



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

Hcra No. 66 Of 2012

PETER KIPCHUMBA TOO APPLICANT

VS

REPUBLIC.....RESPONDENT

(Being an appeal against the decision of Honorable I. Maisiba Resident Magistrate and sentence by Honorable E.A Obina Senior Resident Magistrate delivered on 20 April 2012 in Eldoret Chief Magistrate's Court, Criminal Case No. 3803 of 2011 in which the appellant was convicted of the offence of defilement and sentenced to 25 years in jail)

JUDGMENT ON APPEAL

The appellant was charged with the offence of Defilement contrary to Section 8(1) and (2) of the Sexual Offences Act, Act No.3 of 2006. The particulars of the offence were that on the 17th day of October, 2011, the appellant caused his penis to penetrate the anus of KM a minor aged 7 years. The appellant pleaded not guilty and the matter proceeded for trial. After a full trial, the trial court (Hon. Maisiba) found the appellant guilty of the offence. The judgment was delivered by Hon. Obina as Hon Maisiba had been transferred to another station. Hon. Obina then sentenced the appellant to 25 years in jail. The appellant is aggrieved by both the conviction and the sentence hence this appeal.

The appellant filed 7 grounds of appeal but at the hearing, Mr. Omboto for the appellant stated that the appellant wishes to rely on only three grounds namely :-

- (a) That the offence of defilement was not proved beyond reasonable doubt.
- (b) That the professional expert's report was incomplete.
- (c) That the investigation was not conclusive and exhaustive.

This being a first appellate court, it behoves the court to re-evaluate the evidence and determine whether the trial court arrived at a correct finding.

The prosecution called a total of six witnesses.

PW-1 was one Dr. Chebet a medical officer. She testified that she examined KM, the stated victim of the offence and filled in a P3 form. She did not note any injuries in the genitalia but the anal organ was reddish and painful. A swab of the anus did not show any spermatozoa. I have seen from the P3 that PW-2 examined the minor on the following day at 5 pm.

PW-2 was KM, the stated victim of the offence. He is aged 7 years. He testified that on the day, he was

playing with other children when the appellant emerged and found him on the ground. He stated that the appellant asked his playmates why PW-2 had fallen. The appellant then asked PW-2 to hide with him so that he and the others can play hide and seek. PW-2 stated that the appellant removed the clothes of PW-2 and the appellant put his fingers and a stick in the mouth of PW-2 and that he lay on PW-2 from the back, when he had removed his pants, and defiled PW-2 from the back. PW-2 stated that he screamed but the appellant only laughed. The appellant then ran away and members of the public arrested him.

PW-3 was one EM. He stated that he is a standard 3 pupil. On the material day, he was playing with PW-2 and one Kevin. They were four in total. The appellant then came and told them to play hide and seek. He took KM (PW-2) into the bush and they heard KM scream. They also screamed. People came to the scene and chased the accused and arrested him. PW-3 stated that he does not know exactly what the appellant did to KM.

PW-4 was one JN a minor aged 10 years. He stated that on the day, they were playing hide and seek. The appellant came and went away with KM (PW-2) into the bush. KM screamed. They also screamed and people emerged and arrested the appellant.

PW-5 was one MM an adult. She testified that KM is her nephew. On the material day at 5.30 pm, she was going home when she heard screams from a bush. She rushed to the scene and found members of the public beating the appellant. KM came to her crying and told her that the appellant had sodomized him. KM was bleeding from the mouth. She called the father to KM who came and took KM to hospital. KM was then treated.

PW-6 was the investigating officer. He was at the police station when they were informed of the incident. They went to the scene and re-arrested the appellant who had already been arrested by members of the public. He took KM and the appellant to the Moi Teaching and Referral Hospital.

The appellant was put on his defence and he gave an unsworn statement. He did not call any witnesses despite earlier stating that he would call two. In his defence, he stated that on the material day, he was from Nairobi travelling to Kitale on board a matatu. At the scene, they saw children crossing the road. The driver hooted and one of the children fell. He was told to look at the child. When he alighted, to see the child, and lifted his hand, he was attacked by a mob who accused him of trying to kill the child. He was then charged with this offence.

Mr. Omboto for the appellant, argued that there was inconsistency in the evidence and that the offence of defilement was not proved beyond reasonable doubt. He pointed out that the medical evidence did not reveal any injury in the genitalia and the swab taken did not show spermatozoa. He also pointed out that no treatment notes were ever produced yet the child was said to have been taken to hospital. Neither was the appellant examined yet he was arrested immediately. Mr. Omboto also contended that the trial magistrate did not consider the evidence of the appellant and no reasons were given as to why it was rejected.

Mr. Omwega for the State, opposed the appeal. His view was that there was ample evidence to support the conviction and that the evidence was consistent. He further submitted that under the provisions of Section 8(1) and (2) of the Sexual Offences Act, the sentence ought to have been a life sentence. He asked the court to substitute the sentence of 25 years for one of life imprisonment.

In response, Mr. Omboto argued that the offence ought to have been under Section 162 of the Penal Code and not Section 8 of the Sexual Offences Act.

I have considered the record, and the submissions of counsel. The case of the prosecution was that the appellant found KM and other children playing and that the appellant called KM to accompany him into a bush where it is alleged he defiled the minor by sodomizing him. KM, the stated victim, is a boy of 7 years old. For the offence of defilement to be complete, there has to be penetration. Section 8(1) of the Sexual Offences Act provides that a person who commits an act that causes penetration with a child is guilty of an offence termed defilement. "Penetration" as defined in Section 2 of the statute means the

partial or complete insertion of the genital organs of a person into the genital organs of another person. "Genital organs" include the anus.

The only witnesses who attempted to give evidence of penetration were PW-1 and PW-2. PW-2 was the victim. In his evidence, he never stated that there was penetration. The trial magistrate in his record recorded the evidence of PW-2 as stating that *"he lied (sic) on me from the back when he had removed his pants also defiled me from the back..."*. The trial magistrate recorded the words defilement as having been stated by PW-2, but this is a legal term connoting an offence and by itself is not a statement of fact. It is important for the trial court to avoid using legal terminologies and only record statements of facts as provided in evidence. From the record, I am unable to state with conviction that the evidence of PW-2 is explicit that there was penetration.

PW-1 on her part did not see any injuries on the anus, save that it was reddish and painful. She did not give any evidence as to what could have caused the anus of PW-2 to be in that state. Neither did she state in the P3 the probable type of weapon that caused injury. That area of the P3 was left blank by PW-1. It cannot therefore be said that there was any conclusion reached by PW-1 that there was penetration into the anus of KM.

Probably the initial treatment notes could have assisted, as those notes were the first contact between medical personnel and KM. But none were tendered in evidence. In fact, this is not the first case that I am handling where the initial treatment notes have not been tendered in evidence. It is beyond my comprehension why such a critical bit of evidence is left out, as to me, such notes are critical in proving sexual offences. There is also no evidence that the appellant was examined. An examination of his penis would probably have revealed whether his organ had caused penetration. Critical and important evidence was not tendered and I think the investigators were too casual in their approach. That casualness, makes me come to the conclusion, that penetration, which is an important ingredient of the offence of defilement, if there there was one, was not proved beyond reasonable doubt. The appellant must be given the benefit of that doubt. The trial magistrate was therefore in error in concluding that defilement was proved. I therefore set aside the conviction for the offence of defilement.

The trial magistrate also erred in sentencing the appellant to 25 years in jail if he was convinced that the offence of defilement had been proved. Section 8 (2) of the Sexual Offences Act provides that where the victim is aged 11 years or less, the sentence shall be life imprisonment. No other sentence is provided. There was therefore a clear error on the part of the sentencing magistrate. If I had been convinced that the offence of defilement is proved, I would not have hesitated to sentence the appellant to life. But I have already set aside the conviction and the sentence for defilement is therefore inoperable in the circumstances.

Although I have quashed the conviction on defilement, I do think that there is ample evidence of an attempt at defilement. The appellant took KM to the bush and undressed him. As I have stated earlier, it is not clear whether there was penetration, but KM screamed, and he must have screamed for a reason. The appellant had also put his fingers and a stick into the mouth of KM, no doubt ready to commit the offence of defilement.

I agree with Mr. Omboto that the learned trial magistrate did not consider the defence of the appellant in his judgement. That was an error. I have considered it but I think that the evidence of the prosecution is overwhelming. For the circumstances provided by the appellant in his defence, I doubt that members of the public would want to beat up a person who was a mere passenger in a public service vehicle and not pursue the driver if at all the vehicle came close to committing an accident. I think the appellant's defence was an afterthought, and in fact in my view, a not very well thought out afterthought. In no way does it rebut the wealth of evidence provided by the prosecution.

Pursuant to the provisions of Section 180 of the Criminal Procedure Code, the court has jurisdiction to convict for an attempt if the complete offence is not proved. I therefore hereby convict the appellant for the offence of attempted defilement pursuant to the provisions of Section 9 (1) of the Sexual Offences Act. Under Section 9(2), a person convicted of the offence of attempted defilement with a child is liable

to imprisonment for a term of not less than 10 years. I have taken into account the mitigation tendered by the appellant and also taken note that the appellant is a first offender. The offence is however serious and indeed if the complete offence had been proved, the appellant would have been liable to suffer a life sentence. In my discretion I hereby sentence the appellant to a 15 year term of imprisonment.

I therefore make the following final orders :-

(i) I quash the conviction of the appellant on the offence of defilement and quash the sentence of 25 years meted by the trial court.

(ii) I however convict the appellant of the offence of attempted defilement contrary to Section 9(1) of the Sexual Offences Act.

(iii) I hereby sentence the appellant to a term of 15 years in jail the sentence to start running from 20th April 2012 the day of the original conviction.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 6TH DAY OF FEBRUARY 2014

JUSTICE MUNYAO SILA

HIGH COURT AT ELDORET

Delivered in the presence of:

Mr. Munene for the state

N/A for Mr. Omboto for the appellant

Appellant - Present