crying as he told me to remove my clothes. I removed my trouser. John went to the bed while I was seated on the seat. John called me to the bedroom and I refused The accused touched me. He touched (points at her vagina) my private parts.

4. PW 1 further testified that the appellant did not undress and in a short while PW 2 returned and they both left together. PW 2 testified that PW 1 told him that while he was away the appellant asked her to undress but she cried and he left her alone. The complainant's mother (PW 3) testified that in the evening of the material day, PW 1's aunt came and told her what transpired. When she asked PW 1 what happened, she told her that the appellant asked her to remove her clothes but she refused and started crying. She reported the matter to Gesonso Police Station and was issued with a P3 form which she took to Iyabe District Hospital. PW 4, the clinical officer who examined the PW 1, confirmed that he examined her on 10th December 2014, two weeks after the incident and excluded the possibility of defilement.

5. In his unsworn statement, the appellant denied the offence and told the court that he knew both PW 1 and PW 2 and that on the material day he met them at the shop and they requested him to buy them soda. They followed him to his house and he sent PW 2 to buy the soda. They drank the soda and both went back home.

6. The evidence is clear that the appellant and the children, PW 1 and PW 2 were known to each other and that on the material day, both of them were in his house. The appellant's unsworn statement confirms as much. The issue for disposition is whether, on the basis of the facts,

the prosecution proved that the appellant had committed the offence of attempted defilement. **Section 9** of the *Sexual Offences Act* refers to an attempted defilement as follows;

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.

7. The Court of Appeal in *Francis Mutuku Nzangi v Republic* NRB CA Crim. Appeal No. 358 of 2010 [2013] eKLR elucidated the meaning of an attempt, as defined by **section 388** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. It stated 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.

8. In other words, an attempted defilement is a failed defilement and that is why the intention to penetrate is a key ingredient of the offence (see *Pius arap Maina v Republic* ELD HCCRA No. 247 of 2011 [2013] eKLR). Under **section 2** of the *Act*, “penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person.” In *David Aketch Ochieng v Republic* [2015] eKLR Makau J observed that:

The appellant was charged and convicted with an attempted defilement contrary to Section 9 (1) of Sexual Offences Act No. 3 of 2006. What is attempted defilement? It can safely be stated to be the unsuccessful defilement. For a successful prosecution of an offence of attempted defilement, the prosecution must adduce sufficient evidence to the required standard to prove an attempted penetration....

9. From the facts I have outlined, there is nothing to show that the appellant intended to cause penetration. The testimony of PW 1 and the persons to whom she told what transpired all confirm that what the appellant did was to ask her to remove her clothes and that she cried. He did not remove his clothes to expose his penis or do anything to carry out his felonious intent of causing an act of penetration. In **the case of Daniel Ombasa Omwoyo v Republic** KISII HCCRA No. 64 of 2014 [2016] eKLR Okwany J., dealt with a case with similar facts and noted as follows;

[42] 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 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.

10. For the reasons I have set out above, I find and hold that the prosecution did not prove the offence of attempted penetration.

11. As regards the alternative charge of committing an indecent act with a child, I find that although PW 1 stated that the appellant touched her vagina, the charge as framed referred to the fact that the appellant touched PW 1’s breasts. PW 1 did not testify to the fact that the appellant touched her breasts hence I cannot convict the appellant on the alternative charge.

12. I allow the appeal. The appellant is set free unless otherwise lawfully held.

DATED and DELIVERED at KISII this 12th day of July 2018.

D.S. MAJANJA

JUDGE

Mr Bosire, Advocate for the appellant.

Mr Otieno, Senior Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.