



REPUBLIC OF ENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NUMBER 141 OF 2016

SKM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal from Conviction and Sentence in Original SIRISIA PMCR

No. 1189/2016 delivered on 20/5/2016 by Hon. L.N. Kiniale, (SRM)].

JUDGMENT

The appellant SKM was charged with the offence of attempted defilement contrary to section 9(1)(2) of the Sexual Offences Act. No. 3 of 2006. The particulars of that offence were that on the 11th day of November in Chepatis District, within Bungoma County, intentionally and unlawfully attempted to cause his penis to penetrate the vagina of RCF a child aged eight years.

He also faced an alternative count of committing indecent act with a child contrary to section 11(c) of the Sexual Offences Act. Particulars of the alternative charge were that on the 11th day of November in Cheptais District, within Bungoma County, intentionally and unlawfully attempted to cause his penis to penetrate the vagina of RCF a child aged eight years.

The evidence before the trial court was that on 11/11/2015 at around 8pm Pw1-the complainant- aged 8 years was at home at Kapsaron with her Mother PC when her mother asked the appellant to take Pw1 and S her sister to their grandmothers place. The appellant was well known to her as Simon and she had known him for some time. They arrived and pw1's grandmother asked the appellant and Pw1 to go get vegetables. The appellant followed Pw1 from behind he had a torch he pulled her and threatened her against making any noise and then he removed his clothes and those of Pw1 and did bad things to her. That pw1 cried and the appellant ran away to where pw1's mother was. That later J arrived at Pw1's grandmother place where pw1 told her about the incident and J went and reported the incidence to pw1's mother and pw1 was later taken to Kopsiro health center where she was examined and later taken to Kopsiro police station.

Pw2 PC pw1's mother told court that on 12/11/2015 at around 7.00 am she was at home when J came and told her what had happened to pw1. The appellant referred to her husband as uncle. The previous day she had asked the appellant to take R-Pw1- and S to their grandmothers' place. In the company of her husband she went where the appellant was and took him to the police.

Pw3 JK testified that on 11/11/2015 at around 8.00pm she was at home with the complainant and then left to go fetch vegetables on getting back she did not find pw1 and the appellant as well. Then she saw the appellant bring the complainant back and the complainant was crying. When she asked what had happened the complainant told her of how the appellant dragged her in a bush and slept with her. That she checked the complainant's genitalia and went and informed the complainant's parents the following day.

Pw4 John Keya a clinical officer in charge of Kopsiro Health centre testified that the complainant was brought at the facility on 12/11/2015 with a history of having been defiled by a known person on 11/11/2015 at around 8.00 pm. On examination he found no injury on the genitalia, the hymen was intact and there was no discharge. On age assessment he found the complainant to be 8 years of age. Laboratory examination revealed nothing.

Pw5 Patrick Chepteek testified that he is a village elder and on 12/11/2015 he was at home at around 8.00 pm when he was informed that there was attempted defilement. He went to the scene and enquired from the complainant who told her that she was defiled by the appellant.

Pw6 No. 68029 Cpl. Simon Waweru testified that on 12/11/2015 at around 12.00 noon he received the complainant in the company of pw2, her father and a village elder. They reported about the defilement case. The appellant was also brought to the station and detained and investigations commenced.

When he was put in his defence the appellant chose to give unsworn statement where he told court that on 12/11/15 he was at work

cultivating when a child from home came and told him that he was being called home. He proceeded there and found pw6 and his uncle and they told him that he should go to the hospital but did not tell him why. At the hospital he was told he committed an act which he did not know and they arrested him and took him to the police station. That his uncle wanted land from him and he told him if he gave him the land he would make the case go away. He pleaded innocent on the charges leveled against him.

It is upon this evidence that the trial court convicted the appellant on the 1st count and sentenced him to serve a term of 10 years imprisonment.

Being dissatisfied with that decision the appellant has preferred this appeal on grounds that: the decision was made without proper jurisdiction. The appellant also filed his written submissions stating that the trial was conducted unfairly as he was not served with witness statements and that there was no proper identification.

The state opposed the appeal. Learned prosecution counsel Mr. Oimbo submitted in court that all the ingredients of attempted defilement were properly established and urged the court to dismiss the appeal.

This is a first appeal. The first appellate court is enjoined to review and reconsider the evidence and make its own conclusions but always bearing in mind that it did not have the advantage of seeing or hearing the witnesses (**See Ekeno – v – Republic 1972 EA32**).

The appellant was charged with the offence of attempted defilement contrary to **section 9(1) (2) of the sexual offences Act**. The section 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 upon conviction to imprisonment for a term of not less than ten years”

The prosecution in an offence of attempted defilement must prove the other ingredients of the offence of defilement except penetration; it must prove the age, of the complainant, positive identification of the accused, and then prove steps taken by the accused to execute the defilement which did not succeed. Attempted defilement is as if were a failed defilement, failed because there was no penetration. Attempt to commence an act is defined as

388(1) where a person intending to commit an offence begins to put his intentions into execution by means adopted to its fulfillment, and manifests his intention by some avert act but does not fulfill 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 is prevented by circumstances independent of his will or whether he desists of his own motion from further prosecution of his intention”

In the prove of an attempt to commit an offence the prosecution must prove the **mens rea** which is the intention and the actus reus which constitute the avert act which is geared to the execution of the intention. The **actus reus** must be more than mere preparation to commit the act as there is a difference between preparation mere preparation to commit an offence and attempting to commit an offence (**see Abdi Ali Bere – vs – Republic (2015) EKLR**).

The evidence of the complainant is that on the material day Pw2 the complainant’s mother told the appellant who is their relative to escort the complainant and her sister S to the grandmother JK’s home. He did. Pw3 JK testified that at 8.00p.m. the appellant reached her house with the complainant. She then left to look for vegetables and the appellant and complainant followed her but on looking back did not see them. Later the appellant brought the complainant who was crying. The appellant went away. The complainant explained to the grandmother how the appellant had pulled her aside and did bad things to her. The evidence of the witnesses for the prosecution, established that the appellant was with the complainant on that night and therefore places him at scene of offence; secondly it shows that there is no mistake as to the identity of the person who may have committed the offence. The evidence of the complainant is that the appellant removed her clothing and his clothing and did “bad things to me” she cried and the appellant ran away.

While it is desirable that a trial court do obtain from the child witness what actually they mean by doing bad things, in this appeal I am satisfied that what the appellant did to the complainant amounted to attempt to defile the complainant. There was intention, preparation and was unable to execute the act because of the complainant’s screams. I am therefore satisfied that the evidence of the prosecution supported the evidence of the prosecution supported charge. The accuseds defence, which relates to only his arrest was considered and rightly rejected.

I uphold the conviction and affirm the sentence of 10 years imprisonment imposed. I find no merit in this appeal which is hereby dismissed.

Dated and Signed at Bungoma this 22nd day of November, 2018.

S.N. RIECHI

JUDGE