REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION- MILIMANI

CRIMINAL APPEAL NO. E078 OF 2021

MAURICE OCHIENG MILO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal arising from the original conviction and sentence in Criminal Case No.111 of 2018

at Chief Magistrates Court Makadara by Hon. E. SUTER –PM on 9th July 2021)

JUDGMENT

1. Maurice Ochieng Milo, the Appellant, was charged with attempted defilement contrary to **Section 9(1) (2)** of the Sexual Offences Act. Particulars being that on the 7th June 2018 in Nairobi Area within Nairobi County intentionally attempted to cause his penis to penetrate the vagina of **BNO** a child aged 7 years.

2. In the alternative, he faced the charge of Committing an Indecent Act with a child contrary to **Section 11(1)** of the Sexual Offences **Act No. 3 of 2006.** Particulars being that On the 7th day of June 2018 within Nairobi County, intentionally touched the vagina of **BNO** a child aged seven (7) years with his penis.

3. He was taken through full trial and upon being found guilty, he was convicted of the alternative count of committing an indecent act with a child and was sentenced to serve four (4) years imprisonment. The sentence was to be effective from the 9th July, 2021.

4. Aggrieved by both the conviction and sentence he appeals on the following grounds:

> ***1. THAT*** *the learned magistrate erred in law and in fact in holding that the Prosecution had proved the alternative charge of indecent act with a child beyond reasonable doubt while the evidence stated otherwise.*
>
> ***2. THAT*** *the trial court misdirected itself on facts by finding that the alternative offence of committing an indecent act with a child was proved based on the assumption that there was penetration.*
>
> ***3. THAT*** *the trial court erred in law and facts by failing to record reasons for believing the minor victim contrary to Section 124 of the Evidence Act.*
>
> ***4. THAT*** *the learned magistrate erred in law and in fact in holding that there was indecent act with the child by the appellant which in fact there was no offence established as committed by the appellant.*
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> ***5. THAT*** *the court erred in relying on a P3 Form and medical evidence that does not disclose any offence against the appellant.*
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> ***6. THAT*** *the learned magistrate erred in law and fact by failing to notice that there were material errors, inconsistences and contradictions in the prosecution*
>
> ***7. THAT*** *the learned trial Magistrate misdirected herself in law by rejecting any alibi defence which sufficiently created a reasonable consideration amount of doubt as to the prosecution's case.*

8. THAT *the learned trial Magistrate erred both in law and fact by relying on uncorroborated and unsubstantiated evidence of single identification by the minor who could have been coached.*

9. THAT *the court erred in law and fact by failing to notice that essential ingredients/elements of the offence as charged were not proved.*

10. THAT *the learned trial Magistrate erred in law and fact by failing to consider the Appellant's cogent defence that was rich in truth.*

5. To prove the case the prosecution called Eight (8) witnesses. **PW1 BNO** was the minor complainant. At the outset she was not able to talk, she wanted to hide under the table and had to be stood down. Subsequently she was called to testify on a different date when she stated that she did not know the appellant. She could not remember where she had seen him. She denied knowing what happened and proceeded to state that she did not want to speak on that particular date. However, she had change of heart and testified that while she was alone with the appellant he touched her hand and he put his "dudu" on her "chuchu" but she was fully dressed. She was wearing a biker and jeans. That he called her while she was playing with other children. That she did not fill pain but he did not do anything. On being led in examination in chief she stated that her mum told her to tell her about the accused person and she did so. That she knew him as he used to be at the gate and he was called Maurice and the incident happened at night.

6. On cross examination she stated that the appellant had deterred them from playing at the parking area. That he chased them from the vehicles and she reported to her mother prior to the material date. And when it happened she was with PW2 amongst other children. She confirmed that the appellant worked at night while dressed in uniform and on the date of the incident, "Mama Mboga" was present and there were moving vehicles.

7. PW2 IW testified to have returned from school on 7th June 2018 at 4.00 pm. She changed clothes and went to play with PW1 and some other children; and, she saw the appellant holding PW1's hand leading her to a vehicle. Then she saw him talking to PW1 while she was squatting. She went to the house and when she returned she saw him coming from where the vehicles were parked with PW1. When she asked PW1 what had happened she purportedly said that the appellant asked her to show him her 'susu' and she removed her clothes and did so. She went and told her mother who ultimately told PW1's mother.

8. On cross examination she said that there were other children and some of them were her age mates. That there were other witnesses and motor vehicles were passing and the appellant was in uniform.

9. PW3 JAA, the mother of PW1 stated that PW1, her daughter was Eight (8) years old. That on the 17th June 2018, she was woken up by PW2's mother who sought to know if she had checked PW1 but she said that PW1 who was already asleep had not told her anything and had even been washed. Following the allegations, she checked the child and opined that her private part was red and opened as if someone had tried to penetrate it. PW1 told her that the appellant was touching her and showing her the 'dudu'. Therefore they reported to the Police Post. On cross examination she denied the allegation of having been told by PWI that the appellant had warned them not to play from the parking area. She denied the allegation that as a result she threatened to teach the appellant a lesson. She confirmed having seen old bruises when she checked the complainant and also the fact of the complainant having had a problem of urine incontinence for a duration of one month.

10. PW 4 Dr. Joseph Maundu examined the complainant who had no injury. The genitalia was normal, but, she had bruises on the lower side of the genetalia that looked scratched and the hymen was broken. He also examined the appellant who did not have any injury on the genitals.

11. PW6 Joan Machogu, a nurse saw PW1 on the 8th June 2018 at 6.00pm following allegations of assault. She stated that on examination the child had no physical injury, the outer genetalia had an old bruise at posterior vagina which had redness on the vaginal wall. On cross examination she said the examination was conducted following allegations of sexual abuse. She denied having been told that the child had vaginal issues that had existed for one month. That the old bruise was about three (3) weeks old.

12. PW7 No. 65981 P.C. Richard Boriga arrested the appellant. **PW8 No. 81565 P.C. Marete** investigated the case and caused the appellant to be charged.

13. Upon being placed on his defence, the appellant said that he worked as a security guard from 6.00 pm to 6.00am with two (2) other colleagues. Prior to the matter there were complaints of children playing and scratching people's vehicles and would even use nails to deflate tyres. That on the 4th June 2018 a tenant complained and when he saw children amongst them PW1 playing where vehicles had been parked, he clapped his hands and told them to leave. They ran and PW1 fell down and bruised her knees. The following day PW3 went to confront him with two (2) other ladies. She threatened to teach him a lesson as he had deterred children from playing within that area. On 11th June 2018 he was arrested. That the parking lot was open such that if anyone attempted to defile a child he would be seen.

14. The trial court considered evidence adduced and was of the view that alleged actions were committed by the appellant at different times but it considered acts committed on 7th June, 2018. That evidence adduced pointed to touching of the vagina by the appellant using his penis and fingers. The court found that the defence raised did not raise any material doubt to the prosecution's case; therefore acquitted the appellant on the main charge but convicted on the alternative count.

15. In the instant appeal it was urged by the appellant that he was not identified as the perpetrator of the act, evidence by the complainant could not be relied on pursuant to the provisions of **Section 124** of the Evidence Act, having denied knowing the appellant. Similarly, evidence of PW2, also a minor could not be believed as the appellant who was on night duty was not placed at the scene of the alleged incident. That evidence adduced by the two medical practitioners who testified could not lead to a conviction on a charge of committing on indecent act with a child.

16. The Prosecution was faulted for having not proved the time of the alleged offence which goes to the root of the case. That the date of arrest was not clear and that the defence put up of alibi was not challenged by the prosecution.

17. The appeal is opposed by the State. It is argued that the appellant was recognized by the complainant as he worked at the Estate as a guard.

18. This being a first appellate court it is duty bound to re-analyze and re-consider the evidence tendered before the trial court with a view to arriving at its own independent conclusions. In the case of **Kiilu & Another VS. Republic [2005]1 KLR 174,** the Court of Appeal stated thus:

> **"1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.**
>
> **2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses."**

19. On the main count, the prosecution was required to prove existence of elements of the offence of attempted defilement.

20. Section 9(1) of the Sexual offence Act provides that:-

> **A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.**

21. The Sexual Offences Act does not define the term attempt but **Section 388** of the Penal Code defines " attempt" as:-

> **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.***

22. In the case of **Benson Musumbi Vs Republic [2019] eKLR** the court considered what should be proved regarding ingredients of the offence of defilement. It stated thus:

> **"21. The prosecution in an offence of attempted defilement must prove the other ingredients of the offence of defilement except penetration; it must prove the age of the complainant, positive identification of the assailant, and then prove steps taken by the assailant to execute the defilement which did *not succeed. Attempted defilement is as if it were a failed defilement, because there was no penetration."***

23. Therefore the court has to establish the following ingredients:

i. The age of the complainant

ii. The overt act committed

iii. Positive identification of the assailant

24. Evidence adduced by the complainant as to what allegedly happened ruled out an overt act of an intention to penetrate the genial organ of the complainant. The learned trial magistrate correctly found that no step was taken to execute the offence. What the prosecution proved beyond reasonable doubt was the age of the child. PW3 the mother of the complainant adduced in evidence a birth certificate issued at the time of the complainant's birth. She was born on 20th November, 2011 hence she was a child aged seven years and six months at the time. (Also see ***Francis Omuroni Vs. Uganda Cr. App. No. 2 of 2000).***

25. On the alternative count of committing an indecent act with a child, **Section 11(1)** of the Sexual Offences Act (Act) provides that:

> **Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.**

26. Section 2 (1) of the Act defines an "indecent act" as:

a. Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration;

b. Exposure or display of any pornographic material to any person against his or her will;

27. PW2 alleged that she saw the appellant and the complainant at the motor vehicle at the parking area at 4.00pm.Having been a minor aged twelve years she could not have been mistaken about the time. According to her version, she saw the appellant holding the complainant's hand as they walked towards a motor vehicle at the Parking area, then he stood as the complainant squatted. She went to the house then when she came out she saw them coming from where the vehicle was parked. She did not say how long she took to enter the house and come out. She admitted that the appellant used to report on duty at 6.00 pm. Her evidence did not corroborate that of the complainant as to what happened.

28. Section 124 of the Evidence Act provides that:

Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him. 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 General estoppel. Estoppel of tenant or licensee. Estoppel of acceptor of a bill of exchange. Estoppel of a bailee, licensee or agent. Corroboration required in criminal cases. Cap. 15. 5 of 2003, 3 of 2006, 2nd Sch. Rev. 2010] Evidence CAP. 80 47 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.

29. In the case of **JWA vs Republic (2014) eKLR** the Court of Appeal stated that:

"We note that the appellant was charged with a sexual offence and the proviso to Section 124 of the Evidence Act, clearly states that corroboration is not mandatory. The trial court having conducted a voire dire examination of PW1 and being satisfied that the complainant was a truthful witness, we see no error in law on the part of the High Court in concurring with the findings of the trial magistrate."

30. Testimonies of witnesses were contradictory. The learned trial magistrate appreciated the inconsistencies that were apparent as to what happened to the complainant. In the premises the court would have been left with no option but rely on the evidence of the minor complainant *per se* as required by **Section 124** of the Evidence Act. The trial court was however silent on the question of the credibility of the complainant; the question begging is whether she was worth of believing and for what reasons?

31. The complainant, a child of tender years created a doubt in the mind of all. On examination in chief she denied knowing the appellant and having known what happened. Thereafter she changed her testimony and alleged that she had been molested. At the outset, as alleged by PW2, the complainant said that she removed her clothes and showed the appellant her "susu", a different version from what she told the court. Medical evidence adduced established that the complainant had unexplained injuries in her genetalia, stated to have been sustained some three weeks prior to the alleged time of the incident. The testimony of the complainant was silent on what could have transpired. The trial court was of the view that the child could not recollect everything. It went on to state thus:

"Considering the evidence in totality I do believe that at different times all the alleged actions was committed by the accused person. However, the charge is limited to acts committed on 7th June,2018. The evidence before court does not indicate an attempt to penetrate the child but points to touching of the vagina by the accused person penis and fingers" (Sic)

32. An imagination that the appellant was being accused of committing acts at different times, or using fingers, issues that were not part of evidence adduced were extraneous matters that should not have arisen. This was a misdirection on the part of the court.

33. The prosecution had the duty of proving the case beyond reasonable doubt. Doubts established in the instant case remained unresolved. It was therefore unsafe for the trial court to return a verdict of 'guilty'.

34. The upshot of the above is that the appeal succeeds, and is allowed. Consequently, the conviction is quashed and sentence meted out set aside. The appellant shall be released forthwith unless otherwise lawfully held.

35. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF MARCH,

2022

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

Appellant

Mr. Onyango for Appellant

Mr. Kiragu for ODPP

Court Assistant – Mutai