



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, WARSAME & SICHALE, J.J.A)

CRIMINAL APPEAL NO. 142 OF 2016

BETWEEN

ISAACK ALI ISSACK.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the judgment of the High Court of Kenya

at Garrissa (Dulu, J.) dated 17th February 2015

in

H.C.R.A No. 105 of 2012)

JUDGMENT OF THE COURT

1. This is an appeal from the Judgment of the High Court of Kenya at Garrissa (Dulu, J.) dated 17th February, 2015 in **H.C.R.A No. 105 of 2012**. In it *Issack Ali Issack*, (the appellant), was charged before the Senior Resident Magistrates' Court at Wajir with the offence of attempted defilement contrary to **Section 8(1)** as read with **Section 8 (2)** of the **Sexual Offences Act No. 3 of 2006**. The appellant also faced an alternative count of indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act** and a 2nd independent charge of entering Kenya without a passport or permit contrary to **Section 34(1)** as read with **Section 53(1)(J)(2)** of the **Kenya Citizenship and Immigration Act**.

2. The particulars of the main charge were that on 19th September, 2012 at [particulars withheld] village in Mandera Central District within Mandera County, the appellant unlawfully and intentionally attempted to cause his genital organ, namely his penis to penetrate the genital organ namely the vagina of **JMH** (name withheld) a child under the age of fourteen (14) years old at the time. The particulars of the alternative charge were that on the above mentioned place and date, the appellant unlawfully and indecently assaulted **JMH** a girl aged fourteen (14) years, by touching her private parts and the 2nd count was that on the same day and place being an Ethiopian citizen, was found present in Kenya without a passport or permit.

3. The appellant pleaded not guilty to all the charges. The prosecution's case was predicated on the evidence by three witnesses. After *voire dire* examination, **JMH (PW1)** a young girl aged fourteen (14) years, was found capable of giving sworn testimony. She was also the complainant in the matter. PW1 told the trial court that she used to live in the same house with her mother and two siblings. That on 19th September, 2012 (date on the charge sheet reads 11th September, 2012) at around 3am, while sleeping in a bed she shared with her siblings aged four (4) and two (2) years old respectively, she was rudely awoken from sleep by the appellant who had climbed into the bed where she was sleeping with her siblings, and was attempting to remove her biker and trousers. The appellant had already pulled her inner wear to the knees and had also pushed his kikoi to his groin area. PW1 immediately screamed thereby waking up her mother who ran outside and raised an alarm. Four

4. neighbours responded, and they immediately apprehended the appellant and guarded him until morning when they took him to Wargadud Police Station.

5. **BA** (name withheld) (**PW2**) is the mother of PW1. She testified that on 10th September, 2012, the appellant came to her house at night

around 10pm and said that PW2's relative one **MC** had sent him to her so that she could provide him with accommodation for the night. PW2 testified that she inquired about the appellant's clan after establishing that he came from Darawa Garre clan while PW2 was from Oitira Garre. She asked him to find a place to sleep from a person who was a Darawa but the appellant said he was referred to her by one **Said** who was a family friend. Since both PW2 and appellant shared the larger clan of Garree, she allowed him to sleep in a separate iron sheet house with her son one **Abdikafar** aged sixteen (16) years old. The house had two beds and the appellant slept on one of them. At around 3 am, PW2 heard her daughter screaming and realized that the torch she kept in the house overnight had been switched off. She ran outside and raised an alarm. Four neighbours responded immediately and captured the appellant, detaining him until morning when they escorted him to the police station.

6. The matter was reported to Wargadud Police Station and **PC Labaso (PW3)** was assigned the investigation. PW3 testified that once the appellant was taken to the station by a group of people who reported a case of attempted defilement, he recorded statements from PW1 and her mother. He also visited the scene, re-arrested the appellant and charged him with the main count of defilement as aforesaid and since the appellant was an Ethiopian national and he was unable to produce any identification or permit allowing him to be in Kenya, he also charged him with the offence of being an illegal alien.

7. After hearing the prosecution's case, the learned trial magistrate, found that the appellant had a case to answer. On his being placed on his defence he gave a lengthy sworn statement of defence, essentially denying the charges. He alleged that PW2 found him chewing miraa with two (2) other men; that she is the one who invited him to her hotel because they were from the same tribe; that the appellant bought miraa from her and that he lent her Ksh. 300. She offered him a place to spend the night and borrowed a further Ksh. 6000 from him which she agreed to repay in six (6) months. At night, she gave him water in a jerry can to wash. She told him to sleep in the house with herself and her children but the appellant declined as it was culturally inappropriate. That PW2 gave him a blanket and he went to sleep under a tree. The appellant was woken up by people shining torches who were alleging that PW1 had been indecently touched. It was the appellant's contention that PW2 accused him as he was the only one in the area and that the real attacker had managed to flee from the scene. Regarding the charge of being an illegal alien, the appellant testified that he had a waiting card but he had given it to someone to procure for him an identification card.

8. Upon weighing all the evidence, the learned trial magistrate was convinced that the prosecution had proved its case against the appellant to the required standard. Consequently, the appellant was convicted on the main charge of attempted defilement and sentenced to twenty (20) years' imprisonment, and on count II ordered that the appellant be repatriated on serving the sentence.

9. Aggrieved by the said decision, the appellant appealed against the conviction and sentence in the High Court. The High Court (**Dulu, J.**) vide a judgment dated 17th February, 2015 dismissed the appeal. Unrelenting, the appellant has filed this second appeal which is predicated on his homemade grounds of appeal, there are seven (7) grounds in a memorandum of appeal filed on 21st September, 2015 and five (5) grounds in an amended memorandum subsequently filed on 29th January, 2020. The grounds are prolix and repetitive; we will therefore summarize them as follows;

(i) That the High Court erred in law by failing to draw an adverse inference regarding errors or mistakes of form which were noted and having found that the same occasioned a miscarriage of justice;

(ii) That the High Court erred by failing to observe that the provisions of Section 214 of the CPC ought to have been applied during the trial in view of a defect in the charge sheet;

(iii) That the High Court erred by failing to observe that the provisions of Section 150 of the CPC was not complied with as regards to summoning of essential witnesses;

(iv) That the entire case for the prosecution was not proved to the required standard; and

(v) That section 169(1) of the CPC was not adequately applied.

10. The appeal was heard on 5th February, 2020 and the appellant appeared in person whereas the State was represented by **Ms. Matiru**, learned Senior Principal

Prosecutions Counsel (SPPC). The appellant relied entirely on his amended grounds of appeal together with his written submissions filed before this Court on 29th January, 2020. In his submissions, he argued that the learned Judge had failed in his duty to subject the evidence to a fresh and exhaustive examination; that the prosecution had failed to prove the charge beyond a reasonable doubt as there was no P3 form produced in evidence; and that the charge was defective occasioning the appellant a miscarriage of justice.

11. On the part of the State, **Ms Matiru**, in opposing the appeal, submitted that the appellant was properly charged as the offence of attempted defilement exists in the **Sexual Offences Act**; that the prosecution's evidence was properly analyzed by the two courts below; that the trial was conducted in Kiswahili and the appellant understood the charges against him as demonstrated by an exhaustive cross-examination of the witnesses. On sentencing, learned counsel argued that the sentence prescribed for attempted defilement of a child below fourteen (14) years is not less than ten (10) years and therefore twenty (20) years was a lawful sentence.

12. In a brief reply, the appellant insisted that PW1 's mother borrowed money from him intending that the appellant would marry the complainant; and that the accusation of attempted defilement was a mere fabrication.

13. This being a second appeal, our jurisdiction is limited by **Section 361** of the **Criminal Procedure Code** to consider only matters of law. Our role as the second appellate court was succinctly set out in **Karani vs. R [2010] 1 KLR 73** wherein this Court expressed itself as follows: -

“This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law.”

14. We have considered the record of appeal as captured in the above summary, and deliberated on the submissions out of which we have distilled two issues for determination that is *whether the appellant was charged under the wrong section of the Sexual Offences Act, and if so, what is the effect and whether the appellant was properly convicted for the offence of attempted defilement.*

15. The appellant contended that the charge sheet was fatally defective for stating the he was being charged under **Section 8(1)** of the **Sexual Offences Act**, which provides for the offence of defilement while the particulars of the charge were those of attempted defilement as provided under **Section 9 (1)** of the Act. In his judgment, the learned Judge ruled that the defect was not fatal to the trial and posited thus; -

“I have perused the record and the charge sheet. The Prosecuting Counsel has stated that the charge is defective because the statutory section covering attempted defilement under the Sexual Offences Act was not cited in the charge. Indeed section 8 was cited instead of section 9 of the Act. In my view the mere failure to cite the correct section of the law does not render the charge totally defective. The offence does exist under the law in the same Act. In my view, citing the wrong section was a mistake that is curable under Section 382 of the Criminal Procedure Code (Cap 75). Such a mistake did not cause any prejudice to the appellant or affect him adversely in his defence. (See the case of Fappyton Mutuku Ngui vs. Republic (2012) eKLR.) Even if the learned Magistrate did not either reject the charge or order its amendment, in my view no miscarriage of justice was occasioned upon the appellant.”

16. We agree the above statement by the learned Judge as it represents the correct position of the law regarding a defect in the charge sheet and in particular the instant matter where the particulars were clear on the charge the appellant was facing. We also hasten to add that a reading of the particulars stated in the same charge sheet clearly explained the offence was one of attempted defilement. Whereas we recognize the appellant should have been charged under **Section 9(1)** of the **Sexual Offences Act**, as stated above, this was a defect that is curable under **Section 382** of the Criminal Procedure Code.

17. Were the ingredients of attempted defilement satisfied by the evidence before the trial court? **Section 388** of the **Penal Code** defines **“attempt”** as follows: -

“388 (1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfillment, and manifests his intention by some overt 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 fulfillment 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.”

18. To us, the above section brings out two main ingredients of an attempted offence; the ***mens rea*** which constitutes the intention and the ***actus reus*** which constitutes the overt act towards the execution of the intention. This is what PW1 stated in her own words: -

“... I was asleep. It was at 3am, I was in the house asleep with my two siblings 4 years and 2 years old. We were sleeping in one bed. Even my mother was also asleep in the house. My mother’s name is ...(withheld). Accused climbed the bed and came between me and the two kids. He tried to remove my panty. I had a trouser and biker. He held the biker and trouser together and tried to remove it. Trouser reached knees and biker reached my thighs. He held my breast and stomach. At time I was asleep but when I woke up I realized what he was doing. He had pushed his kikoi up to his groin region. He had a red kikoi and white striped shirt just like the way he is. I screamed and my mother woke up. He was arrested there and there...”

19. The two courts below were satisfied that the ingredients of an attempted defilement were disclosed by the above evidence which proved beyond reasonable doubt that the appellant’s intention to defile PW1 were demonstrated, were it not for PW1’s screams that attracted the timely intervention of PW2 that the appellant was arrested in the nick of time. The learned Judge in considering the prosecution’s evidence against the appellant’s defence had this to say: -

“The only material variation between the evidence of the prosecution and defence, is that (sic) the PW2 claimed that she told the appellant to go and sleep in a nearby iron sheet house, while the appellant stated that she told him to go and sleep with the children and he refused and instead went to sleep outside under a tree. It is noteworthy that the said children included the complainant. In my view, it is unthinkable that an adult mother would tell a stranger like the appellant to go and sleep in the same bed among female children. That was the line of defence of the appellant, which in my view was highly improbable. In my view the defence of the appellant was an afterthought, and an attempt to shift blame. It was a long sworn defence, but it was not coherent or believable. He narrated a long story of being a house boy and how he was mishandled, instead of addressing the real issue about what he did in that homestead.”

20. We find this analysis by the Judge was sound and logical as the facts clearly point out to an intention on the appellant’s part to commit defilement which is clearly demonstrated by his act of climbing on a bed where PW1 and her siblings were sleeping and attempted to

remove her underwear while attempting to expose his own groin by pushing his kikoi. This was indicative of *actus reus* if not for the timely intervention by PW2 the act of defilement would have taken place. This Court explained intention to commit an offence in **Francis Mutuku Nzangi vs. Republic [2013] eKLR** as follows: -

“...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.”

21. The offence of defilement as defined under **Section 9(1)** of the **Sexual Offences Act** is committed when a person attempts to cause penetration with his genital organs, manifested by facts that point to an act of penetration. In an offence of attempted defilement, no penetration takes place, and this is what distinguishes it from the offence of defilement. We therefore find that the *actus reus* as well as the *mens rea* on the part of the appellant was established by the evidence and an offence of attempted defilement was proved in law. The appellant’s conviction is therefore supported by evidence and we find no justification to interfere.

22. We have also given reasons as to why we agree with the learned Judge that the fact that the appellant was charged with defilement under **Section 8(1)** and not attempted defilement under **Section 9 (1)** did not render the trial defective, neither did it prejudice him or occasion any failure of justice. In this regard we also wish to point out what is provided under **Section 214(1)** of the **Criminal Procedure Code** regarding a defective charge is if: -

“(a) it does not accord with the evidence in committal proceedings because of inaccuracies or deficiencies in the charge or because it charges offences in the charge not disclosed in such evidence or fails to charge an offence which the evidence in the committal proceedings discloses; or

(b) it does not, for such reasons, accord with the evidence given at the trial; or

(c) it gives a misdescription of the alleged offence in its particulars. (See Jason Akumu Yongo v Republic [1983] eKLR)”

In the instant case, apart from an indication that the charge was contrary to **Section 8(1)** of the **Sexual Offences Act**, all the particulars clearly stated it was an attempted defilement and the entire evidence was for an attempted offence which falls under **Section 9** of the Act ... ‘attempts to commit an act which would cause penetration with a child’ since the particulars and the evidence led in court clearly pointed to an attempted defilement we agree with the Judge that the appellant did not suffer any prejudice. We therefore find no justification for faulting the two courts below in the conclusions made regarding conviction of the appellant.

23. Finally, on sentencing, **Section 9 (2)** of the **Sexual Offences Act** states as follows: -

“(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 trial court sentenced the appellant to twenty (20) years’ imprisonment and the High Court did not interfere with the sentence. On conviction, the appellant prayed for leniency stating that he was twenty-eight (28) years old at the time of the offence; that he was a first offender and unmarried. The prosecution prayed the court for a deterrent sentence.

24. On our part we are of the view that the sentence meted out against the appellant should be reviewed in line with the recent development in law following the Supreme Court’s decision in **Francis Karioko Muruatetu & another vs. Republic [2017] eKLR** where it was stated as follows: -

“[52] We ...agree with the High Court's statement in Joseph Kaberia Kahinga that mitigation does have a place in the trial process with regard to convicted persons pursuant to Section 204 of the Penal Code. It is during mitigation, after conviction and before sentencing, that the offender's version of events may be heavy with pathos necessitating the Court to consider an aspect that may have been unclear during the trial process calling for pity more than censure or on the converse, impose the death sentence, if mitigation reveals an untold degree of brutality and callousness.”

25. Taking the totality of all the circumstances twenty (20) years when considered along the sentencing guidelines and the mitigation made, can be said to be manifestly excessive as it is apparent the two courts below did not consider the mitigation offered by the appellant, especially the fact that he was a first offender as against the proportionality of the aggravating circumstances of the offence which were absent. The aggravating circumstances we envisage are violence or any other harm to the victim although we do not at all underrate the psychological trauma that is attendant to victims of sexual offences especially minors.

26. Although we dismiss the appeal on conviction, the appeal partially succeeds on sentence. We set aside the sentence of twenty (20) years and substitute therefor with a sentence of ten (10) years, the appeal succeeds to that extent.

Dated and delivered at Nairobi this 8th day of May, 2020.

M. K. KOOME

.....

JUDGE OF APPEAL

M. WARSAME

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signe

DEPUTY REGISTRAR