**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISII**

**CRIMINAL APPEAL NUMBER 17 'B' OF 2020**

**ROBERT NGETICH.....APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**(Being an appeal against the conviction and sentence in Criminal Case No. 44 of 2018 at Kilgoris Law Courts before Hon. R.M. Oanda (P.M) delivered on the 3rd April, 2019)**

# JUDGMENT

1. **ROBERT NGETICH**, who is the appellant herein, was convicted and sentenced to 15 years' imprisonment for 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**. The particulars of the offence were that on the 26th day of September, 2018 in Transmara West Sub-county, within Narok County, he intentionally attempted to cause his penis to penetrate the vagina of NC a child aged 3 years.

2. After a plea of not guilty was taken, the prosecution called 4 witnesses to testify in support of its case against the appellant. SK (PW1) testified that he had gone to till his land on 26th September 2018. At around mid-day, on rushing back home to pick his phone, he found the appellant holding NC with his long trousers down. He testified that when he talked to the appellant he started to run away. The child was taken to Angata dispensary where she was examined and the appellant was pursued and arrested. During cross-examination, PW1 stated that the appellant had attempted to penetrate the child and that the child had no panty.

3. Philemon Ng'etich (PW2) was having a siesta at home at about midday on that day when he heard people shouting next to his place. He went out and found the appellant being interrogated. He stated that the appellant accepted all that was asked of him and that he was later on taken to Angata police. PW2 testified that the appellant had defiled a child.

4. Samuel Maina (PW3) stated that he received a call from the chief of Angata informing him of the case of attempted defilement on 26th September 2018. He testified that he proceeded to the scene with some of his colleagues and found a group of people together with the area chief and the minor aged about 3 years. It was alleged that the appellant had found the minor playing at a compound with other children and that he took her behind the house, removed her inner wear, put her on his laps and leaned on the wall. That he removed his trousers and attempted to defile the child when father of the minor caught him as he was about to defile the child. An alarm was raised and the appellant ran towards [Particulars Withheld] market. PW3 stated that an age assessment had been conducted at Kilgoris Hospital, which confirmed that the minor was 3 years old.

5. Gideon Kibichy Rono (PW4) testified that he was a clinical officer stationed at Lolgorian. He stated that he had a P3 form in respect of the minor who had gone in with a history of defilement. He testified that he examined the child and found that her hymen was intact. She had no lacerations or bruises and her genitals were normal with no discharge. He filled the P3 form and Post Rape Care form which he produced together with treatment notes.

6. When put on his defense, the appellant stated that he was arrested on 28th September 2018 for the offence of attempted defilement. He told the court that he did not actualize the act and that he had taken a lot of cannabis which drove him to the child. He prayed for forgiveness and promised not to commit the offence again.

7. The trial court considered the evidence before it and found that the prosecution had made out its case against the appellant. The court found the appellant guilty of attempted defilement and sentenced him to 15 years' imprisonment.

8. In his petition of appeal, the appellant stated that he was remorseful for committing the offence. He averred that he was a first time offender and did not understand the seriousness of the offence for which he was accused of. He urged the court to review his sentence on his promise to be a good citizen.

9. Although the grounds of appeal were majorly focused on sentence, the appellant also contested his conviction in his written and oral submissions before the court. In his written submissions, the appellant added that he was under the influence of cannabis sativa and that it only occurred to him in court that he was being arraigned in court for the crime of holding a child in his hands. He claimed that he did not know what led PW1 to believe that he intended to harm the child and surmised that PW1 may have jumped to that conclusion because he knew him to be a bhang smoker. He argued that, in the circumstances, the sentence of 15 years' imprisonment was harsh and excessive and urged the court to reduce it or set him at liberty.

10. The respondent opposed the appeal. Mr. Muriuki, learned counsel for the State, submitted that the evidence against the appellant was sufficient and that he was properly convicted. He urged the court to dismiss the appeal and uphold the sentence as the child was very young.

11. In response, the appellant stated that he had not committed the offence. He told the court that he had confessed to committing the offence because he was beaten up a lot and that he had to run to the AP's place for safety as he was about to be slashed. He also claimed that he was not in his right senses at the time.

**ANALYSIS AND DETERIMINATION**

12. The appellant was convicted for the offence of attempted defilement which is prohibited under **Section 9(1)** and **9(2)** of the **Sexual Offences Act** in the following terms;

> *9 (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.*

13. The ingredients forming the offence of attempted defilement as drawn from the above provision are proof that the victim was a minor, proof of the identity of the perpetrator and proof of the attempted commission of the offence of defilement.

14. The age of the victim in this case was confirmed to be 3 years at the time in question. PW3 testified that an age assessment had been conducted to ascertain the minor's age. The medical reports including the P3 form and the treatment notes all confirmed that the minor was 3 years old at the material time.

15. An analysis of the facts also shows that the prosecution established the identity of the appellant as the perpetrator. PW1 testified that he caught the appellant holding the child who had no panty, with his long trousers down, as he was just about to penetrate the child. It was midday when PW1 chanced upon the appellant which meant that the conditions were ideal for visual identification. PW1 had the opportunity to speak to the appellant before he ran away. PW2 also put the appellant at the *locus in quo*. He was having a nap, when he heard people screaming. On getting to where he had heard the commotion, he found the appellant being interrogated about the incident. PW3 confirmed that the appellant was arrested by members of the public soon after the incident. The prosecution thus established beyond peradventure that the appellant had attempted to defile the minor.

16. In his defense, the appellant told the trial court that he had taken a lot of cannabis which drove him to the child. **Section 13** of the **Penal Code** provides for the defense of intoxication as follows:

> ***13. Intoxication***
>
> *(1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.*
>
> *(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and—*
>
> > *(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or*
> >
> > *(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.*
>
> *(3) Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused shall be discharged, and in a case falling under paragraph (b) the provisions of this Code and of the Criminal Procedure Code (Cap. 75) relating to insanity shall apply.*
>
> *(4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.*
>
> *(5) For the purpose of this section, "intoxication" includes a state produced by narcotics or drugs.*

17. Addressing the above provision, the Court of Appeal in ***Roba Galma Wario v Republic CRIMINAL APPEAL NO. 159 OF 2014 [2015] eKLR*** cited its previous decisions on the issue thus:

> *"In the case of KANGORO s/o MRISHO V R, [1956] 23 EACA 532 the predecessor to this Court, the Court of Appeal for East Africa referred to the case of CHEMININGWA V R, EACA CR NO. 450 OF 1955 (unreported), in which it was stated:*

*"It is of course correct that if the accused seeks to set up a defence of insanity by reason of intoxication, the burden of establishing that defence rests upon him in that he must at least demonstrate the probability of what he seeks to prove. But if the plea is merely that the accused was by reason of intoxication incapable of forming the specific intention required to constitute the offence charged, it is a misdirection if the trial court lays the onus of establishing this upon the accused." See: Joshua Matata Ndonye v R, [2001] eKLR, CR NO. 122 OF 1991 (Kwach, Shah & O'Kubasu JJ. A)."*

18. Other than the appellant's unsupported statement that he had taken cannabis sativa, there was no additional proof of his intoxication at the material time neither was there evidence to support his claim that he was a drug addict. It was not shown that the appellant was too intoxicated as fail to know what he was doing. The evidence of PW1 was that the appellant had pulled down his trousers and was holding the child who had no panty and would have defiled her had he not have been caught. The deliberate nature of his actions depicted a man in control of his faculties. On being caught and questioned by PW1, the appellant ran away, which was consistent with the conduct of a person with a guilty mind. I therefore find that the appellant could not benefit from the defence of intoxication and was properly convicted for the offence of attempted defilement.

19. The appellant also challenged the sentence imposed by the trial court for being harsh under the circumstances. An appellate court will not easily interfere with the discretion of the trial court on sentence unless it is shown that in exercising its discretion, the court acted on a wrong principle; failed to take into account relevant matters; took into account irrelevant considerations; imposed an illegal sentence; acted capriciously or that the sentence imposed was harsh and excessive. (See ***Shadrack Kipchoge Kogo vs Republic Criminal Appeal No. 253 of 2003*** and ***Thomas Mwambu Wenyi v Republic [2017] eKLR***)

20. The Court of Appeal in many decisions following the case of ***Francis Karioko Muratetu & Another v Republic Petition No. 15 & 16 of 2015 [2017]eKLR*** such as the cases of ***Dismas Wafula Kilwake v Republic Criminal Appeal No. 129 of 2014 [2018] eKLR, Christopher Ochieng v R KSM Criminal Appeal No. 202 of [2018] eKLR 2011, Jared Koita Injiri v R KSM Criminal Appeal No. 93 of 2014 [2019]eKLR*** and ***Evans Wanjala Wanyonyi v Republic Criminal Appeal No. 312 of 2018 [2019] eKLR*** considered the legality of minimum mandatory sentences under the Sexual Offences Act and found that the provisions of the Sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing.

21. The mandatory minimum sentence for the offence of attempted defilement is 10 years' imprisonment according to **Section 9 (2)** of the **Sexual Offences Act**. In imposing the enhanced sentence of 15 years the trial court considered that the appellant was a first time offender but weighed this against the aspect of the very young age of the minor that the appellant had attempted to defile.

22. According to The Sentencing Policy Guidelines, 2016 sentences must meet the following objectives in totality;

a. Retribution: To punish the offender for his/her criminal conduct in a just manner.

b. Deterrence: To deter the offender from committing a similar offence subsequently as well as discourage other people from committing similar offences.

c. Rehabilitation: To enable the offender reform from his criminal disposition and become a law-abiding person.

d. Restorative justice: To address the needs arising from criminal conduct such as loss and damages.

e. Community protection: To protect the community by incapacitating the offender.

f. Denunciation: To communicates the community's condemnation of the criminal conduct.

23. The sentence imposed by the trial court achieved most of the objectives enumerated above. In his petition of appeal and submissions before this court, the appellant indicated that he was remorseful for his actions. He also sought forgiveness in his defence before the trial court.

24. Although sentences are intended to punish the offender for his wrong doing, they also aim to rehabilitate offenders to renounce their criminal tendencies and become a law abiding person. Having considered his defence and submissions before this court, I am of the view that the appellant intends to reform and rehabilitate. Consequently, I hereby set aside the sentence of fifteen (15) years' imprisonment imposed by the trial court and substitute thereof with a term of imprisonment of twelve (12) years to run date of sentence by the trial court the **3rd April 2019**.

**DATED, SIGNED AND DELIVERED AT KISII THIS 18TH DAY OF MARCH 2021.**

**R.E. OUGO**

**JUDGE**

**In the presence of:**

**Appellant** **In person –Present**

**Mr. Otieno** **Senior State Counsel Office of the DPP**

**Ms Rael** **Court Assistant**