REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 63 OF 2017

KASSIM HAMISI NDARO ....APPELLANT

VERSUS

REPUBLIC... RESPONDENT

(An appeal from the Judgment of Hon. A. Ndung'u, Resident Magistrate, delivered on 20th March, 2017 in Shanzu Senior Principal Magistrate's Court Criminal Case No. 167 of 2015)

JUDGMENT

1. The appellant was charged with the offence of attempted defilement contrary to Section 9(1) as read with subsection (2) of the Sexual Offences Act. No. 3 of 2006. The particulars of the charge were that on the 14th day of February, 2015 within Mombasa County, intentionally attempted to cause his penis to penetrate the vagina of AR [name withheld] a child aged 7 years.

2. The appellant faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on the 14th day of February, 2015 within Mombasa County intentionally touched the vagina of AR [name withheld] a child aged 7 years with his penis.

3. The Hon. Magistrate found the appellant guilty of the main charge of attempted defilement and convicted him accordingly. She sentenced him to serve 20 years imprisonment. The appellant being dissatisfied with the conviction and sentence filed a petition of appeal on 6th April, 2017 raising the following grounds of appeal:-

> (i) That the Learned Trial Magistrate erred in law and in fact by arriving at her conclusion and sentencing him to 20 years imprisonment without considering that the charge of defilement was not proved;
>
> (ii) That the Hon. Trial Magistrate erred in the rule of law by arriving at the said conclusion without putting into consideration that the sentence of 20 years imposed on him was harsh and excessive;
>
> (iii) That the case was not proved beyond reasonable doubt and therefore the sentence of 20 years imprisonment imposed upon him was unsafe; and
>
> (iv)That the Learned Trial Magistrate erred in law by failing to consider his reasonable defence statement.

4. Counsel for the appellant filed his written submissions on 6th June, 2018. Counsel for the respondent filed hers on 18th October, 2018. Both Counsel thereafter highlighted their written submissions.

5. Mr. Kiti, Learned Counsel for the appellant submitted that the Prosecution relied entirely on the evidence of PW2 as the sole witness who gave a first-hand account of the incident. He submitted that the Hon. Magistrate relied on the proviso to Section 124 of the Evidence Act in convicting the appellant.

6. In Mr. Kiti's view, PW2's evidence was weak and other independent evidence was necessary to corroborate her evidence. He stated that PW2 was not truthful and that in accepting the said evidence the Hon. Magistrate tried to conduct a voire dire examination. In making reference to page 13 of the lower court proceedings, Counsel for the appellant contended that no voire dire examination was done. He relied on the case of **Ocharo Obaigwa vs Republic,** Mombasa Criminal Appeal No. 92 of 2003, where the Court of Appeal held that no finding had been made as to whether the minor therein was possessed of enough intelligence to give sworn evidence or was telling the truth as required under Section 19 of the Oaths and Statutory Declarations Act. He also relied on the case of **Samuel Warui Karimi vs Republic**, Criminal Appeal No. 16 of 2014, on the same point.

7. Counsel for the appellant submitted that PW2 was categorical that the appellant penetrated her and that the action was done in the presence of S. He further stated that PW2 talked of the offence happening on 2 occasions. It was contended that the evidence of PW2 was contradicted by that of PW1 and PW3.

8. The appellant's Counsel took issue with the fact that the Post Rape Care (PRC) form was filled 2 days after the incident and as such, he argued the abrasions found on PW2 cannot be said to have been caused by the appellant as she was not examined on the day the offence was committed.

9. Another inconsistency that was pointed out was that PW3 stated that PW2 was threatened with a knife but she did not state so in her evidence. Mr. Kiti submitted that S who was in the company of PW2 when the offence was committed did not testify.

10. It was submitted that PW1 testified that when PW2 was examined by her mother and some other women, they said that she had no injuries on her private parts. It was argued that there was a possibility of the tenderness on PW2's private parts to have been caused by other factors. The case of **David Ochieng Aketch vs Republic** [2015] eKLR was cited to reinforce the argument that tenderness of a female genitalia was not proof of attempted defilement.

11. On the sentence passed against the appellant, his Counsel was of the view that 20 years imprisonment was harsh as the minimum sentence for attempted defilement is 10 years. The court was invited to read the submissions filed by the appellant and to allow the appeal.

12. Ms Marindah, Prosecution Counsel in addressing the issue of the voire dire examination of PW2 invited the court to refer to the handwritten proceedings so that no prejudice would be caused to the respondent.

13. It was submitted that S was not present when the incident the subject of this appeal occurred. She further submitted that the contradiction and inconsistencies on record do not affect the prosecution's case. Ms Marindah pointed out that PW2 was 8 years old and the issue of her having been threatened with a knife could have escaped her mind.

14. The Prosecution Counsel submitted that PW2 could not have lied that she was defiled. In her view the abrasions on her private parts could not have been caused by another factor. She prayed for the sentence not to be interfered with as PW2 was 8 years old when she was defiled.

15. On the issue of the defence, she submitted that it was considered but rejected by the Hon. Magistrate. She cited the case of **Jackson Mwanzia Musembi vs Republic** [2017] eKLR where the Court of Appeal cited the case of **George Kioji vs Republic**, Nyeri Criminal Appeal No. 270 of 2012 on the proviso to Section 124 of the Evidence Act.

16. In his rejoinder, Mr. Kiti distinguished the above case from the present one by saying that there was corroboration of the complainant's evidence in the **George Kioji** case (supra) and that the evidence was overwhelming, but that was not the case in the present appeal.

Evidence adduced before the lower court

17. Starting with the evidence of PW2, AR [name withheld] who was the victim, she gave unsworn evidence after being taken through voire dire examination, by the Hon. Magistrate. She stated that her age was 8 years. She was a pupil in standard 1, in a school [name withheld] in Mtopanga. It was her evidence that on 14th February, 2015 at 4:00 p.m., as she was playing with her friend S, the appellant called them. PW2 recounted that he told them to sit next to him and touch his penis. They touched it. He then asked them to lick his penis, which they did. He then took them to the toilet and asked PW2 to remove her panty. He then carried her and inserted his penis in her vagina. She went home and told no one. They had been told not to tell anyone.

18. She narrated another incident where she went to a certain lady's house to have her hair done but she did not find her. She started playing with other children but the appellant called her. He gave her juice to drink. He then placed her on the bed and removed her panty. He then lay on top of her, kissed her and inserted his penis in her vagina. She stated that she felt pain. When she went home she told her mother. She was disciplined.

19. It was PW2's evidence that her mother looked at her private parts and she was taken to hospital. She stated that she took her mother to Kassim's (appellant's) house and they disciplined him. She indicated that S was taken away by her Aunt. She clarified that the first time the appellant called them was when she was playing with S. The second time was when she was seated with S and the third time was when he called her for juice.

20. PW2's mother, HAN, testified as PW3. She stated that PW2 was 8 years old as she was born on 12th December, 2007. She stated that on 14th February, 2015, PW2 left school at 4:00 p.m., and went home. PW3 asked her to go and play outside. At about 5:00 p.m., she went to call PW2 to go home and take a bath. She found PW2 playing with S outside the appellant's Aunt's home. PW3 gave evidence that she observed that PW2 was tense and that she was not behaving normally. She tried to inquire what was wrong but PW2 was reluctant to talk.

21. PW3 gave evidence that when she was persistent, PW2 told her that the appellant called her and S behind his aunt's house and promised them sweets. He told them to touch and to suck his penis until it produced a milky substance. He then removed their panties, touched their private parts and inserted his fingers inside their vaginas, at different times. He then threatened them by showing them a knife and told them not to tell anyone. He told them he would stab them with the knife.

22. It was her evidence that PW2's father came home and she told him. At that time she was very annoyed. They went to the appellant's house. They interrogated him but he denied having committed the offence. Irate members of the public gathered there and started assaulting him. PW3 further testified that the appellant accepted having committed the offence but he slipped and ran towards his Aunt's home for

safety. They reported the incident to the Village Elder. The Police went to the scene and took the appellant to Kiembeni Police Station where they reported the matter. PW3's mother took PW2 to Coast Province General Hospital (CPGH) where the Doctor examined her and established there was no penetration. Lacerations were however seen on PW2's private parts. PW3 further stated that she never got to see S after the incident as she was taken away by her teachers.

23. PW1, MA testified that he found a crowd gathered outside his house. He inquired from his wife what the problem was. He was told that PW2 was about to be defiled by the appellant. He indicated that PW2 led them to the appellant's house where she pointed him out. PW1 testified that an irate crowd wanted to beat the appellant but he stopped them from doing so. The Police then arrived at the scene and arrested the appellant who was taken to Kiembeni Police Station.

24. PW1's evidence was that PW2 was examined at CPGH and a P3 filled. Age assessment was also done at the said Hospital. He further stated that PW2 told them that the incident was not the first one in the hands of the appellant, who would also force them to do a blow job on him. He further testified that PW2 had not told them of the other incidents at an earlier date, because the appellant had threatened her.

25. PW4, Dr. Athman Ali of CPGH produced the P3 form for PW2. She indicated that it was filled by Dr. Njuguna. A PRC form was filled at CPGH on 3rd June, 2015. PW4 testified that she was familiar with Dr. Njuguna's handwriting and produced the P3 form on his behalf. The said form indicated that the external genitalia was normal. PW2 however has abrasions on the vestibule. The hymen was intact. She produced the P3 form as P. exh. 1 and the PRC as P. exh. 2. PW4 indicated that PW2 was taken to Hospital on 16th February, 2015.

26. The Investigating Officer was No. 88052 Corporal Masani attached to Kiembeni Police Station. She testified as PW5. It was her evidence that on 15th October, 2015 she perused the OB when she reported to work and noted that she had been assigned this case. On the said date, she escorted PW2 to CPGH where she was examined and a PRC form filled. An age assessment was also done as PW2 had no birth certificate. Her age was established to be 8 years as per the age assessment report dated 3rd June, 2015, which she produced as p. exh. 4. She recounted the report which was made to her by the PW2 that the appellant had defiled her. PW5 confirmed that the Doctor established that there were abrasions on PW2's private parts thus there was attempted defilement.

27. In his defence, the appellant denied having committed the offence and recounted his movements on the 14th of February, 2015. He stated that he worked until 4:00 p.m., when he asked for permission to attend a burial. After the burial he went to his uncle's place until 6:45 pm and thereafter left for his home at Mtopanga, Bamburi. He reached home at about 8:00 pm. He stated that when seated outside his house, he saw people carrying thick sticks. He also saw PW3's mother, whom he knew as his Aunt's tenant. The crowd accompanying her asked who Kassim was. He asked them why they wanted to know. They told him he had been assaulting their children. The appellant indicated that he was slapped by PW2's father and his brother. He slipped and ran away. They got hold of him and took him to his Aunt's house and they called Elders. He stated that S was called and that in the presence of PW3, she said that nothing had happened. He was arrested and charged. The appellant said that S was his Aunt's daughter and that she did not relocate to another place.

28. DW2, Rehema Hamisi Ndaro stated that on 14th February, 2015 the appellant and her husband went for a funeral at 4:00 p.m., and returned to her house at 5:00 p.m. Thereafter the two returned to her house and that the appellant left for his home. At 9:00 p.m., he called her and told her that he was being killed. She learnt the following day that he had been charged with the offence of defilement.

29. DW3 was Hamisi Abdalla Frijo. He testified that he was with the appellant on 13th February, 2015. He further stated that the appellant left for his house at 6:00 p.m. At 9:00pm he called DW2 to tell her he was being killed. The appellant called them later to tell them that he was being taken to Bamburi Police Station. He was later charged with defilement.

ANALYSIS AND DETERMINATION

30. This court is mindful of the duty of the first appellate court to analyze the evidence adduced before the lower court and to come to its own independent conclusion, bearing in mind that it has neither seen nor heard the witnesses testify. The Court of Appeal in I**ssac Ng'ang'a alias Peter Ng'ang'a Kahiga v Republic, Criminal Appeal No. 272 of 2005** stated as follows in respect to the duty of the 1st appellate court:-

> ***"....in the same way, a court hearing a first appeal (i.e. a first appellate court) also has duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same. There are now a myriad of case law on this but the well-known case of Okeno -vs- Republic (1972) EA 32 will suffice. In this case, the predecessor of this court stated:-***
>
> ***The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses (See Peters vs. Sunday Post, (1958) EA 424)".***

31. The issues for determination are:-

(i) If voire dire examination was conducted;

(ii) If the Learned Trial Magistrate erred in relying on the proviso to Section 124 of the Evidence Act;

(iii) If there were contradictions in the evidence of PW1 and PW3 as compared to that of PW1;

(iv) If the appellant’s defence was considered;

(v) If attempted defilement was proved; and

(vi) If the sentence of 20 years imprisonment is excessive.

Voire dire examination

32. To address the contention raised by Mr. Kiti to the effect that the Hon. Magistrate did not deal with the issue of voire dire as required, this court has referred to the original lower court record. It shows that voire dire examination was conducted. The Hon. Magistrate made the following remarks:-

> ***“The child is of average intelligence. She seems to understand the difference between truths from falsehood. However she does not understand the nature of oath. She will give unsworn evidence.”***

33. An examination of the lower court case proceedings shows that the Hon. Magistrate handled the issue of voire dire examination properly and she cannot be faulted on that score.

Proviso to Section 124 of the Evidence Act.

34. The only evidence tendered before the court as to how the offence was committed was adduced by PW2, the victim, who was a child of tender age. In this instance, the only other evidence that could have been availed was by PW2’s friend by the name S, who according to PW2, suffered a similar fate as hers. It was the evidence of PW3 and PW5 that the said S who used to live in the appellant’s Aunt's house which was in the same compound as PW2's house, was relocated when the offence occurred. The appellant in his evidence indicated that S still lived in his Aunt’s house. This court notes that PW5, the Investigating Officer, was an independent witness and would have no reason to lie that S was relocated after the incident happened.

35. In the absence of S's evidence, the court relied on the sole evidence of PW2. In her Judgment, the Hon. Magistrate was alive to the proviso to Section 124 of the Evidence Act in that the evidence of a victim in a sexual offence can on its own stand the test of the law as long as the trial court for reasons to be recorded has basis to believe that the witness is speaking the truth. Section 124 of the Evidence Act provides as follows:-

> ***“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:***
>
> ***Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”*** (emphasis added).

36. In this case, the Hon. Magistrate considered the evidence of PW2 and was of the view that the complainant was clear and consistent in her testimony. It is not lost to this court that the Hon. Magistrate had the advantage of hearing and observing PW2 testify. This court has no reason to depart from finding of the said Magistrate that PW2 gave a clear account of the events surrounding the commission on the offence.

Contradictions and inconsistencies

37. Mr. Kiti in his submissions pointed out inconsistencies in the evidence of PW2 and PW3 to the effect that she told her that at the time the offence was committed, the appellant threatened her with a knife. With regard to the foregoing issue, this court notes that PW2 was a child of 8 years of age and contrary to what Mr. Kiti said that she could not have forgotten about having being threatened with a knife, this court finds that the omission on PW2's part to testify that she was threatened with a knife is not material to the offence facing the appellant. What is material is whether there was an attempt to defile her or not. I do agree with Ms Marindah's submission that at 8 years of age, it was possible for PW2 not to have remembered the incident in minute details. What is evident from the record of the lower court is that the Hon. Magistrate found PW2 to be a witness of truth.

38. The appellant's Counsel also took issue with the evidence of PW1, who was PW2’s step-father, in that he testified that his wife, PW3, told him that she and some female neighbours checked PW2's private parts and saw no injuries. It was submitted that in the same breath, PW1 stated that PW2 had bruises. This court notes that PW3 did not say that she was either a Medical Doctor or a Nurse who could have been in a position to conclusively determine if PW2 had injuries on her private parts. The authority cited by Counsel for the appellant of **David Ochieng Aketch vs Republic** (supra) is not applicable in this case as the medical evidence on record did establish that PW2 sustained abrasions on her vestibule as a result of attempted defilement.

39. Counsel for the appellant also stated that the evidence of PW2 had material discrepancies which were contradicted by PW1 and PW3. He referred to the fact that PW2 gave evidence that the appellant carried her and then inserted his penis in her vagina. In his view, if the above had happened, there would have been evidence of defilement. He also argued that PW2 could have sustained injuries on her private parts from another cause between the 14th of February, 2015 and 16th February, 2015 when she was taken to Hospital. The said submission is unfounded as PW2’s PRC form indicates that she had abrasions on her vestibule but her hymen was intact. There was nothing to show that between the 14th February, 2015 when the offence was committed and when she was medically examined, there was an attempt made by a

third party to penetrate her vagina or that she sustained injuries from other sources.

40. PW2 gave a vivid account of how the appellant inserted fingers in her private parts and lifted her up and inserted his penis in her vagina. The P3 form and PRC form shows that there was no penetration of PW2's vagina, thus the offence of defilement was not complete. I do not see any discrepancy, contradiction or inconsistency in PW2's narration of how the incident happened. Once she gave evidence as to what the appellant did to her, the issue of whether there was penetration or not was left for the Medical Personnel who examined her to determine. PW2 gave a narration of what transpired to PW3, PW1 and PW3 was therefore dependent on how they grasped and perceived the events that were narrated to them.

41. The Ugandan Court of Appeal in ***Twehangane Alfred vs Uganda,*** *Criminal Appeal No. 139 of 2001, [2003] UGCA, 6 held that* it is not every contradiction that warrants rejection of evidence. The said Court put it thus:-

> ***"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."***

42. Also in the case of **Philip Nzaku Watu vs Republic** [2017] eKLR, the Court of Appeal had the following to say:-

> "***However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognized in many decisions of this court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signify fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."***

43. Having analyzed the evidence adduced before the lower court, it is my finding that the inconsistencies, discrepancies or contradictions referred to by Counsel for the appellant do not weaken the prosecution case to such an extent that would lead to them being resolved in favour of the appellant.

Defence case

44. On the issue of the defence that was raised, the Hon. Magistrate did consider it and dismissed it for being baseless and an afterthought. She further held that the evidence of the appellant, DW2 and DW3 did not displace or controvert the prosecution's case. I have considered the defence made by the appellant and his witnesses. It is clear that DW2 was lying in her evidence in trying to support the appellant's alibi defence so as to exonerate him from the commission of the offence. She gave evidence that the appellant left her house at 5:00 p.m., on 14 th February, 2015, yet the appellant in his defence said that he left the said house at 6:45p.m. DW3 in cross-examination stated that the appellant left his house at 4:00p.m., on 14th February, 2015 and he did not see him after that.

If attempted defilement was proved

45. It is clear that the evidence of PW2 that an attempt was made to defile her and the foregoing was corroborated by the Doctor, PW4. She confirmed that PW2 at the time of examination on 16th February, 2015 had some bruises on her vestibule. PW2's evidence was clear and cogent. It is also apparent that the prosecution did not deliberately fail to call S to court to testify. I believe the evidence of PW3 and PW5 that she was relocated after the incident. It is also clear that S was living in the appellant's Aunt's house and that PW1, PW2 and PW3 were living in one of her houses as tenants. They were therefore possessed of the knowledge that S was relocated.

46. This court concurs with Ms. Marindah, Prosecution Counsel that there was overwhelming evidence against the appellant. The Hon. Magistrate found the evidence of PW2 to be truthful and cogent and went the extra mile to warn herself on the dangers of convicting on the evidence of a single witness.

Sentence imposed

47. The appellant challenged the sentence of 20 years imprisonment which was imposed against him. Under the provisions Section 9(2) of the Sexual Offences Act, the minimum sentence provided for the offence of attempted defilement is 10 years imprisonment. The age assessment report indicated that PW2 was a child of 8 years of age. A custodial sentence is not only meant to punish the appellant for having committed the offence herein but it is also aimed at reforming him, to make him a person who can to fit in a better way in the society, after completion of his jail term. Guided by the Judiciary Sentencing Policy, I hereby reduce the sentence imposed against the appellant from 20 years to 12 years imprisonment. The appeal against sentence succeeds to the said extent.

48. The appeal against conviction is hereby dismissed.

DELIVERED, DATED and SIGNED at MOMBASA on this 30th day of January, 2019.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Kiti for the appellant

Ms Ogweno - Prosecution Counsel, for the respondent

Mr. Oliver Musundi - Court Assistant