REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARSEN

CRIMINAL APPEAL NO. 24 OF 2019

SAMMY ABIYO JILLO .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Lower Court Criminal Case No. 262 of 2016 in the Principal Magistrate Court at Hola before Hon A.P Ndege (PM) in chambers dated 11.09.2018.)

Coram: Hon. Justice R. Nyakundi

The appellant in person

Mr. Mwangi for the state

J U D G M E N T

The appellant was initially charged, tried and convicted with attempted defilement contrary to Section 9 (1) as read with Section 9 (2) of the Sexual Offences Act, No. 6 of 2006 (hereinafter referred to as "SOA"). He was sentenced to serve thirteen (13) years imprisonment. After having been aggrieved and dissatisfied by the learned magistrate judgement, the appellant lodged the instant appeal against both conviction and sentence.

Particulars of the offence were that on the 4th of September 2016, at around 14.00hrs at [Particulars Withheld] village Tana-River Sub-County of Tana River, the appellant intentionally and unlawfully attempted to cause his genital organ to penetrate the genital organ of **SK** a child aged 6. He also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the SOA. The particulars of the offence were that on the aforesaid date, time and place, the appellant unlawfully attempted to touch the complainant's genital organ namely vagina. The appellant vehemently denied the charges.

Grounds of Appeal:

The appeal is based on the following grounds:

> ***(a) That the learned trial magistrate grossly erred in both law and facts by failing to consider that the sentence imposed on him was manifestly harsh and excessive.***
>
> ***(b) That the learned trial magistrate erred in law and facts by failing to consider that no proper procedure for voire dire examination was conducted on complainant and PW3.***
>
> ***(c) That the learned trial magistrate erred in law and facts by failing to consider that no certified copy of the birth certificate was produced as Section as required in Sections 64 and 66 of the Evidence Act.***
>
> ***(d) That section 9 of the Sexual offences Act conflicts with sections 216 and 329 of the Criminal Procedure Code.***

This being the first appeal, the court is mandated to re-analyse and re-evaluate all the evidence on record afresh. In so doing, the court reminds itself that it did not the benefit of seeing the witnesses testify before the trial court. **(See Okeno vs Republic (1972) EA 32).**

Facts

The appellant was arrested by members of the public who had witnessed him holding the complainant's hand leading her into an open bathroom to a field where some children, including **(PW3), MM** were playing in a bid to defile her. It was alleged that the appellant had lowered his trousers down to his knees and undressed the child victim herein and was arrested while his manhood was protruding and erect.

MM rushed to call **(PW4), ECA** a neighbour who quickly responded and found the appellant herein while still with the child at the bathing room. She found the appellant with his pants lowered, and with an erect penis. She got hold of him while screaming. Several people responded to her creams and the victim's was amongst them. She had however been called by another child and informed of the incident. When she arrived at the scene, she found the appellant having already been arrested by villagers. His trouser zip or fly was however still open.

(PW3); MM, and the complainant in their evidence before the trial court, confirmed that the appellant herein removed his genital organ *"mdudu"* and directed it or placed it down towards the victim's organ. The complainant pointed at her pubic region to the trial court. This made the witnesses to conclude that the appellant was attempting to defile the victim. He was not in hurry to put back his on even after he had been caught.

The witnesses and the appellant had not met before hence they had no grudge against him. They also denied having assaulted him or do any harm to him. It was then decided that the appellant be handed over to the police. On their way to the police station, they came across **PW5, Sgt, No. 85808 SGT Wycliffe Kwendo**, of Hola Police Station. He rearrested the appellant and took him to the police station. The complainant was then referred to the hospital for examination. **(PW6) Gloria Hahabona Konde**, a clinical officer at Hola District Hospital assessed the victim's age and found her to have been five years and eight months old as of 05/09/2016. The produced the age assessment report marked as **PEXH. NO.1.**

The defence case was that he was attacked on the material date by thugs who took him to a road where they met with police officers who arrested him. That the thugs who attacked were not the witnesses in this matter. He confirmed that he did not know the witnesses herein, and that he had no grudge or issue or issue with them.

Submission

The appellant filed written submission in support of his grounds of appeal. The appellant pointed out that the learned magistrate imposed a thirteen years sentence in excess of the mandatory minimum sentence provided for by the law. The sentence, in the appellant's view, is manifestly harsh and excessive in the circumstances. Further that the learned magistrate operated outside the perimeters of the law in total disregard of the rule of law and rules natural justice which should be discouraged. He referred this court to Article 50(2)(P); 159(2)(a)(b); 27(1)(2)(4) of the constitution of Kenya. In summation, it is the appellant's humble submission that the sentence imposed on him is a prejudice and failure of justice. He humbly request this court to re-analyse and re-evaluate the whole and arrive at its own independent verdict and allow the appeal.

In ground two, he submitted that the trial magistrate did not properly conduct a *voire dire* examination on the complainant and **(PW3)** respectively in violation of section 19(1) of the oaths and statutory declaration act cap (150 of the laws of Kenya) prior to recording of their testimony. He pointed out that the learned trial magistrate did not follow the *voire dire* procedure of the law. In support of his argument, he cited the case of **John Muiriri Njoroge vs Republic (1983) eKLR 445** which states that the judge is under a duty to record the terms in which (s)he was persuaded and satisfied that the child understands the nature of the oath failure to do so is fatal to conviction.

In ground three, the appellant submitted that the complainant's age was not proved to the legal standard of proof required by the law and the document produced in evidence as an exhibit being a copy of an age assessment report dated 5.9.2016 by **(PW6)** could not be relied upon to prove the apparent of actual age of the victim. He argues that the document was just a copy of the original which was not even certified with a rubber stamp by a commissioner of oaths as required in terms of section 64 and 65 of the Evidence Act which permits the admissibility of primary and secondary documentary evidence. He further argues that in such an offence as the one facing the appellant, the age of the complainant determines the gravity and nature of the offence committed and the consequences that flow from it, thus it is a matter of great importance that such age be proved beyond reasonable doubt. He cited the cases of **Hadson Ali Mwachongoo vs Republic (2016) eKLR** and **Alfayo Gombe Okelloh vs Republic CR App No. 203 of 2009** at Kisumu to support his position.

In the fourth ground the appellant challenged the sentence imposed on him by the learned trial magistrate saying the section he was charged with provides for a mandatory minimum sentence which denies judicial officers the exercise of discretion to impose appropriate sentence based on the scope of the evidence adduced and recorded on each case. He cited the case of **Eluid Waweru Wambui vs Republic CR App No. 102 of 2016** in support of his contention. He therefore prayed to the court to allow his appeal.

The respondent opposed the appeal the learned Counsel **Mr. F. Sirima.** His contention is that the Respondent proved its case beyond reasonable doubt. He pointed out that the elements of *men's rea*, *actus reus* and identification of the perpetration are all present in this matter. According to the Respondent the train of events was that he took the complainant to a secluded place (bathroom); he lowered his trouser, undressed the complainant and removed his genital organ. Further that the appellant was positively identified as the perpetrator of the offence. On the age of the complainant, the learned Counsel for the Respondent referred to the testimony of the complainant's mother who testified that she was 6 years of age. **Mr. Sirima** argued that the evidence of the mother was enough proof of the complainant's age.

Lastly, the Learned Counsel for the respondent argued that the appellant tendered no relevant or credible evidence in his defence. That he deflected the case against him and only made allegations of money stolen from him by unknown thugs. Counsel therefore argued that the appellant's appeal is not merited as there is no substantial ground by the appellant for this honourable court to disturb the findings of the trial court.

Findings and Determination

This is a first appeal. The first appellate court is enjoined to review and reconsider the evidence and make its own conclusions but always

bearing in mind that it did not have the advantage of seeing or hearing the witnesses **(See Ekeno – v – Republic 1972 EA32)**.

The appellant was charged with the offence of attempted defilement contrary to **Section 9(1) (2) of the sexual offences Act**. The section provides

> ***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"***

In matter involving allegations of attempted defilement, the prosecution must prove the ingredients of the offence of defilement save for penetration. Thus, the prosecution must prove the minority age of the complainant that the appellant was positively identified as the perpetrator and then prove the steps taken by the accused to execute the defilement which failed. Attempted defilement is synonymous with failed defilement, and the failed should be attributed to the lack of penetration.

Section 2 of the Children Act, Chapter 141 of the Laws of Kenya defines a **"child"** as: -

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

In the case of **Charles Nega v Republic [2016] KLR**, the court stated as follows:

> ***"In an attempted defilement charge, the prosecution only has to tender evidence that the victim was below the age of eighteen years and not necessarily the specific age. Needless to say if the specific age is availed to a trial court it equally has a bearing in sentencing upon conviction."***

The prosecution's evidence is that the child was six years at the time the attempted defilement was committed. The trial court's observation was that the complainant was definitely under the age of 18 years. Since it had the opportunity to see the child in court and also received the age assessment report in the evidence of **(PW6);** a Clinical Officer at Hola District Hospital who assessed the minor's age to be five years and eight months as at 5/6/2016. **(PW1);** the mother to the complainant averred that she was six years old. I, therefore, have no reason to doubt the age of the complainant. Thus, the age of the minor cannot be said to be in dispute herein.

The complainant was not the only witness to the commission of the offence. Her testimony was well corroborated by the evidence of **(PW3);** a minor of ten years of age and **(PW4)** who witnessed the commission of the offence. In fact, **(PW4)** caught the appellant in *fragrante delicto.* The complainant narrated clearly how the appellant pulled her into a bathroom, lowered his trousers to the knees with his genital organ out and erect and that he was arrested by members of the public after being caught in process of committing the crime.

Section 388 of the Penal Code defines ***"attempt"*** as follows: -

> ***"388 (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 is prevented by circumstances independent of his will or whether he desists of his own motion from further prosecution of his intention"***

The above piece of legislation brings out the main ingredients of an attempted offence; to wit, the *mens rea* which constitutes the intention and the *actus reus* which constitutes the overt act towards execution of the intention. The actus reus must be more than mere preparation to commit an offence. **(See Abdi Ali Bere vs Republic (2015) eKLR).**

From the evidence on record, I am satisfied that the appellant put his intention of defiling the complainant into execution by dragging the complainant into a secluded place (bathroom), lowering his trousers to the knees and having his genital organ facing the complainant. The execution of the defilement was incomplete because it was disrupted by **(PW4)** who caught him in *fragrante delicto* and raised alarm which prompted members of the public to come and arrest the appellant.

I am persuaded that his defence was considered by the learned trial magistrate and rightly rejected. Thus his conviction was well founded. On the question of sentence, the appellant was sentenced to 13 years imprisonment. The sentence for attempted defilement in terms of Section 9(2) of the Act is prescribed to be not less than 10 years of the Act. I however consider the Supreme Court's decision in **Francis Karioko Muruatetu & Another v Republic and 5 Others (2017) eKLR** and although the appellant is a first offender and that he had pleaded for leniency, the psychological effect of the offence on the six year old complainant cannot be overlooked.

I have considered cases whose circumstances are akin to the one in this matter specifically in terms of sentencing after the case of Muruatetu (supra). One such case if the case of **Edward Gikundi Ndege v Republic (2021) eKLR** in which the learned **Judge T.W. Cherere** sentenced the convict to 5 years imprisonment. In the same spirit, I find the appeal partially meritorious particularly on the issue of sentence. The 13 years imposed on the appellant is therefore vacated and substituted with five (5) years imprisonment from 6/9/2018.

As a consequence, the appeal partially succeeds on sentence for conviction order be and is hereby affirmed.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 27TH DAY OF OCTOBER 2021

.....

R. NYAKUNDI

JUDGE

IN THE PRESENCE OF:

1. THE APPELLANT

2. MR. MWANGI FOR THE STATE