REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL NO. 141 OF 2019

GEOFFREY OCHIENG ONSONDO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence by Hon. E. Kanyiri (SRM)

on 28th January 2018 in Makadara Chief Magistrate's Sexual

Offences Case No. 117 of 2016)

JUDGMENT

1. The appellant, *Geoffrey Ochieng Onsondo*, was charged, tried and convicted of the offence of attempted defilement of a child contrary to section 9 (1) as read with *Section 9 (2)* of the *Sexual Offences Act No. 3 of 2006*.

2. The particulars supporting the charge alleged that on 27th August 2016 in Njiru District within Nairobi County, the appellant intentionally attempted to cause his penis to penetrate the genital organ of *FAO* (name withheld) a child aged 7 years.

3. After conviction, the appellant was sentenced to life imprisonment. He was aggrieved by his conviction and sentence hence this appeal. He initially filed his grounds of appeal on 8th July 2021 but he subsequently filed amended grounds of appeal on 23rd April 2021together with written submissions. I note that the amended grounds of appeal are framed as issues for the court's determination but since the appellant is acting in person, I will disregard this anomaly in the interest of justice and treat the said issues as his amended grounds of appeal. The appellant requested the court to determine whether:

i. The ingredients of the case were proved as per the law in SOA No. 3 of 2006 and contrary section 111 (2) (c) of the Evidence Act.

ii. The conviction hinged on a grossly defective charge sheet C/S 134 & 214 of the CPC.

iii. The procedure of plea taking was flawed as per Art. 47 (4); 50 (1) & (2) (b) of the 2010 Constitution and C/S 207 of the CPC.

iv. The investigations were shoddy contrary to Sec. 48 of the Evidence act.

v. There was admission of incredible witness contrary to section 144 and 150 of the CPC and non production of crucial and essential witnesses C/S 146 (IV) of the Evidence Act Cap. 80 Laws of Kenya.

vi. The life sentence has overridden the proportional legal tenets of punishment thus does not achieve the objectives intended in the SOA No. 3 of 2006 and goes against the Sentencing Policy Guidelines.

vii. The defence was denied cross examination on the original maker of the medical examination report.

viii. The TCM convicted safely without appreciating that the findings and conclusions were farfetched hence an invalid judgment.

4. At the hearing, both the appellant and the respondent chose to rely entirely on their written submissions. A look at the appellant's submissions shows that he submitted at length on matters that had no bearing on his amended grounds of appeal.

Under *Section 350 (2)* of the *Criminal Procedure Code*, at the hearing of the appeal, the appellant is prohibited from relying on grounds of appeal other than those stated in the grounds of appeal. Consequently, in this appeal, I will only consider the submissions that are relevant to the appellant's amended grounds of appeal.

5. In his submissions, the appellant started by challenging the credibility of the complainant's evidence claiming that it was not corroborated by the medical evidence contained in the medical report and the P3 form and that the medical evidence did not support the charge; that the claim that one *Mama Niko* and *Tracy* found him in the act cannot be true since the two did not raise an alarm to attract neighbours who lived in the same residential building. He submitted that the learned trial magistrate erred by failing to consider the evidence placed before her in its totality and wrongly convicted him on evidence which did not link him to the offence and did not prove the charge against him beyond any reasonable doubt. He complained that the prosecution did not prove the age of the victim and failed to call crucial witnesses.

6. Further, the appellant contended that his plea was equivocal as the learned trial magistrate did not explain to him the nature and magnitude of the offence he was facing; that there was a variance between the evidence adduced during the trial regarding the date the offence was allegedly committed and the dates the victim was examined at Mama Lucy Hospital; that this made the charge defective under *Section 214* of the *Criminal Procedure Code*.

7. On sentence, the appellant basically faulted the learned trial magistrate for imposing a sentence that was both unconstitutional and went against the proportional legal tenets of punishment and the objectives of sentencing. He urged the court to find merit in the appeal and allow it in its entirety.

8. The appeal is contested by the state. Learned prosecuting counsel supported the appellant's conviction and urged the court to uphold it. She submitted that the conviction was safe as it was based on the evidence of PW1, PW2 and PW3 which was credible and consistent and proved all the ingredients of the offence charged beyond any reasonable doubt. She denied the appellant's claim that the charge was defective noting that it complied with the provisions of *Section 134* of the *Criminal Procedure Code* and it was thus competent.

9. On the appeal against sentence, *Ms Chege* conceded that the sentence passed by the trial court was against the law and that it was harsh and manifestly excessive. She agreed with the appellant that the sentence should be quashed. She urged the court to substitute it with the sentence prescribed by the law.

10. This being a first appeal to the High Court, I am reminded of my duty to revisit the evidence presented before the trial court and to subject it to a thorough and exhaustive analysis to draw my own independent conclusions bearing in mind that unlike the trial court, I did not have the benefit of seeing and hearing the witnesses. This duty has been crystalized in a long line of authorities including ***Okeno V Republic, [1972] EA 32; Njoroge V Republic, [1987] KLR 99***; ***Patrick V Republic, [2005] 2 KLR 162*** among others.

11. I have carefully considered the grounds of appeal, the entire evidence presented before the trial court and the written submissions filed by both the appellant and the respondent. I have also read the judgment of the learned trial magistrate. Having done so, I find that three main issues emerge for my determination. These are:

i. Whether the appellant was convicted on the basis of a defective charge sheet;

ii. Whether the evidence on record proved the charge preferred against the appellant beyond any reasonable doubt;

iii. Whether the sentence imposed on the appellant was lawful.

12. Starting with the first issue, the appellant claimed that the charge was defective because there was a variance between the evidence of PW2 regarding the date the victim was examined at Mama Lucy Hospital and the date the offence was committed as disclosed in the charge sheet.

13. *Section 134* of the *Criminal Procedure Code* directs how charges should be drafted. It provides that a charge is valid if it contains a statement of the specific offence charged and such particulars as are necessary to give reasonable information regarding the nature of the offence.

Looking at the charge sheet in this case, I find that it fully complied with the above provision. It contains a statement of the offence charged and the particulars which sufficiently disclosed the nature of the offence charged.

14. Turning to the appellant's argument that the charge was defective because the date shown in the charge sheet as the date the offence was committed differed with the medical evidence produced by PW2, I find that whereas it is true that PW2 produced a medical report (exhibit 1) showing that PW1 was examined at Mama Lucy Hospital on 25th August 2016 which was three days prior to the date the offence was allegedly committed, this discrepancy alone did not make the charge fatally defective.

15. The above finding is based on grounds that though *Section 214* of the *Criminal Procedure Code* confirms that a charge that is at variance with the evidence is defective and requires to be amended or substituted, *Section 214 (2)* specifically provides that variance between the charge and evidence regarding the time an offence was committed was not material and did not require amendment of the charge if the proceedings were instituted within the time (if any) limited by law for the institution of the offence. There is no law limiting the time for institution of sexual offences and indeed all criminal offences in Kenya but it may be important to note that the accused was arraigned in court on 2nd September 2016 about a week after the offence was allegedly committed.

16. In any event, the discrepancy in dates stated in evidence and in the charge sheet is not a defect which could have prejudiced the appellant

or occasion him any miscarriage of justice since according to the trial court's record, the charge and its particulars which stated the date the offence was allegedly committed were read out to the appellant in a language that he understood on the date he took his plea and he pleaded not guilty. The appellant was thus aware throughout the trial of the date he was alleged to have committed the offence and the fact that a different date was indicated in the medical report cannot be a basis of vitiating his conviction. See ***Peter Ngure Mwangi V Republic, [2014] eKLR***. This was a minor defect which was curable under *Section 382* of the *Criminal Procedure Code*.

17. On the second issue, to determine whether the charges were proved beyond any reasonable doubt, it is important to revisit the evidence adduced before the trial court. The trial court's record shows that after a brief *voire dire* examination, the victim (PW1) gave an unsworn statement and testified that she used to live in the same plot as the appellant and on the material day, she was playing outside their residential building with her friend. The appellant called her and sent her on an errand to fetch water for him which she did. He then asked her to go to his house which was upstairs. She complied and on arrival, the appellant locked the door and asked her to remove her clothes. She declined. The appellant proceeded to remove them as well as his trouser and underwear. He then did *"tabia mbaya"* which she described as *"allingiza kitu ya susu kwa yangu"*.

18. The record indicates that PW1 pointed to what she described as her *"kitu ya susu"* which the trial court noted was her private parts. After the incident, the appellant told her to go out to play but before she did so, *Mama Niko* and *Tracy* went to the house and left. She did not say what she was doing when the two went to the house but according to her, they are the ones who reported the matter to her parents who in turn reported to the police. She was taken to Mama Lucy Hospital for examination.

19. PW2 who worked at Mama Lucy SGBV Clinic produced a medical report which was prepared by her colleague who examined PW1 as *pexhibit1*. Although it was not specifically stated by the trial court, the report was apparently produced under *Section 33 (b)* and *Section 77 (1)* of the *Evidence Act* which allows for production of expert reports or documents by witnesses other than their makers if the attendance of their makers cannot be procured or cannot be procured without occasioning unnecessary delay and expense.

20. A look at the medical report shows that upon examination, PW1's genitalia was found to be normal but had reddening on the right *labia majora*. A further examination on 31st August, 2016 by PW4 *Dr. Shako* at Police Surgery Nairobi Area produced the same results. PW4 after his examination completed a P3 form in which he opined that PW1 had been sexually assaulted. He produced it in evidence as *pexhibit2*.

21. The record shows that there was mis-numbering of witnesses as the arresting officer who ought to have testified as PW4 was indicated as PW3 and the investigating officer who ought to have been PW5 was recorded as PW4. Be that as it may, the evidence of those two witnesses was to the effect that after the incident was reported to the police, *Cpl Cyrus Onduma* arrested the appellant and after investigations by *PC Faith Kirui*, he was charged with the offence subject of the impugned conviction.

22. When put on his defence, the appellant chose to remain silent as he was entitled to under *Article 50 (1) (i)* of the *Constitution*.

23. In her judgment, the learned trial magistrate carefully analysed the evidence adduced by the prosecution witnesses and believed the evidence of PW1 since in her view, it was corroborated by the evidence of the people who dealt with her after the incident including PW2, PW3 and PW5. She found that the victim knew the appellant before and that she positively identified him as her assailant; that the appellant's actions as described by PW1 amounted to attempted defilement of a child since PW1's age was proved by the immunization card produced in evidence as *pexhibit4*.

24. Upon my own re-appraisal of the evidence on record, I find no good reason to fault the findings of the learned trial magistrate. She addressed her mind to the ingredients of the offence facing the appellant and found that the same had been proved beyond any reasonable doubt. Even though it is true that only PW1 gave direct evidence implicating the appellant with the offence as her parents, *Mama Niko* and *Tracy* were not called to testify in support of the prosecution case, under *Section 124* of the *Evidence Act*, the evidence of PW1 alone was sufficient to found a conviction if the trial court was satisfied that she was a truthful witness and gave reasons for that finding.

25. In this case, the learned trial magistrate was satisfied that PW1 had told the court the truth and clearly recorded her reasons for so finding. The reasons were well supported by the evidence on record since besides the medical evidence, the appellant himself conceded during cross examination of PW1 that he had sent her to fetch water for him on the material day. He also admitted having been with her in his house thereafter. His identification as the assailant was thus free from any possibility of error.

26. Regarding proof of age, the immunization card proved that the victim was eight years at the time of commission of the offence not seven years as stated in the charge sheet. This did not however affect the prosecution case since it still proved that PW1 was a child within the meaning of *Section 2* of the *Sexual Offences Act* at the time the offence was committed.

27. Though it would have been desirable for the prosecution to call *Mama Niko* and *Tracy* who the appellant described as crucial witnesses in the case though their role in the incident was not clearly stated, failure to call the said witnesses was not fatal to the prosecution case since under *Section 143* of the *Evidence Act*, no particular number of witnesses is required to prove a fact. In ***Keter V Republic, [2007] 1 EA 135***, the court was categorical that ***"the prosecution is not obligated to call a superfluity of witnesses but only such witnesses that are sufficient to establish the charge beyond any reasonable doubt".***

28. In view of the foregoing, I am in agreement with the trial court's finding that the evidence adduced by the prosecution in this case was sufficient to prove the charge preferred against the appellant beyond any reasonable doubt. I am thus satisfied that the appellant was properly convicted. His conviction is therefore upheld.

29. Regarding the appeal against sentence, the penalty prescribed by the law for the offence of attempted defilement of a child is a minimum of ten years imprisonment. It is provided for under *Section 9* of the *Sexual Offences Act* which states that:

"(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.

(3) The provisions of section 8(5),(6),(7) and (8) shall apply mutatis mutandis to this section."

30. Without repeating the appellant's complaints regarding his sentence, it is important to note that sentencing is dependent on the trial court's discretion and for this court to interfere with that discretion, it must be satisfied that the sentence was either illegal or that in passing it, the trial court took into account an irrelevant factor or applied the wrong legal principles or that the sentence was so harsh and excessive that an error in principle must be inferred. See ***Thomas Mwambu Wenyi V Republic, [2017] eKLR***.

31. In this case, though the sentence of life imprisonment passed against the appellant was not *per se* illegal given that the law prescribed a minimum mandatory punishment of ten years imprisonment, in my view, the sentence was manifestly harsh and excessive considering the fact that the appellant was a first offender, a fact which the trial court did not apparently consider when sentencing the appellant.

32. The prosecution did not advance any grounds which could have justified imposition of a sentence other than the minimum one prescribed by the law. In the circumstances, I set aside the sentence imposed by the trial court and substitute it with a sentence of ten years imprisonment. As the appellant was in lawful custody during the entire trial, the sentence shall take effect from 28th August 2016 when he was arrested.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF SEPTEMBER 2021.

C. W. GITHUA

JUDGE

In the presence of:

Appellant present

Mr. Chebii for the respondent

Ms Karwitha: Court Assistant