

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 55 OF 2012

Formerly Kabarnet SPM'S Criminal case No 48 of 2012

SIMON ROKOO.....APPELLANT

VS

REPUBLIC.....RESPONDENT

(Being an appeal against the decision of Honorable H.M. Nyaga, Senior Principal Magistrate, in Kabarnet Criminal Case No. 48 of 2012 delivered on 1 March 2012)

JUDGMENT ON APPEAL

The appellant in this case was charged with the offence of Attempted Defilement contrary to Section 9 (1) of the Sexual Offences Act, Act No. 3 of 2006. The particulars of the offence were that the appellant intentionally attempted to cause his penis to penetrate the vagina of LN a child aged 4 years. There was an alternative charge of Indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act. The particulars of the alternative charge were that the appellant intentionally and indecently caused his penis to come into contact with the vagina of LN a girl aged 4 years old. After a full trial, the appellant was found guilty of the main charge and sentenced to 16 years in jail. He has now appealed against both conviction and sentence. Inter alia, it is contended that the prosecution had not proved its case beyond reasonable doubt; that the trial magistrate erred in failing to evaluate (sic) that the prosecution failed to call essential witnesses to corroborate the evidence adduced before court; that the trial magistrate erred in not taking regard the weight of the evidence of the defence; and that the sentence was harsh and improper in the circumstances.

This being a first appeal, I have a duty to re-evaluate the evidence and determine whether the trial magistrate came to a correct finding.

The prosecution called a total of four witnesses. PW-1 was a clinical officer. He testified that he examined LN on 19 January 2012 and filled in a P3 form. He was given history by the mother of LN, that a sexual assault took place on 16 January 2012. He noticed that LN had a limping gait. The genitalia was however normal and the hymen intact. He noted no discharge. He testified that laboratory tests were done and red blood cells seen. HIV test was negative. His conclusion was that there was no penetration but an attempt to penetrate.

PW-2 was mother to LN. She testified that on 16 January 2012, she had gone to fetch water. She left LN at home with other young children. When she came back, LN was not there. She assumed that LN was playing. After a while, LN came home. She told her that the appellant had called her to a house and did "tabia mbaya" to her. She told her this while she (PW-2) was washing her. LN told her that she felt pain on her vaginal area. PW-2 examined her vaginal area which appeared swollen. She did not see any spermatozoa. LN also complained of pain in her abdomen. PW-2 took her to Kapedo dispensary. She was examined. She stated that Police came and booked the report and arrested the appellant on the same day.

PW-3 was LN, the stated minor victim of the offence, whom the court noted to appear to be of age 4-5 years. A voire dire was done and the court was satisfied that the child was capable of telling the truth. She testified without being sworn or affirmed. LN testified that the appellant called her to his mother's house and told her to remove her clothes. He removed them. He then told her to sleep on the floor. He removed his clothes as well and did what she stated to be "tabia mbaya" to her. She cried because it was painful.

He then told her to put on her clothes which she did and left her in the house. She then went home and informed her mother.

PW-4 was a police officer. He stated that on 19 January 2012, GSU officers came with the appellant and the victim and mother. They took LN to see the clinical officer who filled the P3 form.

The defendant gave an unsworn statement. He stated that PW-2 had a grudge with him as he had seen her with other men. That is why she opted to fix him with this offence. He stated that LN was coached.

The trial magistrate evaluated the evidence of both the prosecution and the appellant. He was of the firm belief that PW-3 was saying the truth. He was also of the opinion that when a child of the age of the stated victim says "tabia mbaya", that meant sexual intercourse. In his view, "tabia mbaya" was an act of penetration but since the medical evidence did not support it, then the appellant could not be charged with defilement. He proceeded to convict him for attempted defilement and sentenced him to 16 years.

Mr. Sirtuy for the appellant submitted that there was no proof of age. He also submitted that there was no conclusive evidence of penetration. He was also of the view that the defence of the appellant was not considered.

Mr. Omwega for the State supported the conviction. He submitted that PW- 1 stated that there was an attempt to penetrate. He also submitted that the child was specific as to what happened. As to the defence of the appellant, he stated that this never came out in cross-examination and that his defence was duly considered. He further submitted that the trial magistrate could convict on the sole evidence of the victim.

I have considered the record and the rival submissions. The offence that the appellant was charged with is contained in Section 9 of the Sexual Offence Act which provides as follows :-

S. 9 Attempted defilement

(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.

(3 The provisions of [section 8](#)(5), (6), (7) and (8) shall apply mutatis mutandis to this section.

If a person causes actual penetration, then the proper offence is that of defilement under Section 8 of the Sexual Offences Act. In attempted defilement, there is no penetration, but an attempt to penetrate.

The first argument of Mr. Sirtuy was that age was not proved. I have perused the record and I agree with Mr. Sirtuy, that the prosecution did not tender documentary proof in the form of a birth certificate to prove age. But it is not a must for there to be such documentary proof for age to be proved. PW-2 stated that LN was aged 4 years. The court saw for itself LN, and was of the view that she was aged about 4-5 years. I think the evidence and the assessment of the victim did not bring any doubt that the victim was certainly less than 9 years of age. I do not agree with Mr. Sirtuy, that age was not proved beyond reasonable doubt.

It was also argued that the evidence tendered was not conclusive that the offence of attempted defilement was committed. In assessing the evidence, the trial magistrate was of the view that "tabia mbaya" as stated by the alleged victim meant penetration of a sexual organ, even if partially. However, he was also of the view that the medical evidence tendered did not support an act of penetration and that is why he was comfortable in convicting the appellant for the offence of attempted defilement. I think the trial court had to make a firm finding , whether on the facts, there was penetration or no penetration.

The trial court came to the conclusion that there was an attempt, solely on the evidence of PW-1. I have carefully looked at the evidence of PW-1 and I am afraid that the same is not conclusive as to whether there was attempted defilement, in the form of an attempt to penetrate. The mere statement by the witness, that there was attempted defilement cannot be conclusive in itself. The surrounding circumstances that made the witness draw such an opinion must be examined and the court needs to satisfy itself that the opinion of the witness is duly supported. In this instance, PW-1, the clinical officer stated that there was no evidence of penetration. He stated that laboratory tests were done which showed red blood cells. The nature of this "laboratory test" was not disclosed. What is this that was being tested? Was it a vaginal swab, or urine, or blood? It is not clear what specimen was tested. The witness ought to have been clear as to what exactly he examined and what was unusual in the specimen. The witness further needed to state what results in the laboratory tests, or in his assessment of the minor, led him to the conclusion that there was an attempt at defilement. The witness could not off-hand say that there was an attempted defilement without attempting to support that opinion with facts. I also do not understand why the minor had a limping gait if there was no penetration and no injuries noted on her. She otherwise appeared normal and I find it difficult to connect the limping gait with the attempt at defilement.

I understand the difficulty that a trial court encounters when faced with a child who has to recount what exactly transpired in a sexual attack. However, it cannot be said that the term "tabia mbaya" is a blanket term for actual sexual intercourse and cannot mean anything else. In the circumstances of this case, I think it was important for the court to try and determine what exactly this "tabia mbaya" meant. The offence was one of attempted defilement, meaning that there was no penetration and indeed there appears to be consensus that there was no penetration. So what exactly did the child mean by "tabia mbaya"? Given this situation, the trial court had a duty, to the best of its ability, to determine the facts surrounding this term "tabia mbaya". It was probably something else that did not constitute an act of penetration and I think that given the surrounding circumstances, it was wrong for the court to come to the conclusion that "tabia mbaya" in the instance meant the act of sexual intercourse or penetration of a genital organ.

I have difficulty with the totality of the evidence tendered. Some bits of the evidence tendered simply do not add up or there are gaping holes in the evidence which I am unable to reconcile. I have already said that I am at a loss in connecting the limping gait of PW-3 with the alleged attack since there was no penetration. That aside, the evidence of PW-2, the mother of the victim does not state when all this transaction took place. Neither that of PW-3, the stated victim of the offence. I appreciate that children may have difficulty in pin-pointing exact times but at least they can tell whether it is in the morning, lunch time or evening. Moreover, it was said that LN was playing with some children. None of them was called to testify so as to buttress the point that LN was actually called by the appellant. Of course, it was not a must for them to be called, but their evidence, given the lack of a clear timed sequence, was in my view, important.

Further, the circumstances that led to the arrest of the appellant were never laid out. For example, was the appellant found in the house? Was he with his clothes? Where exactly was he when he was arrested? Who arrested him? All this is not disclosed. There are in fact serious contradictions between the evidence of PW-2 and that of PW-4 as regards the arrest of the appellant. On one hand PW-2 testified that the appellant was arrested on the same day, i.e 16 January 2012, and was taken to Nginyang police station. However PW-4, the police officer, stated that the appellant was brought on 19 January 2012 by GSU officers and they were accompanied by PW-2 and PW-3. That position seems to be buttressed by the P3 form which seems to have been issued on 19 January 2012 and not on 16 January 2012. Indeed, it was the evidence of the appellant that he was arrested on 19 January 2012. These discrepancies, to me, call to doubt the credibility of PW-2 as a witness.

It was also averred by PW-2 that she took the stated victim to a named dispensary. The notes of the dispensary were never displayed in court and no reason was given why. It is certainly not mandatory for hospital notes to be tendered in evidence so as to sustain a sexual offence, for the prosecution is free to tender what it feels is enough to sustain the charge; however to me such evidence is an important piece of evidence where available, and it can shed a lot of light, especially in instances where there is little direct evidence, and it should be availed if possible. The appellant in his defence stated that the first doctor,

assuming that he is referring to the dispensary doctor, did not see anything wrong with LN. Given that no treatment notes were produced, and the P3 showed nothing unusual, it cannot be ruled out that the first doctor saw nothing wrong with LN, and I think that this statement by the appellant ought to have been given some weight.

I am aware that the court can convict on the sole evidence of the victim of a sexual offence. This is spelt out in Section 124 of the Evidence Act, CAP 80. The court could indeed convict the appellant on the sole evidence of PW-3. However, as I said, it is not clear what exactly the appellant did to the stated victim, so that it can be determined that those actions constituted an offence. What the minor said is that the appellant removed her clothes and he removed his as well and then the appellant did "tabia mbaya" to her. The victim only stated "tabia mbaya" but it has been impossible to conclude with finality whether this constituted an act of penetration even if partial, or what exactly it constituted. This calls the question, what exactly did the appellant do? Unless we know exactly what he did, we cannot conclude that the same constituted an indecent act.

The appellant may have done something to the minor, but unless we know what it is, there is no way we can reach the conclusion that the same constituted an indecent act so as to have him convicted of the offence of attempted defilement. The particulars of the offence say that he attempted to penetrate the vagina of LN, but the facts surrounding that attempt are not clear. There is some doubt, and the law is that the appellant must be given the benefit of that doubt.

There was the contention that the sentence was severe. I have not seen anything wrong with the sentence and if I was to sustain the conviction, I would not have disturbed the sentence. The prescribed minimum sentence for attempted defilement is 10 years as prescribed by Section 9(2) of the Sexual Offences Act, and therefore there was nothing wrong with the sentence of 16 years. But of course the sentence cannot stand if the conviction for attempted defilement is set aside.

I am aware that there was an alternative charge, but I am also unable to convict the appellant on the alternative count. There is no evidence that the appellant caused his penis to come into contact with the vagina of the stated victim. In fact, there is serious doubt as to whether his penis in any way came into contact with the vagina of the stated victim.

All these doubts would have been put to rest if the prosecution had gathered all necessary evidence and witnesses. I think the case was investigated and prosecuted too casually, which casualness has brought doubt as to whether the appellant actually committed the offence for which he was charged. There is serious need for the police and prosecutors to ensure that all relevant evidence is gathered, for without such meticulousness, it could be, that persons who otherwise belong to jail, will go scot free or persons who do not belong to jail, will be jailed. Sustaining a conviction all depends on the wealth of evidence gathered, and it is dangerous for the prosecution to only aim at gathering the barest of evidence.

For the circumstances of this case, I must give the benefit of doubt to the appellant. For the above reasons, I quash the conviction and sentence. I direct that the appellant be released forthwith unless otherwise lawfully held.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 13TH DAY OF FEBRUARY 2014

JUSTICE MUNYAO SILA

HIGH COURT AT ELDORET

Delivered in open court in the presence of:-

Appellant - present

Mr. Munene for the state

N/A for Mr. Sirtuy for the appellant