



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO 48 OF 2017

AYUB SHAFI MUSA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal against the original conviction and sentence of Hon. V.J.Yator SRM delivered on 28th February 2017 in Criminal Case No. 3289 of 2012 in the Chief Magistrate's Court at Mombasa)

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 section 9(2) of the Sexual Offences Act. The particulars of the offence were that on 15th of November 2012 at [Particulars Withheld] Area, Mombasa District within Coast Province, the Appellant unlawfully and intentionally attempted to cause his penis to penetrate into the vagina of SM, a girl aged 5 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 pleaded not guilty to the charge in the trial court on 19th November 2012, and was convicted and sentenced as aforesaid after a full trial. He 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 a Petition and Amended Grounds of Appeal that he filed in this Court are as follows:

a) THAT, the Trial subordinate court erred in law and fact by failing to find that the evidence adduced against the Appellant did not satisfy the ingredients required to uphold a conviction under the charge that was preferred against the Appellant;

b) THAT in so doing the learned Trial Magistrate erred in law by failing to note that the prosecution case was not proved to standard required by the law and hence the Appellant's conviction was very unsafe.

c) THAT, the Learned Trial Magistrate failed to appreciate that the case against the Appellants was a fabrication and in so doing also failed to take note that the key witness were not called to clear doubts raised by the prosecution case;

d) THAT, the Learned Trial Magistrate failed in law and in fact to appreciate, analyze and resolve the numerous contradictions manifest on record in favour of the Appellant, and which contradictions diminished any credibility the prosecution evidence had.

e) THAT in view of paragraph 4 above the Learned Trial Magistrate failed to properly analyze the evidence on record and thereby arrived at erroneous finding of fact and law;

f) THAT the Trial Court erred in law by convicting the appellant on uncorroborated evidence of a minor.

g) THAT the Learned Trial Magistrate failed in law in not making a finding that the medical evidence as presented did not disclose the offence the Appellant was charged with;

h) THAT the Trial Court erred in law and fact in failing to find that the conduct of the Appellant did not portray a guilty mind.

i) THAT the Learned trial Magistrate failed in law and in fact in not finding that the evidence of the first report materially contradicted the evidence on record and ;

j) THAT the Trial Court erred in law and fact by failing to objectively apply its mind to the defence and evidence raised by the Appellant and his witness, and which evidence was credible and uncontroverted.

4. The appeal proceeded for hearing on 20th July, 2017, and the Appellant's counsel, Mr. Nabwana, stated that he would wholly rely on written submissions that he filed in Court on 18th July 2017 of the same date, while emphasizing that the present case was framed against the Appellant. The Prosecution counsel made oral submissions.

5. The Appellant in his submissions argued that the prosecution had failed to prove the case on the required standard of beyond doubt. The decision in **Woolimington vs. DPP (1953) AC.462** was in this respect cited on the standard of proof to be met by the prosecution in any criminal case being that of beyond reasonable doubt. The Appellant urged that the main ingredients of proof in the offence of attempted defilement are age of complainant, attempted penetration and positive identification of the assailant. He relied on **Geoffrey Mutune Mwanzia vs Republic (2017) eKLR** in this respect.

6. On the age of the complainant, the Appellant alleged that there was contradiction as to the age of the complainant since PW2, the complainant's mother, had indicated that the child was 6 years, yet the age assessment report, the P3 and the charge sheet had all placed the child at 5 years of age. The Appellant however appreciated that regardless the complainant was still a minor.

7. The Appellant also noted that the evidence of the prosecution was marred with numerous contradictions. First, that the evidence given by PW1 was not corroborated, and the court went ahead to convict on the said evidence. Second, he argued that the form of attempted defilement as described by the complainant changed during cross-examination, which created major doubts as to the veracity and truthfulness of the complainant.

8. Further, that PW1 first indicated that the offence took place inside the house in the madrassa, and PW2 stated that the Appellant was a madrassa teacher. However, that on re-examination PW2 confirmed that there was no madrassa that day, and that the alleged madrassa classes were locked at the time of the alleged offence.

9. Third, the Appellant also took issue with the fact that the prosecution alleged that two of the complainant's uncles had been called by the complainant's mother during the arresting of the Appellant, yet the said uncles and the arresting persons were never called to testify during the hearing. He also expressed concerns as to why the complainant did not call for help, and that she indicated that she went home and waited for the mother.

10. Lastly, the Appellant prayed to court to ignore the medical evidence adduced because of the contradicting age difference between the P3 form, PRC and the charge sheet. He indicated that the evidence by the defence had been corroborated unlike the prosecution evidence.

11. Mr. Fundi, the learned prosecution counsel, submitted that he would entirely rely on the evidence on record in the lower court which found the Appellant culpable. He indicated that the prosecution had proved its case beyond reasonable ground and he prayed to court to uphold the conviction and sentence and dismiss the appeal.

12. My duty as the first Appellate court is to re-evaluate the evidence and draw independent conclusions as held in **Okeno v Republic (1972) E.A. 32**. However, I am alive to the fact that I did not have the advantages enjoyed by the trial court of seeing and hearing the witnesses, as was observed in **Soki v Republic (2004) 2 KLR 21** and **Kimeu v/s Republic (2003) 1 KLR 756**.

The Evidence

13. A brief summary of the evidence adduced before the trial court is as follows. The prosecution called five witnesses. The complainant (SM) was PW1, and she testified after a *voire dire* examination that she knew the Appellant by the name Ayub, and that she was with her brother on the material day at a house at the madrassa when the Appellant person put his finger and tongue in her private parts. Further, that she felt pain and cried, and later told her mother what had happened.

14. MS (PW2), was the complainant's mother, and she testified that on 15th November 2012, she had left the complainant with the Appellant, who was a teacher at a madrassa next to her house, and that when she went to look for the child, she saw the Appellant coming out of the madrassa with the complainant. She noticed that the Appellant had an erect penis, and the complainant later told her that her private parts were hurting, and that the Appellant had inserted his fingers into her private parts.

15. PW3 was Dr. Mirfale Shadir, a medical doctor at Coast General Hospital. She testified that she was familiar with the handwriting of Dr. Ngone who had filled the complainant's PRC and P3 form. Further, that the complainant was examined on 15th November 2012, and had lacerations on the vagina which injuries were categorized as harm, however that the hymen was not perforated and there was no defilement noted. She produced the PRC and P3 forms as the Prosecution's Exhibit 3. PW3 also produced an age assessment form dated 15th November 2012 filled by a Dr. Wakinga as the Prosecution's Exhibit 4, which showed that the complainant was 5 years old.

16. PC. Jacob Wanyonyi was the last prosecution witness, and he testified that he took over the case as the investigating officer, after the commission of the offence. Further that the previous investigating officer issued the complainant with a P3 form after receiving a report of the defilement. He also stated that the officers who arrested the Accused did not record any statements.

The Determination

17. I have considered the arguments made by the Appellant and the Prosecution, as well as the evidence before the trial court. The main issue for determination is whether the Appellant's conviction for the offence of attempted defilement was on the basis of sufficient and satisfactory evidence. Section 9(1) of the Sexual Offences Act refers to an attempted defilement as an act which would cause penetration. It states as follows:

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

Section 2 of the Act in addition defines penetration as “the partial or complete insertion of the genital organs of a person into the genital organs of another person.”

18. An attempt is on the other hand defined in section 388 of the Penal Code 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.”

19. 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 fulfilment. It also matters not that circumstances did in fact exist, unbeknown to the person, that would have rendered his success impossible.”

20. The offence under section 9(1) of the Sexual Offences Act is therefore committed when a person attempts to causes penetration with his genital organs, manifested by facts that point to an act of penetration. However, in an offence of attempted defilement, no penetration takes place, and this is what distinguishes the offence from that of defilement. The punishment provided for the offence of attempted defilement with a child under section 9(2) of the Sexual Offences Act is with a child is imprisonment for a term of not less than ten years.

21. It is also important to have in mind the definition of defilement in section 8(1) of the Sexual Offences Act as an act which causes penetration with a child. The ingredients of defilement were further highlighted in **Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013** as follows:

“The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”

22. In the present appeal, the evidence provided during trial as to the age of the victim was the testimony of the mother of the complainant who was PW2, and who testified on 10th December 2013 that the complainant was 6 years old. PW3 in addition produced an age assessment report as Exhibit 4, that showed that on the date of commission of the alleged offence on 15th November 2012, the complainant was 5 years old. There was therefore no contradictory evidence of the complainant's age, which all pointed to the complainant being 5 years of age at the time of the alleged offence.

23. As regards penetration, the Appellant has urged that the trial Court relied on the complainant's uncorroborated evidence. Further, that the said evidence was also contradictory. Section **124 of the Evidence Act** provides as follows as regards the corroboration of evidence given in sexual offences cases:

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

24. In the present appeal, the evidence of PW1 was supported by medical evidence, namely Exhibit 3, which were the PRC and P3 forms that were produced by PW3, and which revealed that upon PW1's examination on the day of the alleged offence, she had lacerations on her vagina. There was thus corroboration of the complainant's evidence. There was also positive identification and recognition of the Appellant by both PW1 and PW3, as he was their neighbor.

25. It was also alleged that there was contradictory evidence as regards whether or not there were madrassa classes on that day, and that if the classes were locked then the attempted defilement could not have occurred in the class. I note in this respect that PW1 stated that the attempted defilement occurred inside a house in the madrassa, and PW3 testified that she saw the Accused coming out of a room, and there was no testimony given that the said house and/or room were the madrassa classes.

26. However, I note that there was contradictory evidence on the alleged penetration, with the complainant testifying that the Appellant used his fingers and tongue to penetrate her, and upon cross-examination that he used his fingers and penis. Evidence of an attempt of penetration by the Appellant of his genital organ in any part of the complainant's genital organ, is key to a determination as to whether there was attempted defilement, in accordance with the definition of penetration that is set by section 2 of the Sexual Offences Act.

27. It is thus my finding for this reason that the evidence adduced by the prosecution was not sufficient to establish the offence of attempted defilement as against the Appellant beyond reasonable doubt. However, the evidence adduced did establish the offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act, which was also the alternative charge that the Appellant was charged with in the trial Court.

28. Section 11 (1) of the Sexual Offences Act provides as follows as regards the offence of indecent act with a child:

“Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.”

An indecent act is in addition defined in section 2 of the said Act as 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.

29. This Court has powers on an appeal from conviction to alter the findings and sentence made by the trial Court under section 354 (3) of the Criminal Procedure Code as follows:

“(3) The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may—

(a) in an appeal from a conviction—

(i) reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction; or.

(ii) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence; or

(iii) with or without a reduction or increase and with or without altering the finding, alter the nature of the sentence.”

30. The Court is also empowered under the section to may make any amendment or any consequential or incidental order that may appear just and proper. Given that the Appellant was charged with, and did take a plea on the alternative charge of committing an indecent act with a child, and the evidence in the trial Court established that such an indecent act did occur, conviction of the said offence is the proper finding that ought to be made, and the trial Court's findings in this respect can thus be altered by this Court.

31. I hereby accordingly quash the conviction of the Appellant for the offence of attempted defilement of a child contrary to section 9 (1) and (2) of the Sexual Offences Act, and substitute it with the conviction of the Appellant for the offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. I however retain the sentence of ten (10) years imprisonment imposed upon the Appellant, which sentence is to run from the date of conviction by the trial Court.

32. It is so ordered.

DATED AND SIGNED THIS 16TH DAY OF AUGUST 2018

P. NYAMWEYA

JUDGE

DELIVERED AT MOMBASA THIS THIS 3RD DAY OF OCTOBER 2018

D. O. CHEPKWONY

JUDGE