**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT GARISSA**

**CRIMINAL APPEAL NO. 33 OF 2019**

**BO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(An appeal arising from the original conviction and sentence in Criminal Case No. 10 of 2019 in the Senior Resident Magistrate's Court at Wajir delivered by Hon. Mugendi Nyaga SRM on 23/8/2019)**

**JUDGEMENT**

1. The Appellant was convicted and sentenced to serve 15 years' imprisonment for offence of attempted defilement contrary to section 9(1) (2) of the Sexual Offences Act No. 3 of 2006.

2. Particulars being that on 6/4/2019 at [particulars withheld], Wajir East Sub-County, Wajir County intentionally attempted to cause his penis to penetrate the vagina of (IIS) child aged 15 years.

3. He was dissatisfied with verdict thus appealed against same vide instant appeal where he complained in his summary of grounds of appeal in the submissions that: -

- **The charge was defective.**
- **The case was not proved beyond reasonable doubt as identification was not safe.**

**PROSECUTION'S CASE**

4. The brief facts of the case are that; **FI (PW1)** testified that on 6/4/2019 around 1.30 am she was with I and F Mohamed. They were sleeping in a traditional Somali hut. PW1 told the trial court that as they were sleeping she heard I scream. She woke up and found the appellant carrying I taking her out of the hut.

5. PW1 testified that FM shone a torch. The appellant put I down. According to PW1, the torch was bright enough and therefore they were able to identify the appellant. It was PW1's testimony that she knew the appellant as he used to be their neighbour at some point. According to PW1, the appellant was naked from the waist downwards.

6. PW1 testified that when the appellant put I down he laid her on her back. She told the trial court that I dress was torn on the front but she had her innerwear on. PW1 testified that the appellant kicked I on the stomach. When asked by FM what he was doing the appellant told them not to embarrass him and themselves. He then escaped.

7. It was PW1's testimony that I called their uncle and told him what had transpired. The uncle told them to go to their aunt's house. In the morning the matter was reported to the police.

8. In cross examination PW1 testified that the 3 of them were sleeping in the same bed. She told the trial court that they did not hear the appellant enter into the house. It was her evidence that they heard the noise after I was taken out of the house. Finally, she testified that when they woke up they found that the appellant had already torn I dress.

**9. II (PW2)** testified that she was aged 15 years old. She told the trial court that on 6/4/2019 around 1 am she was in company of PW1 and FM. They were sleeping in a traditional Somali hut. The 3 of them were sleeping in one bed. PW2 explained that she was sleeping next to the door.

10. PW2 testified that as they were sleeping the appellant entered into the house and carried her. He covered her mouth. PW2 told the trial court that while outside the house the appellant tore her dress. According to PW2, she screamed forcing the appellant to drop her.

11. PW2 testified that the appellant held her innerwear on the top but he did not remove it. It was her evidence that the appellant was naked. She explained that the appellant was wearing a vest only. She told the trial court that she even saw his penis. According to PW2, the appellant attempted to have sex with her but she was wearing her innerwear. PW2 testified that she was able to identify the appellant after the other 2 girls shone a torch.

12. PW2 also explained that she had seen the appellant before. PW2 testified that after the torch was shone the accused kicked her on the stomach. He then escaped. PW2 testified that the torch light was intense enough to identify the appellant.

13. PW2 testified that after the incident they went to their aunt's place. The aunt called their uncle namely MD who advised them to report the matter to the police. In the morning they reported the matter to the police.

14. PW2 testified that police officers visited their home and took photographs at the scene. PW2 told the trial court that she was treated at Wajir County Referral Hospital. She was examined, a P3 form was filled for her.

15. In cross examination PW2 testified that after the appellant gained entry into their house, he untucked their mosquito net and climbed into their bed. He then picked her up and carried her. PW2 testified that she woke up after she was dropped on the ground.

16. PW2 told the trial court that PW1 and F woke up after she was dropped on the ground. PW2 testified that F slapped the appellant. It was her testimony that her dress was already torn as at the time she was dropped down.

17. PW2 denied that the appellant had family disputes with her family. PW2 testified that before the appellant left, he told them not to embarrass him and themselves.

**18. FM (PW3)** testified that on 6/4/2019 around 1am she was sleeping with PW1 and PW2 in one bed. She told the trial court that she was woken up by screams. She testified that the noise was coming out of the house. After waking up she shone a torch. PW3 testified that she saw the appellant outside the house. It was her evidence that appellant was holding PW2.

19. PW3 testified that she slapped the appellant. According to PW3, at the time PW2 was lying on her back. It was her testimony that PW2's dress was torn on the front. She testified that PW2 had her innerwear on. PW3 told the trial court that the appellant was wearing a T-shirt only.

20. He was naked from the waist downwards. PW3 testified that she saw the appellant's private parts. According to PW3, the appellant could not penetrate PW2 because she was wearing innerwear.

21. PW3 testified that the appellant kicked PW2 before he escaped. She told the trial court that she identified the appellant using torch light. It was her testimony that she knew the appellant as he used to pass through their home. She testified that he used to visit his relatives who happen to be their neighbours.

22. PW3 testified that after the incident they went to their aunt's place. The aunt called their uncle namely D. D advised them to report the matter to the police. They did so in the morning. PW3 testified that police officers from Wajir Police Station visited their home and photographed the alleged scene of crime.

23. In cross examination PW3 testified that no one went to their rescue. PW3 told the court that when she went out of the house, she found PW2 on the ground. She denied that they had family differences with the appellant.

**24. MD (PW4)** testified that on 6/4/2019 around 2am FD called him. She told him that the appellant had attempted to defile PW2. PW4 testified that he knew the appellant well. PW4 told the trial court that he was PW2's uncle. PW4 told the trial court that in the morning they reported the mater at Wajir Police Station.

25. Police officers visited the alleged scene of crime and took photographs. Subsequently the appellant was arrested.

26. In cross examination PW4 denied that he had differences with the appellant. PW4 testified that the appellant used to be their neighbour. Also, he told the trial court that the appellant is a neighbour. Finally, he testified that he appellant used to visit them.

**27. Thomas Nyagaka** a Clinical Officer from Wajir County Referral Hospital (PW5) testified that PW2 was examined at the facility on 6/4/2019 and a P3 form filled for her. PW5 testified that on examination it was found that she had mild pain on touch on the stomach area. No injuries were found on her private parts.

28. PW5 testified that her hymen was intact and that there was no bleeding or discharge. PW5 produced the P3 form and Post Rape Card form as exhibit 3 and 4.

**29. No. [xxxx] Cpl. Wycline Wanjala** of Wajir Police Station (PW6) that on 6/4/2019 around 9 am PW1, PW2, PW3 and PW4 went to the station. PW2 lodged a complaint of defilement. PW6 testified that PW2 complained of pain on her stomach.

30. It was her testimony that she had a torn dress. She handed over the dress to the police. PW6 testified that he referred PW2 to Wajir

County Referral Hospital where a P3 form was filled for her. PW6 recorded witness statements. PW6 told the trial court that he visited the alleged scene of crime.

31. It was his evidence that the scene was photographed. PW6 told the trial court that after investigations the appellant was arrested for another offence. Hence PW6 was able to charge him with the current offence.

32. PW6 produced the torn dress as exhibit 1. Copy of PW2's birth certificate was produced as exhibit 2. He produced a photograph of the scene of crime as exhibit 5.

33. In cross examination PW6 testified that he was told that the accused ran when the witnesses screamed. He admitted that PW2's dress did not have semen.

**DEFENCE CASE**

34. The accused was found with a case to answer and placed on his defence. He gave unsworn statement and called one witness.

35. The appellant told the trial court that on 6/4/2019 he was at Eldas attending a funeral. He left Eldas on 7/4/2019 around 8 am. The appellant produced a bus ticket as defence exhibit 1 to prove this.

36. The appellant testified that he is neighbour and relative to the complainant and the other prosecution witnesses. He testified that he had fought over a plot with PW2's uncle.

**37. HM (DW2)** testified that between 3/4/2019 and 10/4/2019 he was attending a funeral with the appellant at Eldas. He told the trial court that the appellant left Eldas on 7/4/2019.

38. The parties canvassed appeal via submissions.

APPELLANT'S SUBMISSIONS

39. It is clear from the foregoing that the word "unlawfully" is missing from these particulars. It is humbly submitted that in the absence of the said word, the said charge does not disclose any offence.

40. In the case of **Achoki vs Republic [2000] 2 EA**, the appellant was charged with attempted rape contrary to section 139 of the Penal Code. In the charge that the appellant faced, it failed to state that the attempted rape was unlawful. The Court of Appeal had the following to say in that regard:-

> **"A charge of rape – under section 141(1) of the Penal Code Cap 63 must allege in its particulars that the Act of sexual intercourse was unlawful…"**

41. The appellant submitted that the description of the assailant was given and the appellant was arrested for another offence and charged with the present one. PW6 testified thus:

> **"After investigations the accused was arrested for another offence. I get a chance to charge him with the current offence."**

42. What this court is called upon to decide is why the appellant had not been arrested if indeed the witnesses knew him before only to be arrested for another offence, which infact he was never charged with?

43. According to PW6, he found the appellant already arrested and charged him not for the offence he had been arrested for but with the present offence thus:

> "I found him arrested for another offence. I charged him."

44. The appellant also contends it was prudent for the arresting officer who arrested him to have testified and for the trial court to decide with what offence he was initially arrested for and under what circumstances he was arrested. This piece of evidence is missing.

45. PW6 testified thus:

> **"I personally knew the accused. The prosecution witnesses described him to me."**

46. The above piece of evidence puts more doubt in the present case. If indeed the appellant was arrested from the description derived from the victims, why did PW6 failed to give those descriptions?

47. This is an exceptional case where the investigating officer knew the appellant personally. The appellant was not arrested because of the alleged descriptions but for another offence. The person who arrested him did not testify.

**RESPONDENT'S SUBMISSIONS**

48. The appellant is contesting the conviction and sentence. On the issue of proving the case against the appellant, the respondent has to establish the age of the complainant, positive identification of the assailant and the action by the assailant that is the attempted defilement.

49. On age, the respondent submitted that the particulars of the offence, it is clearly indicated that the victim was aged 15 years. The evidence of the victim PW2 indicated that she was 15 years. The birth certificate also indicated that the victim was born on 4/8/2003 which confirms that indeed she was 15 years old at the time the offence was committed.

50. On identification of the appellant, the respondent submitted that when the victim screamed on the material day, PW3 shone a torch whence both PW1 through PW3 saw the appellant. They indicated that the torch was bright enough. PW1 knew the appellant for at some point he used to be their neighbour.

51. PW2 the complainant also indicated that when the torch was shone, she saw the assailant and was able to identify him as B, the appellant herein and that she had been seen him before. That he used to pass through their home.

52. PW3 was the one who had the torch. When she was woken up by screams, she shone the torch and saw B who was holding the complainant. That also knew B prior to that material day. That B used to visit his relatives who were neighbours to them. That the appellant was positively identified by the witnesses.

53. On attempted defilement, PW3 testified that on 6/4/2019 while sleeping, someone entered into the house. That he carried her from the bed. He had covered her mouth. He tore her dress. That the person held her panty on its top. The man was naked. The complainant saw his penis. That he attempted to have sex with her but she was wearing innerwear.

54. PW1 adds quantum to that evidence that she heard PW3 scream and when she woke up, found a man carrying PW2 taking her outside. She confirmed also that the man was naked from waist down. That with PW3 they got to where they were before the man could remove the complainant's innerwear. The evidence of PW3 is pari-material to that of PW1.

55. The upshot is that the appellant wanted to consummate sex with the complainant only that it was not successful.

56. On the issue of alibi, the issue of alibi came up at the defence stage. The appellant had not given notice or raise the alibi at the earliest opportunity. He also did not bring out through cross examining prosecution's witnesses. That being the case, the court was behooved to weigh the alibi as against the prosecution case.

57. That the trial court did consider the prosecution's evidence visa vis the defence case. The evidence placed the appellant at the locus and was conclusive of fasten responsibility for the offence to the appellant. The trial court was absolutely justified in holding that the alibi was not reliable and believed.

**ISSUES, ANALYSIS AND DETERMINATION**

58. After going through the materials before the court, I find the issues were; whether the charge was defective and whether the prosecution case was proved beyond reasonable doubt as regards identification of the appellant.

59. On the issue of whether the charge was defective, I must ask myself when it is appropriate to find that a charge sheet is fatally defective. Our case law has given crucial pointers. Two cases are pertinent: the case of **Yosefa v. Uganda [1969] E.A. 236** – a decision of the Court of Appeals – and **Sigilani v. Republic [2004] 2 KLR 480** – a High Court decision by Justice Kimaru. Both hold that a charge sheet is fatally defective if it does not allege an essential ingredient of the offence. **Sigilani v. Republic [2004] 2 KLR** held:

> **"The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defence."**

60. The answer from our decisional law is this: the test for whether a charge sheet is fatally defective is a substantive one: was the accused charged with an offence known to law and was it disclosed in a sufficiently accurate fashion to give the accused adequate notice of the charges facing him? If the answer is in the affirmative, it cannot be said in any way other than a contrived one that the charges were defective.

61. Hence, as our case law has established, the test for a defective charge sheet is a substantive one, not a formalistic one and when it is used here it establishes that the charges gave fair notice to the Accused Person to the charges he was facing, and the trial was fair in a substantive sense. The alleged error is that the words unlawfully was omitted in the charge sheet.

62. Unlike in rape case, there is no lawful sex with a minor thus it is unnecessary to state that the accused attempted to penetrate the vagina of a child unlawfully. Any penetration of a minor child's genital is unlawful. Thus, the ground has no substance.

63. 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).**

64. 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"**

65. In **LODWAR HIGH COURT CRIMINAL APPEAL NO.32 OF 2016 PETER NDOLI ADISA VS R** the court held that, ***the prosecution in an offence of attempted defilement must prove the other ingredients of the offence of defilement except penetration; it must from the age, of the complainant the positive identification of the accused, and then prove steps taken by the accused to execute the defilement which did not succeed. Attempted defilement is as if were a failed defilement, failed because there was no penetration.***

> **388(1) where a person intending to commit an offence begins to put his intentions into execution by means adopted to its fulfillment, and manifests his intention by some avert 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"**

66. In the prove of an attempt to commit an offence the prosecution must prove the *mens rea* which is the intention and the *actus reus* which constitute the avert act which is geared to the execution of the intention. The *actus reus* must be more than mere preparation to commit the act as there is a …….. between preparation, mere preparation to commit an offence and attempting to commit an offence (See **Abdi Ali Bere vs Republic (2015) EKLR**).

67. In the particulars of the offence it is indicated that PW2 was 15 years at the time the offence was committed. PW2 in her testimony told the trial court that she was 15 years of age. This was corroborated by PW1 who is her relative. PW2's birth certificate indicates that she was born on 4/8/2003.

68. This effectively makes her 15 years old as at the time the offence was committed. The appellant did not challenge the foregoing evidence. Therefore, PW2's age was proved beyond any reasonable doubt.

69. It was the evidence of PW1, PW2 and PW3 that on 6/4/2019 they were sleeping on the same bed. PW2 testified that she was sleeping next to the door. The appellant picked her and took her outside the house. According to PW2, the appellant dropped her on the ground and she woke up. The appellant held her panty on its top but did not remove it. He was naked and she saw his penis. He tried to have sex with her but she was wearing inner wear. PW2 testified that she screamed.

70. PW1 testified that when she woke up she found the appellant carrying PW2. He then put her on the ground. He put her on her back. The evidence of PW1 and PW2 was corroborated by PW3. PW1 and PW3 testified that they were woken by PW2's screams.

71. From the evidence before court the offence was allegedly committed at night. In **Nzaro vs Republic [1991] KAR 212** and **Kiarie vs Republic [1984] KLR 739** the Court of Appeal stated held that the evidence of identification/recognition at night must be absolutely watertight to justify conviction. In **Fredrick Kaburu Mbaka vs Republic [2011] eKLR** the court had the following to say about identification at night:

> **"I have also noted that offence was committed at night. The source of light is said to be torch lights. The intensity of light has not been disclosed. It has not been disclosed how long the light was shone. The complainant did not give any physical features of the members of the gang or their names. In the circumstances I find the conditions were not conductive for a proper identification."**

72. PW1 testified that they were able to identify the appellant after PW3 shone a torch. This was corroborated by PW2. According to PW3, she used torch light to identify the appellant. PW1 told the trial court that the torch was bright enough.

73. PW2 testified that the torch light was enough to identify the appellant. Therefore, the source of light and its intensity was disclosed to the trial court. PW1 testified that at some point the appellant was their neighbour. PW3 told the trial court that the appellant used to visit his relatives who were their neighbours.

74. According to PW4, the appellant used to be their neighbour. In his defence the appellant admitted that he was a neighbour and relative to the complainant. This clearly shows that the accused was known to PW1, PW2, PW3 and PW4.

75. In his defence the appellant testified that on 6/4/2019 he was at Eldas attending a funeral. He told the trial court that he left Eldas on 7/4/2019 around 8 am. This was corroborated by DW2. The appellant produced a bus ticket that shows that on 7/4/2019 he travelled from Eldas to Wajir. In essence the appellant raised the defence of alibi.

76. In **Athuman Salim Athuman vs Republic [2016] eKLR** the Court of Appeal at Mombasa held that:

> **"The principle has long been accepted that an accused person who wishes to rely on a defence of alibi must raise it at the**

**earliest opportunity to afford the prosecution an opportunity to investigate the truth or otherwise of the alibi."**

77. The court went on to state that:

> **"Indeed in Ganzi & 2 Others vs Republic [2005] 1KLR 52, this court stated that where the defence of alibi is raised for the first time in the appellant's defence and not when he pleaded to the charge, the correct approach is for the trial court to weigh the defence of alibi against the prosecution evidence."**

78. From the above authority the principles on alibi defence are laid down. That an accused who intends to rely on alibi as a defence he must raise it early in the case to enable prosecution investigate it. Secondly, where alibi is raised during defence hearing it should not be ignored. Rather it should be weighed against the prosecution evidence.

79. In this case the accused raised his alibi for the first time during defence hearing. Therefore, he did not give the prosecution a chance to investigate the truth or otherwise of the alibi. Be that as it may the trial court weighed the alibi against the prosecution evidence.

80. In other parts of this judgement trial court found that the prosecution witnesses knew the accused well. Having found that the source and intensity of the light on the material night was disclosed and considering that the appellant was well known to the prosecution witnesses, the finding that he was properly identified cannot be faulted.

81. Therefore, he is the person who was at the scene on 6/4/2019. In this regard his alibi could not stand in light of the watertight and corroborative prosecution evidence.PW2 testified that when outside the house the appellant tore her dress on the front. PW1 and PW3 found that PW2's dress was torn on the front.

82. The dress was produced as an exhibit in this case and the trial court confirmed that the same was torn on the front. According to PW2, the appellant was naked from the waist downwards. It was her testimony that she even saw his penis.

83. This was also corroborated by PW1 and PW3. PW3 told the trial court that she also saw the appellant's penis. The appellant denied that he committed the offence. However, his defence does not stand in light of the corroborative and watertight prosecution evidence.

84. The trial court was not given any reason to doubt the credibility and truthfulness of the prosecution witnesses.PW1, PW2 and PW3 testified that before the appellant escaped, he kicked PW2 on the stomach. This was confirmed when she was examined at Wajir County Referral Hospital. It was found that her stomach was tender.

85. By carrying PW2 in the dead of the night with his manhood exposed and thereafter tearing her dress the appellant had only one intention, to defile her. His evil intentions were thwarted by PW1 and PW3. To register his annoyance having been stopped on his tracks the appellant kicked PW2 on the stomach.

86. The upshot of the above is that the finding that the prosecution case was proved beyond any reasonable doubt that the appellant attempted to defile PW2 cannot be faulted.

87. On sentence the court finds that there was no record of previous conviction on appellant record and yet he was sentenced beyond what is set as minimum mandatory sentence which in any case has been held unconstitutional due to the mandatory aspect of the sentence. Thus the court will interfere with sentence in view of the circumstances of the case.

88. Thus, the court makes the following orders;

**i. The appeal on conviction is dismissed and conviction is upheld.**

**ii. The sentence of 15 years is set aside and in lieu appellant is sentenced to serve 5 years from 22/4/2019 date of arrest.**

**DATED, DELIVERED AND SIGNED AT GARISSA THIS 29TH DAY OF JULY, 2020.**

**…….……**

**C. KARIUKI**

**JUDGE**