REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 64 OF 2020

RODGERS ODHIAMBO MANGENI .... APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGMENT

1. The brief background of this appeal is that the appellant, *Rodgers Odhiambo Mangeni*, was tried and convicted of the offence of attempted defilement contrary to *Section 9 (1)* as read with *Section 9 (2)* of the *Sexual Offences Act No. 3 of 2006*.

2. The particulars of the charge were that on 9th July 2016 at Mathare North Area 1 within Nairobi County, the appellant intentionally attempted to cause his penis to penetrate the vagina of *MA*, a child aged 4 years.

3. Upon conviction, the appellant was sentenced to serve (20) years imprisonment. He was aggrieved by his conviction and sentence hence this appeal.

4. In the grounds encapsulated in his petition of appeal filed on 18th May 2020, the appellant mainly complained that the trial magistrate erred by convicting him on the basis of a defective charge sheet; convicting him on evidence which was contradictory and inconsistent which was insufficient to prove the charges preferred against him beyond any reasonable doubt and by rejecting his plausible defence.

5. At the hearing, both the appellant and the respondent prosecuted the appeal by way of written submissions. The appellant who appeared in person during the hearing filed his written submissions on 23rd April 2021 while those of the respondent were filed on 8th May 2021.

6. In his submissions, the appellant faulted the learned trial magistrate for allegedly failing to faithfully and objectively analyse the evidence presented before him during the trial and claimed that his conviction was based on suspicion which cannot be a basis of inferring guilt.

7. He questioned the credibility of the DNA report produced as *Pexhibit 5* by a Government Analyst who testified as PW3 which indicated that the semen found on the victim's underwear matched his DNA Profile.

In a nutshell, the appellant contended that he was wrongly convicted as in his view, the prosecution case was not proved beyond any reasonable doubt as required by the law.

8. In opposing the appeal against conviction, it was submitted on behalf of the respondent that the appellant's conviction was proper as the evidence tendered before the trial court proved all the ingredients of the offence beyond any reasonable doubt. The respondent denied the appellants claim that the DNA report was not credible and asserted that the report corroborated the evidence of the victim (PW 2) and her mother (PW1).

9. The respondent however conceded to the appellant's complaint that the sentence imposed by the trial court was harsh and excessive. According to the respondent, the learned trial magistrate failed to give reasons for sentencing the appellant to twenty years imprisonment when the law prescribed a minimum sentence of ten years imprisonment.

10. As a first appellate court, I am enjoined to carefully and exhaustively scrutinize the evidence adduced before the trial court to arrive at my own independent conclusions regarding the validity or otherwise of the appellant's conviction and sentence. In doing so, I should remember that unlike the trial court, I did not have the benefit of seeing or hearing the witnesses and give due allowance for that disadvantage. See: ***Okeno V Republic, [1972] EA 32***.

11. I have given due consideration to the grounds of appeal, the evidence on record and the written submissions filed by both parties as well as the authorities cited by the appellant.

Having done so, I find that the key issues arising for my determination are twofold namely:

i. Whether the evidence presented before the trial court proved the guilt of the appellant as charged beyond any reasonable doubt.

ii. Whether the sentence imposed on the appellant was harsh and excessive in the circumstances of the case.

12. Starting with the first issue, to establish a charge of attempted defilement, the prosecution must prove beyond doubt all the ingredients of the offence of defilement except penetration which is what completes the offence of defilement. The prosecution must therefore prove that the victim was a child within the meaning of the *Children's Act*; that the accused was positively identified as the assailant and the overt acts or steps taken by the accused towards committing the offence of defilement which was not completed.

13. An attempt to commit an offence is defined in *Section 388* of the *Penal Code* as follows:

"1. When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil 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 fulfilment 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."

14. Bearing in mind the above provisions, I will now analyse the evidence on record to ascertain whether the essential ingredients of the offence preferred against the appellant were established to the required standard of proof.

15. Regarding proof of age, I wish to state at the outset that the importance of proving the age of a victim in sexual offences is paramount considering that under the *Sexual Offences Act*, the prescribed sentence is determined by the age of the victim.

There are various ways which can be used to prove a victim's age as held in ***Mwalengo Chichoro Mwajembe V Republic, Criminal Appeal No. 24 of 2015 (UR)*** where the court stated as follows:

"……..the question of proof of age has finally been settled by a recent decisions of this court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof" It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. (See Denis Kinywa -Vs- Republic Criminal Appeal No. 19 of 2014) and (Omar Ucher -Vs- Republic Criminal Appeal No. 11 of 2015). We doubt if the courts are possessed of requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decisions of the Court of Appeal of Uganda in Francis Omuroni -Vs- Uganda Criminal Appeal No. 2 of 2000. We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable..."

16. In this case, although the appellant did not dispute the age of the complainant as stated in the charge sheet, it is important to note that PW1, her mother, testified that she was about 5 years old at the time she testified before the trial court. This was on 24th February 2017 which was about 6 months after the offence was allegedly committed. She also tendered in evidence PW2's health and notification card (Pexhibit1) which shows that the complainant was born on 28th April 2012.

17. Section 2 of the *Children's Act* defines a child as a person under the age of eighteen (18) years. Given the above evidence, I am satisfied that in this case, the prosecution adduced credible evidence to prove that the complainant was indeed a child at the time the offence was allegedly committed.

18. The question I must now grapple with is whether the prosecution adduced sufficient evidence to prove that the appellant attempted to defile the child victim as alleged. PW2 after a brief *voire dire* examination gave an unsworn statement in which she testified that at the material time, the appellant found her at "kwa mawe" and took her to his house. On arrival, he gave her porridge then put her on his bed, removed her clothes and then put his penis on her vagina. Thereafter, he told her to go outside and play.

19. PW2's evidence was materially corroborated by the evidence of pw1, her mother. PW1 recalled that she was washing clothes on the door to her house and PW2 was outside playing. She heard a cough resembling PW2's coming from a neighbouring plot. When going to the plot, she met with PW2 leaving and noted that her trouser was open. She also had dry porridge on her upper lip.

20. Upon enquiry, PW2 narrated how the appellant had placed his penis on her genitalia and on examining her private part, she found it wet and her underwear had whitish substances. PW2 then led her to the house in which the sexual assault had happened and in there she found the appellant. She caused his arrest by members of the public and she immediately reported the matter to PW4 at Ruaraka Police Station.

PW2 identified in court the underwear (panty) she had worn on the material day which was produced as Pexhibit9 by the investigating officer who testified as PW7.

21. On the same day at around 4:45pm, PW2 was examined by *Dr. Suhaylaa Abud* and by *Dr. Maundu* on 13th July 2016. Both doctors completed reports showing that her genitalia had no visible injuries and her hymen was intact.

According to the Post Rape Care form (PCR) produced as Pexhibit1, urine samples and vaginal swabs obtained from PW2 when subjected to laboratory analysis confirmed the presence of spermatozoa in both her urine and genitalia.

22. In her evidence, PW7 recalled that when she re-arrested the appellant from members of the public, she took possession of both the minor's and appellant's underwear which were labelled accordingly. She thereafter obtained their blood samples. She escorted the underwears and the blood samples to the Government Chemist for analysis. They were scientifically analysed by PW3 *Ms. Anne Wangechi Nderitu*, a Government Analyst.

23. According to PW3, upon examining the two underwears, she found that the panty recovered from PW2 (*Pexhibit 9*) was stained with seminal fluid. She generated DNA profiles from the underwear and the blood samples. After her analysis, she concluded that the DNA profile generated from the semen stains in *Pexhibit 9* matched the DNA profile of the blood sample obtained from the appellant.

24. When placed on his defence, the appellant chose to make an unsworn statement and did not call any witness. In his statement, he admitted that he was PW1's neighbour and that he was with PW2 in his house on the date alleged and that he had fed her with porridge. He narrated how he was arrested but denied having committed the offence as charged. He claimed that PW1 had framed him with the offence after he demanded a refund of a loan of KShs.8,000 he had earlier advanced to her.

25. After my own appraisal of the evidence on record, I am unable to fault the finding of the learned trial magistrate given the admission by the appellant that he was with the victim in his house at the time alleged and immediately after she left his house, she reported to PW2 what had happened and on examination, her underpant was found to be soiled with a whitish substance which was later confirmed by PW3 to be spermatozoa which matched the DNA profile generated from the appellant's blood sample. This evidence leaves no doubt in my mind that the appellant had in fact attempted to have coitus with PW2.

26. I am in agreement with *Makau J* when he held as follows in ***David Aketch Ochieng V R, [2015] eKLR*****:**

> **"….For a successful prosecution of an offence of an attempted defilement, the prosecution must adduce sufficient evidence to the required standard to prove an attempted penetration. This may in my view include bruises, or lacerations from complainant's vagina, and/or bruises or lacerations of culprit's genital organ and finding made discharge such as semen or spermatozoa outside the complainant's vagina or innerwear without there being penetration."**

27. The claim by the appellant that the charge was a fabrication by PW1 because she wanted to avoid refunding a debt she owed him must be false and an afterthought because if it was true, he would have put it to her during her cross examination which he did not.

28. For the foregoing reasons, I have come to the same conclusion as the learned trial magistrate that in this case, the prosecution proved its case against the appellant beyond any reasonable doubt. I am thus satisfied that the appellant was properly convicted.

29. Regarding the sentence imposed by the trial court, the appellant did not specify his grievance regarding his sentence in his grounds of appeal but in his submissions, he complained that the sentence was manifestly harsh and excessive given that he was a first offender yet he was sentenced to serve 20 years imprisonment, double the minimum term prescribed by the law.

30. It is trite that although sentencing is at the discretion of the trial court, that discretion must be exercised judiciously in accordance with the law taking into account the facts and circumstances of each case.

31. The punishment prescribed by the law for the offence of attempted defilement is a minimum of ten years imprisonment and a maximum of life imprisonment. The court record shows that the appellant was a first offender and that prior to his sentence, he had spent about three and a half years in lawful custody.

32. In sentencing the appellant to twenty years imprisonment, the learned trial magistrate did not give reasons justifying imposition of a sentence which was double the minimum prescribed by the law.

33. Although sentences are intended, *inter alia*, to punish an offender for his wrong doing, they also aim to rehabilitate offenders to renounce their criminal tendencies and become law abiding citizens. I have no doubt that the sentence imposed by the trial court in this case was lawful but considering that the appellant was a first offender, I am satisfied that the sentence was harsh and manifestly excessive.

34. For the above reason, I hereby set aside the sentence passed by the trial court and substitute it with a sentence of ten years imprisonment. The sentence shall take effect from the date of the appellant's arrest which is 9th of July 2016.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF FEBRUARY, 2022

C. W. GITHUA

JUDGE

In the presence of:

Appellant present

Ms Chege for the respondent

Ms Karwitha: Court Assistant