



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Appeal 384 of 2008

JOSEPH LUTANGALA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in criminal case Number 1231 of 2008

in the Chief Magistrate's Court at Kibera – Mrs. Odero (CM) on 30th November 2008)

JUDGMENT

1. The appellant **Joseph lutangala**, was charged with defilement of a child contrary to **Section 8(1)(4)** of the **Sexual Offences Act No. 3 of 2006**. In the alternative count, he was charged with Indecent Act with a Child contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**.
2. The brief particulars were that on the 15th day of May 2008 at Nairobi District within Nairobi Area Province, wilfully and unlawfully committed an act which caused penetration with his male genital organ into a female genital organ of V.C, a child aged 7 years. (identity concealed on account of her being a minor)
3. At the close of the case the appellant was convicted and sentenced to serve ten (10) years imprisonment for attempted defilement. He thereafter filed an appeal relying on two amended grounds in which he urged that he was convicted and sentenced on a defective charge sheet, and further that the learned trial magistrate invoked **Section 180** of the **Criminal Procedure Code** while the evidence tendered before the court was full of inconsistencies and contradictions thus violating **Section 124** of the **Evidence Act**.
4. Being the first appellate court I have analysed and re-evaluated all the evidence on record, to make my own findings and draw my own conclusions, bearing in mind that I did not have the advantage of seeing or hearing the witnesses as they testified.

5. On ground No. I, the appellant urged that the charge sheet was incurably defective and therefore rendered the entire trial a nullity. His reasons were that, there was a variance between the charge and evidence tendered which would have required amendment to the charge as provided by **Section 214** of the **Criminal Procedure Code**. He submitted that the court failed to alter the charge and call upon the accused person to plead to the amended charge as was required. Instead the learned trial Magistrate invoked **Section 180** of the **Criminal Procedure Code** and sentenced the appellant to 10 years imprisonment.

6. I have examined the trial court record and note that the trial magistrate made the following observation:-

“The fact that the accused may be the child’s biological father is not a bar to him (sic) having an intention to defile her. The accused was found in a very compromising situation with the child. There is no doubt in the court’s mind that his intention was to defile the child and the situation in which the accused was found is clear evidence of an attempt to defile the complainant. Therefore the court invokes Section 180 Criminal Procedure Code.”

7. The trial court did not find the appellant guilty on Count 1 or on alternative count as the prosecution had not proved it’s case to the required standard, but went ahead to convict the appellant of attempted defilement contrary to **Section 9(1)** of the **Sexual Offences Acts 2006**.

8. I have therefore scrutinized and re-evaluated the evidence to establish whether the prosecution had proved the offence of attempted defilement contrary to **Section 9(1)** of the **Sexual Offences Acts 2006**, to warrant the conviction by the trial Magistrate.

9. Mr. Kadebe, the learned State Counsel, opposed the appeal on behalf of the respondent. He submitted that the appellant was rightly convicted for the offence of attempted defilement as he was caught “red handed” in bed with **PW1** by **PW2** and that **PW1** did not have her pants on. Further that the evidence of **PW3** confirmed that **PW1** was involved in a sexual act as evinced by the fresh injury on her hymen.

10. In summary, the prosecution’s case was that on 15th May 2008 the appellant who was the step-father to the complainant (**PW1**), a child of 8 years defiled her in their home at [particulars withheld] **PW1** narrated to the court how on the material day she came home from school at 2.00 p.m. and found the appellant in the house. The appellant pulled her onto the bed, pulled up her dress and removed her under pant. The appellant removed his own trouser and lay on top of her. He put his penis into her vagina and she felt pain.

11. **PW2** the mother to **PW1** came home early at 3.00 p.m. on the same date of 15th May 2008 and found the door closed. On opening it she found the appellant who was totally naked on the bed with **PW1** who was in her school uniform but without her under pants. **PW2** took the minor to their neighbour’s house and together they checked her genitals. She found no semen on the child but decided to take her to Nairobi Women’s hospital where upon examination it was confirmed that the child had been defiled. She reported the matter to the police, and the appellant was subsequently arrested and charged.

12. **PW4**, Beatrice Atieno was the neighbour to whose **PW2**, house went. She told the court that she was at home on 15th May 2008 at 3 p.m. when **PW2** came weeping to her house, and told her that she had found the appellant and **PW1** in bed together. **PW4** questioned, **PW1** who told her that the appellant had “raped” her. She examined **PW1**’s genitalia and confirmed that indeed she had been sexually interfered with. She helped **PW2** take the child to hospital.

13. Upon analysis of the evidence of **PW4**, however, the trial court found it to be contrary to that of **PW2** who did not mention seeing any semen, bruises or injuries on **PW1**’s genitalia. I have looked at the record and respectfully agree with this finding by the trial court.

14. **PW3** Dr. Ketra Muhombe, gave evidence that she examined the complainant on 15th May 2008. She

prepared and signed a medical report which she produced before the court as P exhibit 1. **PW3** found the complainant to have a fresh tear on the hymen. A swab taken from her revealed no traces of spermatozoa. She made an impression of defilement.

15. **PW6**, Dr. Kamau the Police Surgeon, on the other hand, examined **PW1** on 18th May 2008 two days after the alleged defilement, and found **PW1's** hymen to be intact. The external genitalia was normal, and there were no injuries to the vulva or vagina, neither did he find any trace of spermatozoa. He produced a P3 form as P. exhibit 2, in her regard.

16. The trial magistrate analysed the evidence of **PW3** and **PW6**, who were both qualified medical practitioners, and noted that they contradicted each other on an aspect which was crucial to this case, that is, a torn hymen. This contradiction created reasonable doubt as to whether **PW1** was actually defiled.

17. The act of defilement requires penetration, and the fact of the hymen not being breached does not negate **PW1's** assertion that the appellant inserted his penis into her vagina. **Section 2 of the Sexual Offences Act No. 3 of 2006** interprets the act of penetration as follows:

“Penetration means the partial or complete insertion of the genital organs of a person into the genital organs of another person”.

Therefore **PW1's** assertion that the appellant put his penis into her vagina and that she felt pain indicates that there was an act of penetration.

18. From the court record, the trial court noted that, despite her tender years **PW1** was able to narrate the events of the day in a clear and concise manner. She narrated how the accused pulled her onto the bed, removed her under pant and lay on top of her. The trial court also noted that **PW1** remained unshaken under cross examination by the appellant.

19. **PW1** was able to positively identify the appellant in court. She knew him well as he lived with her family as her mother's boyfriend. There is no possibility that **PW1** was mistaken in her identification of the appellant. Further, her evidence that the appellant pulled her onto the bed and removed her under pant and his own clothes was corroborated by **PW2** who found them on the bed in that state.

20. The appellant was placed on his defence on the basis of the foregoing evidence from the prosecution. In his unsworn statement he denied the charges and stated that on the date of the alleged offence, he was not found with the Child. He asked the court to release him as the child was his and he could not have possibly committed the said offence against her.

21. Under **Section 180 of the Criminal Procedure Code**, a person charged with an offence may be convicted of having attempted to commit that offence although he was not charged with the attempt. The said **Section 180 of the Criminal Procedure Code** provides as follows:

“When a person is charged with an offence he may be convicted of having attempted to commit that offence although he was not charged with the “attempt”

It was not therefore unusual for the appellant to be convicted for an offence which he was not charged with.

22. After a careful analysis of the record I find that there was cogent evidence to warrant the conviction of the appellant for the offence of attempted defilement contrary to **Section 9(1) of the Sexual Offences Act 2006**. After discarding the medical evidence due to the contradiction between the two medical witnesses the fact of penetration as presupposed by **Section 8 (1) of the Sexual offences Act**, remained in doubt.

23. The evidence in totality however proved the offence of attempted defilement, as illustrated by the actions of the appellant, on the fateful day, in the evidence of both **PW1** and **PW2**.

24. It is not necessary that the evidence of a child of tender age be corroborated for the court to found a conviction upon it, provided that the court is satisfied that the child is telling the truth. The trial court expressed satisfaction in the fact that the child was telling the truth, and that there was no reason for her to fabricate evidence against the appellant.

The proviso to **Section 124** of the **Evidence Act** provides that:

“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.”

25. I have given the defence raised by the appellant adequate consideration and find that it did not manage to dislodge the prosecution’s case.

26. After a careful re-assessment, of the evidence on record, I am in agreement with the findings of the trial court, and I am satisfied that the conviction entered against the appellant was based on sound evidence. I therefore find that the appeal is unmerited. I uphold the conviction entered and sentence imposed by the learned trial magistrate.

The appeal is hereby dismissed.

SIGNED DATED and **DELIVERED** in open court this **27th day of February 2013**.

L. A. ACHODE

JUDGE