REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 57 OF 2020

JULIUS KIMATHI.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTION

JUDGMENT

1. Julius Kimathi, the Appellant was charged with the offence of *'Attempted Defilement contrary to Section 9 (1) (2) of the Sexual Offences Act No. 3 of 2006'* with the alternative charge of *'Committing an Indecent Act with a Child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006'* in Tigania Criminal Case No. 23 of 2018.

2. The particulars of offence for the offence of *Attempted Defilement* were as follows: -

> ***'On the 23th day of July 2018 in Tigania West Sub County within Meru County, intentionally attempted to cause his penis to penetrate the vagina of NM, a child aged 16 years.'***

3. The particulars of offence for the offence of *Committing and Indecent Act with a Child* were as follows: -

> ***'On the 23th day of July 2018 in Tigania West Sub County within Meru County, intentionally caused his penis to touch the vagina of NM, a child aged 16 years.'***

4. He pleaded not guilty to both charges and the matter proceeded for trial. By Judgement delivered on 23rd January 2020 by Hon P. M. Wechuli SRM, he was convicted for the offence of Attempted Defilement and was sentenced to 10 years imprisonment. Being dissatisfied with both the Judgement and the Sentence meted by the trial Court, he has preferred the instant appeal. He initially filed grounds of appeal but in his submissions made amended supplementary grounds of appeal. He raises the following grounds of appeal: -

> ***i) That the Learned Trial Magistrate erred in matters of law and fact by failing to observe that the mandatory sentence of 10 years imprisonment meted against the Appellant fails to conform to the tenet of fair trial that accrue to the accused under Article 25 (C) of the Constitution.***
>
> ***ii) That the Learned Trial Magistrate erred in law and fact by failing to note that the prosecution witnesses gave inconsistent, contradictory and conflicting testimonies.***
>
> ***iii) That the Learned Trial Magistrate erred in both law and fact by sentencing the Appellant to serve 10 years imprisonment without considering the fact adduced before Court.***
>
> ***iv) That the Learned Trial Magistrate erred in both law and fact by failing to note that the investigation was shoddy and vital witnesses were not called to testify and consider that there was a grudge over land boundary.***
>
> ***v) That the Learned Trial Magistrate erred in matters of law and fact by failing to note that the prosecution did not prove their case to the required standards as required by law.***
>
> ***vi) That the Learned Trial Magistrate erred in both law and fact by rejecting the Appellant's defence without giving cogent reasons.***

Appellant's Submissions

5. The appeal was canvassed by way of written submissions. The Appellant filed written submissions which were filed on 8th January 2021.

He submits that the mandatory sentence meted against him does not conform to the tenets of fair trial as per Article 25 (c) of the Constitution and that 10 years imprisonment should not be the minimum in regards to the sentence under the Sexual Offences Act. He submits that as seen in the case of *Denis Kinyua vs Republic (2017) eKLR*, penalties under the Sexual Offences Act may be described as straight 'jacket' penalties leaving no room for exercise of any discretion by the sentencing Court. That the Court held such a view in many dedicates but now things have changed and the Court's hands are not tied. He also relies on the case of *Evans Wanjala vs Republic* and *Gideon Majau Gitire alias Kombo in Meru Criminal Appeal No. 131 of 2018*.

6. He further submits that the Prosecution's evidence was not enough to sustain a conviction and that the Prosecution witnesses gave inconsistent, contradictory and conflicting testimonies. That in this regard, PW1, the Complainant stated that the she was going to school at 5.30 a.m whereas both PW2 and PW3 gave time as 6.30 a.m. He urges that this is an indication that these were cooked up testimonies. He relies on the case of *Dankerai Ramkisham Pandya vs R E.A.C.A (1957)* for the proposition that contradictory and inconsistent evidence should not be relied upon. He also relies on the case of *Twahanga M. Alfred v Uganda, Criminal Appeal No. 139 of 2001 (2003) UGCS* wherein the case of *Annah Kendi vs Republic* was cited for the proposition that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of the witness being rejected and that the Court will ignore minor contradictions unless the Court thinks that they point to deliberate unfaithfulness. He urges that the one hour difference should not be taken lightly because it points to unfaithfulness in the testimonies given and for that matter, it ought to be rejected in entirely.

7. He further urges that the testimony of PW2, CK should be rejected since no *voire dire* was conducted to verify his competence to testify. He urges that though PW2 said that he recognized the accused and at 6.30 a.m the person he saw was one Kimathi Munyao, he urges that the charge sheet indicates the accused as Julius Kimathi. He thus urges that PW2 was unsure of whom he saw. He further urges that PW3 saw Kimathi Munyaru and this again removes Julius Kimathi from the scene.

8. He further submits that one GW who after *voire dire* was found competent to testify did not. He further urges that the complainant's father was severally mentioned by the witnesses but he neither recorded the statement nor testified before Court. He relies on the case of *JMN vs Republic, Criminal Appeal No. 139, 140, 141* for the proposition that failure by the prosecution to summon vital witnesses mentioned in various trial records leaves no doubts that the prosecution did not prove their case beyond reasonable doubt. He also relies on the case of *Bukenya vs Uganda (1972).*

9. He urges that the father of the Complainant used his children to fix him because of the land boundary dispute. That during cross-examination, the issue of the land dispute arose and during his defence, and that he repeated the same and this was not therefore an afterthought as it came out during the trial process.

10. He further urges that the investigating officer failed to investigate the relationship between him and the family of the Complainant. That had the relationship been good, they would not have created such a damaging case against him. He urges that the investigating officer ought to have investigated whether there was a grudge. He urges that the bad blood and vendetta between his family and that of the Complainant is evinced by the harshness of the witnesses showed before Court while testifying.

11. He further urges that there are contradictions on who between Service No. 7802 and No. 78021 made the report by the investigating officer. He urges that despite Service No. 78021 saying that the accused was arrested by members of public, none of them was called to testify in support of that claim. He relies on the case of *John Kenga v Republic Criminal Application No. 1171 of 1894* to urge that where some of the witnesses were not summoned to come and clear doubts of the arrest, the accused ought to be acquitted.

12. He further urges that the clothes worn by the Complainant were muddy as per PW3's testimony but the same were not produced before the Court as exhibits. He relies on the case of *Joginder Patbic Chama v Republic 1971 KLR* for the proposition that the prosecution has to bring exhibits of the case to Court to be read and marked. He also urges that there is a dispute as to when the Complainant went to see the clinician and this brings the question of whether there were two clinicians. He urges that the contradictions in the prosecution's case imputes doubts calling for a different determination other than that of the subordinate court.

Prosecution's Submissions

13. The Prosecution filed submissions dated 24th June 2021. They urge that they proved all the elements of the offence. Concerning the age of the child, they urge that this was established and that PW1 informed the Court that she was 16 years old and the P3 form indicated as much. They further urge that unlike in cases of defilement and rape where the exact age of the victim must be proven, in attempted defilement, the prosecution only has to show that the victim was below the age of 18 years and not necessarily the specific age.

14. They further urge that there was indeed an attempt by the accused to defile the victim. That PW1 clearly testified in her testimony that on 23rd July 2018, at 5.30 a.m while going to school she saw the Appellant who passed in front of her at a fast pace. That while the Appellant was ahead of her, he asked whether he could greet her but PW1 refused and that is when the Appellant held PW1's throat as well as her private parts. That while the Appellant was struggling with PW1, she screamed and other students who were also headed to school heard her scream and went to help her. That PW2 testified that while he was heading to school, he saw the Appellant struggling to pull down PW1 while pulling her off the road and that he also saw the Appellant holding PW1 by the neck while trying to push her down. That PW2 stated that he was with PW3. That PW4, the clinician stated that after examining PW1, he found that she had tenderness on the neck. That there was therefore corroboration of PW1's evidence with that of PW2, PW3 and PW4 who produced a P3 form confirming injuries of PW1 on the neck.

15. As to the identity of the Appellant, they urge that this was by recognition. That PW1 had known the Appellant before the date of the offence. That PW2 and PW3 also knew the Appellant prior to the incident. That PW1 stated that she knew the Appellant very well and that he was a person of questionable behavior. They rely on the case of *Anjononi & Others v Republic (1976-80) 1 KLR 1566* for the proposition that recognition of an assailant is reliable than identification.

16. Concerning the Appellant's defence, they urge that the Appellant did not give an account of where he was on 23rd July 2018 and that he only stated that he had been framed with the offence because of a land boundary dispute.

17. They urge that the sentence meted out by the Court was lenient considering that if PW2 and PW3 had not rescued PW1, the Appellant would have defiled her. That the Appellant was not at all remorseful during mitigation and therefore the sentence of 10 years is appropriate.

Determination

18. This being a first appeal, as well espoused in the case of ***Okeno v Republic (1972) EA 32,*** this Court is invited to look at both questions of fact and of law. The Court is enjoined to analyze the evidence and make its own independent findings bearing in mind that it is the trial Court that had the advantage of observing the demeanour of the witnesses.

19. The Appellant's grounds of Appeal can be condensed into 2 points which form the gravamen of the Appellant's Appeal as per the issues hereunder: -

> ***i) Whether or not the Prosecution proved their case beyond reasonable doubt.***
>
> ***ii) Whether or not the sentence meted out was excessive in the circumstances of the case.***

Whether or not the Prosecution proved their case beyond reasonable doubt.

20. To begin with, this Court shall consider the necessary ingredients for the offence of 'Attempted Defilement Contrary to Section 9 (1) (2) of the Sexual Offences Act.' The said section provides as follows: -

> ***9. Attempted Defilement***
>
> ***(1) A person who attempts to commit an act which causes 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.***
>
> ***(3) The provisions of section 8 (5), (6), (7) and (8) shall apply mutatis mutandis to this section.***

21. Section 8 (5), (6), (7) and (8) which shall apply *mutatis mutandis* to a charge under Section 9 set out the defence to the charge of defilement which includes a belief that the child was over the age of eighteen as well as the procedure to be used in sentencing. It is provided as follows: -

> ***(5) It is a defence to a charge under this Section if –***
>
> > ***(a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and***
> >
> > ***(b) the accused reasonably believed that the child was over the age of eighteen years.***
>
> ***(6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.***
>
> ***(7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act (Cap. 92) and the Children Act (No. 8 of 2001).***
>
> ***(8) The provisions of subsection (5) shall not apply if the accused person is related to such child within the prohibited degrees of blood or affinity.***

22. Attempted defilement occurs when a person attempts to commit the act of ***penetration*** with a child. Penetration under Section 2 of the Sexual Offences At is defined as follows: -

> ***"penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person;***

23. Genital organs under the very Section 2 of the Sexual Offences Act is defined as follows: -

> ***"genital organs" includes the whole or part of male or female genital organs and for purposes of this Act includes the anus;***

24. The definition of child under the very Section 2 of the Sexual Offences Act is the same as that of child under the Children Act (No. 8 of

2001) which provides as follows at Section 2 thereof: -

> ***"child" means any human being under the age of eighteen years;***

25. The above provisions of law form the essential factors and elements which must be present for a positive finding that there was defilement. The offence is issue is however not defilement but attempted defilement. This Court thus finds it necessary to deconstruct the meaning of *attempt* in the context of an offence and in this case that of defilement. Indeed, Section 2 of the Penal Code Cap 63 defines an offence to mean an act, attempt or omission punishable by law.

26. Section 388 of the Penal Code defines the term attempt within the criminal justice system. It provides as follows: -

> ***388. Attempt Defined***
>
> ***(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 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.***

27. It is evident that intention is a key component of the offence of attempted defilement. It a requirement however that the accused person at the material time had begun to put his intention to execution and that he manifested this by way of an overt act. The extent as to how far he went in his mission to commit an offence would not matter and neither would it matter that he was prevented from committing the main act itself. In this case, what the law is concerned with is the attempt itself, characterized by the setting into motion an intention.

28. The key questions are whether the complainant was a child and whether there was an attempt of penetration of the Appellant genitals into the complainant's genitals.

Evidence adduced at trial Court

Prosecution's Case

PW1

29. This Court has had a chance to examine the evidence led at the trial. The Prosecution adduced evidenced from a total of 5 witnesses. PW1, the complainant testified first, after undergoing a *voire dire*. She said that she is in **NM** from [Particulars withheld] Secondary School and that the accused is from her village.

30. That on 23rd July 2018 at 5.30 a.m, she was going to school and she saw the accused whom she knows as Kimathi. That she knows him very well. That he passed in front of her at a very first pace since he knew his behavior. That she refused since she was alone. That he held her throat and her private parts and he struggled with her while pulling her off the road. That she screamed since he had held her and by luck, fellow students came and saw what the accused was doing. That he then ran into the nearby farm.

31. That her fellow students took her home to inform her parents and his father went to look for him at his home but he had disappeared. That her father informed his uncle who said that the accused was used to that. That her father took her to Kibuline Police Post to report and they referred her to Mbeu Hospital where she was given a P3 form and treatment notes. That as the accused was struggling with her, he was also trying to remove his trouser. That he was trying to rape her. That he had on the same trouser he has in Court. That she knows the accused very well as he is notorious and he identified him as the one on the dock.

32. On cross-examination, she said that he Appellant held her on the road. That there were bomas nearby and her fellow students came. That she was crying out of much pain.

PW2

33. PW2 was CK, a minor. He testified that he is from [Particulars withheld] and that NM is his fellow student and that the accused is a villager. That he recalls on 23rd July 2018 at 6.30 a.m he was going to school and he saw a certain boy whom he recognized as Kimathi Munyau who was struggling to pull down the complainant while pulling her off the road. That the complainant's screams were not very loud. That he was with MK and they asked the boy what he was doing and when they confronted him, he ran away through the farm. That they held their classmate by hand and took her back to her parents. That the said Kiamthi had held the complainant by the neck, trying to push her down and her clothes became muddy. That he was also pulling her skirt trying to take it off. That they found the complainant's father at home and the father took her to hospital. He, PW2 then went to school. That he wrote his statement ion 26th July 2018. He identified the said Kimathi as the accused person on the dock.

34. On cross-examination, he confirmed that he was present at the scene and that the complainant is a fellow student and is also his sister. He

confirmed that they screamed and that there were other children behind them and that it was at 6.30 a.m. He confirmed that their father is not a chief or police and that their parents did not take anything from him and that it is his behavior which is bad.

PW3

35. PW3 was MK, a minor. He testified after going through a viore dire. He stated that he goes to [Particulars withheld] School and that **NM** is his fellow student. That he knows the accused as a villager who has bad manners. That on 23rd July 2018, at 6.30 a.m he was on his way to school and was with GK. That he heard screams in front of him and he saw the accused beside the road pulling NM. That he was holding her by the neck and was trying to push her down. That he knew him well as Kimathi Munyaru. That they asked him what he was doing and he ran through the farm. That they took the complainant to her father. That the accused held the complainant's neck and private parts and her clothes were muddy. He identified the accused as the one on the dock.

36. On cross-examination, he said that he was at the scene and that the accused did not finish the act since they went to rescue to NM He said that he is a brother to the complainant and he is not aware of any land dispute.

PW4

37. PW4 was James Mathenge from Mbeu Sub County Hospital. He testified that he is a clinician and he confirmed to have a P3 form for NM who came to the hospital on 25th July 2018. That NM said that someone had tried to defile her after holding her and that she screamed and escaped. That there was tenderness on the neck and that the appropriate age of the injuries was 3 days. That she was attended to on 23rd July 2018 and later came for the P3 on 25th July 2018. That she had soft tissue injuries secondary to attempted defilement.

38. On cross-examination, he said that NM did not have wounds but she had pains and tenderness on the neck.

PW5

39. PW5 was No. 78021 Corporal Owondo of Mebu Patrol Base. He said that on 23rd July 2018, a report was made of attempted defilement. That on 27th July 2018, the accused was arrested by members of the public and he was taken to Aps who brought him to him and he then brought him to Court.

40. On cross-examination, he said that the accused was not arrested on the same day but they were conducting investigations. That the minor was referred to hospital.

41. This was the close of the Prosecution's case.

Defence Case

42. The Appellant was placed on his defence. He stated that as follows: -

> ***"I am Julius Kimathi. I am from Machegene. The charges are false. On 27th January 2018, the complainant's father came home and asked my mum where I was. She said I was asleep. He knocked my door and entered. He had a panga. Her uncle had a slasher. They beat me tore my shirt. The uncle took my mother and money. My mother inquired but her father said it is over a boundary of land. I had interfered with the boundary that time. At Kibuline Station it was changed to attempted defilement. They said I attempted to defile her as she went to school. It is false charge over land."***

43. On cross examination, he said that he can't recall where he was on 23rd January 2018. That he had many works such as motor cycle riding. That he was arrested when he went to report to the police.

Analysis

Age of the Complainant at the time of Offence

44. Concerning the complainant's age, the P3 form which was produced indicated her age to be 16 years at the time of the offence. This evidence was not challenged. This Court therefore finds that the complainant was indeed a child at the time of the offence. As correctly pointed out by the Prosecution in their submissions, in cases of attempted defilement, what is most important is to show that the victim was below the age of majority unlike in defilement and rape where the exact age has to be indicated.

Act of Attempted Penetration by the Accused

Identification

45. On the matter of identification of the accused person, this Court observes that PW1, PW2 and PW3, who were all eye witnesses were able to identify the accused person as the perpetrator. They also all confirmed that the accused is a villager and he is known for his bad behaviour. They had all seen the accused before. The complainant was on record as having known the accused very well. Their evidence remained the same during cross-examination. Theirs was evidence of recognition which this Court has held many times to be stronger than that of identification. In the case of ***Anjononi and Others vs Republic (1976-1980) 1 KLR*** Madan, Law & Potter JJA held as follows: -

"This was however a case of recognition, not identification of the assailants; recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or the other. We drew attention to the distinction between recognition and identification in Siro Ole Giteya v Republic (unreported)."

46. The accused has further raised questions as to how the witnesses had referred to him in that while the charge sheet describes him as Julius Kimathi, PW2 described him as Kimathi Munyao and PW3 described him as Kimathi Munyaru. This Court finds that this disparity in the names is not sufficient enough to discredit the evidence of recognition by the witnesses. In any event, the complainant who was the victim identified him as Kimathi. Although there were several witnesses whose testimonies this Court finds credible, this Court is minded that it is in fact possible to admit the evidence of one witness.

Attempted Penetration

47. On the matter of attempted penetration, this Court observes that PW1 confirmed that the Appellant, on the morning of 23rd July 2018 passed by her very fast and then struggled with her and held her throat and her private parts and as he did so, he was pulling her off the road. She testified that the accused was also trying to pull down his trousers and he tried to pull her skirt off. She testified that it was by sheer luck that her fellow students came and rescued her from her assailant who run into the farm.

48. Her evidence was consistent with that of PW2 and PW3 who were eye witnesses. They testified that they saw the Appellant struggle with the complainant by the side of the road while trying to pull off her skirt and holding her by the neck. They confirmed that they went and confronted the Appellant and it is then that he ran off into the farm.

49. Their evidence was further corroborated by that of PW4, the clinical officer who confirmed that he examined the complainant and found that there was tenderness on her neck. He produced a P3 form which was not challenged.

50. Based on the evidence adduced, and bearing in mind the essentials of an offence of attempted defilement, this Court finds that there was indeed an attempt to defile the complainant and this is confirmed by the fact of the Appellant struggling with her and touching her private parts while trying to pull off her skirt as he tried to remove his trousers. During hearing, PW1 was able to identify the trouser that the Appellant had on as it was the same one he was in on the material day. As per the definition of attempt under Section 388 of the Penal Code, the test is whether an accused person had begun to set his intention into motion by way of an over act. Indeed, this was the case herein. This Court does not see any other reason as to why a man would make attempts to remove his trousers while trying to pull off the skirt of a young girl child and struggling to overpower her by holding her neck apart from him intending to defile her. It is immaterial that the Appellant did not complete his intention or that he was stopped by the confrontation by PW1 and PW2. This Court finds that the ingredients of the offence of attempted defilement were indeed proven beyond reasonable doubt.

Analysis of other issues raised by Appellant

Inconsistent times

51. The Appellant has raised an issue with the times indicated by the witnesses in that the complainant testified that the time was 5.30 a.m and PW1 and PW2 testified that the time was 6.30 a.m. This Court does not find this disparity to be material enough to outweigh the other evidence adduced. Furthermore, he did not raise this issue during cross-examination despite having an opportunity to do so. This Court has also perused the treatment notes with respect to the complainant and observes that the time of the offence was recorded to be about 6.30 a.m. Generally, the struggle could not have taken place in a single moment but it must have gone on for minutes with the successive events of pulling hero off the road, struggling with her, making attempts at removing her skirt and trying to remove his own trousers. This Court finds that the offence took place within a period of time from 5.30 a.m to 6.30 a.m.

Failure to conduct voire dire on PW2

52. The Appellant has also said that PW2 was not taken through a *voire dire.* This Court has confirmed that indeed, PW2 was not taken through a *voire dire.* It would have been helpful if the age of the said PW2 had been recorded as this would give the Court an indication as to whether a *voire dire* was necessary. It is not all children who are required to be taken through a *voire dire* exercise before they testify. A *voire dire* is intended to test the competency of a witness and to test whether the witness understands the meaning of an oath. In the case of ***Samuel Warui Karimi v Republic, Criminal Appeal No. 16 of 2014 [2016] eKLR*** **Nambuye, Kiage, JJ.A. & Koome JA** ***(as she then was)*** **held as follows: -**

"Subjecting a witness of tender age to voire dire examination is founded under Section 125 (1) of the Evidence Act, which states: -

> ***"All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause)".***

Also Section 19 (1) of the Oaths and Statutory Declarations Act has something to do with receiving evidence of a child in the following:

> ***"Where in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any <u>child of tender</u> years called as a witness does not, in the opinion of the court or such person, understand the nature***

of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth".

53. The Court went further to expound on the meaning of a child of tender years. As per the Children's Act, a child of tender years is one below the age of 10 years. This is however not settled as law as some authorities require children older than 10 years to be examined and it is argued that the development and intellectual ability of children differs depending of their socio-economic circumstances.

54. In the present case, this Court observes that the omission to indicate the age of the child, PW2 makes it difficult for this Court to determine whether or not it was necessary to subject him to a *voire dire.* It is however noteworthy that the said PW2 is said to have been a school mate to PW1 and PW2 both of whom are children.

55. The foregoing notwithstanding, it is necessary for this Court to determine the nature of this child's evidence. He was an eye witness and he testified to have been in the company of PW3 when they went to confront the Appellant and took the complainant home to her father. PW3 came in to corroborate this evidence. This Court finds that even if the Court were to discredit the evidence of PW2 for failure to have been taken through a *voire dire*, this would not be enough to disturb the weighty evidence of the prosecution because there was another eye witness, PW3.

Purported Framing

56. The Appellant has also urged that there was a boundary dispute between him and the complainant's family and that this is what led to him being charged. It is true that where an accused person claims to have been framed in a sexual offence matter, it is material as to whether the circumstantial evidence infers any grudge or motive for framing him. In ***Archbold 2017 by Sweet and Maxwell, pg 1455*** it is established as follows: -

'It is permissible, in a case of an alleged sexual offence, for the defendant to be asked in cross-examination whether he knows of any reason why the complainant might be lying; the existence or non-existence of a motive for lying was relevant to the credibility of the complainant;'

57. In the present case, despite claiming that there was a land boundary dispute, the evidence adduced in the matter does not point towards this dispute. During cross-examination, he indeed questioned the witnesses as to whether they were aware of a boundary dispute but this was answered in the negative. The Appellant did not claim to be a neighbour to the complainant's family and he was described by the Prosecution witnesses as a mere villager. The particulars leading to this supposed grudge were not identified to make this Court give the accused the benefit of the doubt.

58. The Appellant has claimed that the trial Court rejected his defence without giving cogent reasons. This Court finds this to be untrue. A record of the Judgement shows that the Court considered the Appellant's defence and came to a rational conclusion as follows: -

"As I conclude. I did analyze the accused defence at length and in depth. Since the burden of proof never shifts to the accused, I analyzed the defence to determine whether it brought any doubts on the allegations by the state.

However, it did not. This is so since the accused did not adduce any evidence of the land dispute that he said was the cause of false allegations. He also had no evidence to show that he was assaulted and his clothes torn over land issues before these charges were forged on him."

59. This Court thus finds that the allegation of the existence of a grudge was not sufficiently substantiated to raise doubt on the Prosecution's case.

Failure to call crucial witness

60. Another issue raised by the Appellant is that the Prosecution failed to call the complainant's father, whom he claims he had a boundary dispute with. And further, that GW despite having gone through a *voire dire* did not testify.

61. This Court is alive to the finding in *Bukenya* & Others *vs Uganda, Criminal Appeal No. 68 of 1972 (1972) E.A, 549* where it was found that the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution. In this case however, the evidence that was called was strong and adequate to prove the offence of attempted defilement. The Appellant's contention against the omission to call the complainant's father is tied to his defence of being framed up which this Court has already discussed above.

62. While it would have been best to call the father of the complainant as a witness, the Court finds that there is other strong evidence from eye witnesses including medical evidence to confirm that the Appellant was engaged in a struggle with the complainant. This evidence remains unchallenged.

63. Furthermore, Section 143 of Evidence Act (Cap 80) Laws of Kenya provides as follows: -

143. Number of Witnesses

No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any

fact.

64. This issue was also discussed in the Court of Appeal case of ***Keter v Republic [2007] 1 EA 135*** where Bosire, Githinji and Onyango-Otieno JJA held as follows: -

> ***"The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt."***

65. In the instant case, this Court finds that the evidence of PW1, the complainant, that of PW3 and corroborated by the expert evidence of PW4, the clinical officer and that of PW5, the investigating officer was sufficient to prove the charge beyond reasonable doubt and that the omission to call the complainant's father as a witness or the child namely GW does not injure the Prosecution's case.

66. Concerning the failure to produce the muddy clothes as evidence, this Court similarly finds that this is not enough to raise doubt in the Prosecution's case, in the face of unchallenged medical evidence and eye witness testimonies. The issue of confusion as to who between No. 7802 and 78021 does not also hold water because when the investigating officer ultimately testified, he introduced himself as CP Corporal Owondo which name was used consistently and in any event, he was not the main witness and was not even an eye witness.

67. This Court ultimately finds that all the essential ingredients of the offence of attempted defilement were proven beyond reasonable doubt and the Court upholds the conviction of the trial Court.

Whether or not the sentence meted out was excessive in the circumstances of the case.

68. The leading authority on the question of interfering with sentence is that of ***Wanjema v Republic Criminal Appeal No. 204 of 1970 (1971) EA 493, 494,,*** where Trevelyan J held as follows:-

> ***'An appellate Court should not interfere with the discretion which a trial Court has exercised as to sentence unless it is evident that it overlooked some material factor, took into account some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case.'***

69. The penalty section for the offence of attempted defilement under the Sexual Offences Act is found in Section 9 (2) and it provides as follows: -

> ***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.***

70. The Appellant's first ground of appeal is that the mandatory minimum sentence of 10 years imprisonment fails to conform to the tenet of fair trial that accrue to the accused under Article 25 (c) of the Constitution. The Appellant's argument is that the mandatory minimum sentence takes away the discretion of the Court and this should not be the case because the Court's hands are not supposed to be tied.

71. This Court takes judicial notice of the recent clarification by the Supreme Court by their directions issued on 6th July 2021 that the holding in *Francis Muruatetu* which abhorred the mandatory nature of the death penalty for taking away the discretion of the Court was only with respect to the offence of murder and was not intended to have a blanket application to all other offences.

72. Further, this Court observes that the accused was indeed given an opportunity to mitigate and he merely stated that the charges were not true. This Court finds no reason to disturb the sentence of the trial Court. In fact, the Appellant was given the minimum sentence and the Court could have well imposed a harsher sentence had it deemed that the circumstances of the case called for the same. Furthermore, in sentencing, the Court has to be careful to ensure that the objectives of sentencing are indeed met. This Court finds that indeed, a custodial sentence of 10 years would best serve the punitive, deterrent and retributive functions of sentencing in the circumstances of the case. This Court will not disturb the finding of the trial Court on sentencing.

Conclusion

73. The complainant, a young school going girl of 16 years at the time was innocently walking to school to lay a proper foundation for her future. While on the way, the Appellant who was known to the complainant stopped her and begun to struggle with her with the intention of defiling her. The ugly ordeal was witnessed by other eye witnesses and was corroborated by medical and expert evidence. The Prosecution's evidence was not challenged successfully. Despite the allegations that he was being framed, the Appellant failed to substantiate his allegations of the existence of a land boundary dispute. This Court, being minded that any doubts raised by the defence ought not to be whimsical. This Court finds that the trial Court exercised its discretion well in convicting the Appellant for the offence of attempted defilement which was proven beyond reasonable doubt. Further, this Court also finds that the trial Court exercised its discretion well in meting out the sentence of 10 years against the Appellant.

ORDERS

74. Accordingly, for the reasons set out above, the court makes the following orders: -

i) The Appeal on conviction is hereby declined and the finding of the lower Court on conviction is hereby upheld.

ii) The Appeal on sentence is hereby declined and the finding of the lower Court on Sentence is hereby upheld.

Order accordingly.

DATED AND DELIVERED ON THIS 29TH DAY OF JULY, 2021.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

Julius Kimathi, the Appellant in person.

Ms B. Nandwa, Prosecution Counsel for the Respondent.