REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 118 OF 2015

BENSON MUSUMBI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal arising from the judgement of Hon. I.M Kahuya, SRM delivered on 28.7.2015 in Machakos Chief Magistrate's Court Criminal Case No.17 of 2015)

JUDGEMENT

1. This is an appeal that was lodged herein on **7th August 2015** by the Appellant, **Benson Musumbi**, against the Judgment of the Learned Senior Resident Magistrate, **Hon. I.M Kahuya**, in Machakos Chief Magistrate's **Criminal Case No. 17 of 2015**. The Appellant had been charged in court with the offence of Attempted Defilement contrary to **Section 9(1) as read with Section 9(2)** of the **Sexual Offences Act**, **No. 3 of 2006**. In the alternative, he was charged with Indecent Act with a Child, contrary to **Section 11(1)** of the **Sexual Offences Act**. The offences were alleged to have occurred on **12th November 2014** in Machakos County.

2. The Appellant, having denied the allegations against him was taken through the trial process and a Judgment was subsequently rendered by the Learned Trial Magistrate on **28th July, 2015.** The Appellant was found guilty of the offence of attempted defilement. He was convicted and sentenced to serve 12 years' imprisonment. Being dissatisfied with the conviction and sentence thereto, the Appellant, preferred this appeal on the following amended grounds:

a) That court erred and misdirected itself in fact and in law on the identification of witnesses under the criminal procedure code generally and in particular the identification of the appellant to the detriment of the appellant;

b) The court erred and misdirected itself in fact and in law in relying on the evidence of a single witness namely the complainant while the evidence of that witness was full of glaring inconsistencies that made it unsafe and evidentially weak to rely upon to base so grave and weighty a conviction;

c) That the Trial Magistrate erred in law and fact in omitting to observe and warn herself that the prosecution had failed or omitted to call the essential witnesses namely “KAMAMA” and the arresting officers and thereby occasioned a miscarriage of justice;

d) That the Trial Magistrate erred in law and in fact when she did not find that the prosecution case was not proved beyond doubt and thereby occasioned a miscarriage of justice;

e) The Trial Magistrate misdirected herself on several matters of law and fact;

f) The Trial Magistrate erred in law in failing to note that all the ingredients of the offence of committing an attempted defilement were not proved by the prosecution.

g) The Trial Magistrate erred in law in deciding the case against the weighty evidence in that

- She failed to take into account the motive of a frame up which emanated from a long standing dispute between the complainants’ father and the employer of the appellant.

- The learned trial magistrate erred in failing to conduct a voire dire in light of absence of the medical evidence as to age assessment of the victim.

h) The trial magistrate erred in law by failing to note that the prosecution failed to prove the offence to the required standards and she did not make a finding as to that;

i) The trial magistrate erred in law by failing to note that there was no direct evidence that the appellant tried to penetrate Pw2 or that he attempted to defile her;

j) The trial magistrate erred in law and in fact in holding that age was not a necessary ingredient in the offence of attempt and the age of Pw2 was not established;

k) The trial magistrate erred in not making a finding in the defence that the appellant was framed;

l) The trial magistrate erred in law and in fact failing to find that the prosecution did not establish the fact that the appellant was lying on the victim with his pair of trousers lowered and unzipped and also that his penis came into contact with the vagina and that the minor sustained injuries as to her thighs;

m) The trial magistrate erred in law by finding that despite the said "KAMAMA" not recording statement there was sufficient evidence that the appellant worked at the home of Pw.1's neighbor which had unfinished house and that it was this house that was the scene of crime;

n) The court erred in fact and in law in finding that the appellant's actions was clear proof that he intended to have sexual intercourse with the said minor and had it not been interrupted, worse might have happened to JN;

o) The court erred in shifting the burden of proof to the appellant's where it held that the appellant did not cross examine Pw1 on the allegation that the former had threatened to harm him in future because of existing feud.

3. Accordingly, the Appellant prayed that appeal be allowed, the judgement and order issued in Machakos Criminal Case No 17 of 2015 be set aside.

4. In his written submissions, the Appellant's Counsel submitted that the state failed to prove that there was attempted defilement. Counsel further submitted that the trial magistrate relied on evidence of a single witness without cautioning herself of the danger of having a conviction of such evidence; counsel cited the case of **Musyimi Kasoa v R Criminal Appeal No. 47 of 2013**.Counsel also submitted that there was bad blood between Pw1 and the appellant's employer and as such the court ought to have taken this into account.

5. On the issue of sufficiency of evidence to warrant a conviction, counsel submitted that from the medical evidence from the doctor, there were red blood cells on the outer wall of the vagina of the complainant and the same could have been caused by an abrasion and the evidence that the complainant was scratching it was the cause of the abrasion.

6. Counsel submitted that the evidence of Pw1, 2 and 3 who are members of the same family should be considered as evidence of a single witness. Counsel further submitted that conviction without a key witness was not safe and he quoted the case of **Bukenya v Uganda (1971) EA 49** which held that failure to call an essential witness would be adverse to the prosecution case. He submitted that the judgement was not in compliance with the provisions of Section 169 of the Criminal Procedure Code. In conclusion, he submitted that there wasn't sufficient evidence on record to prove the charge of attempted defilement against the appellant and thus the conviction should be quashed and sentence be set aside and the appellant be set at liberty.

7. The appeal was opposed by the State. Learned Counsel Machogu's contention was that attempted defilement is a failed defilement meaning that there was no penetration. He submitted that the complainant knew the Appellant physically before the incident and thus there was no wrong identification of the Appellant. On the ingredient of age, counsel submitted that the father of the child testified on her age and the birth certificate that was produced as an exhibit was cogent evidence of age. He further submitted that the Prosecution adduced credible evidence before the lower court, through **PW2,** to prove that there was attempted defilement; which evidence was corroborated by the evidence of **PW1** and **PW3** which confirmed that the appellant had undressed her while inside the house which was under construction and touched her private parts. Counsel according prayed that the appeal be dismissed.

8. I have given careful consideration to the appeal and taken into account the written submissions made herein. I am mindful that, in a first appeal such as this, the Court is under obligation to reconsider the evidence adduced before the lower court and come to its own conclusions thereon. In **Okeno vs. Republic [1972] EA 32,** the Court of Appeal for East Africa expressed this principle thus:

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination ... and to the appellate court's own decision on the whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions...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 findings 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..."**

9. The Appellant had been charged with **Attempted Defilement contrary to Section 9(1) as read with Section 9(2)** of the **Sexual Offences Act**, **No. 3 of 2006**. In the alternative, the Appellant was charged with Indecent Act with a Child, contrary to **Section 11(1)** of the **Sexual Offences Act.**

10. The Prosecution called a total of 6 witnesses in support of its case. The first of whom was the father of the Complainant (**PW1).** His

evidence was that, on 2.1.15 his wife told him that the complainant had difficulties walking and was in a bad mood. Later he interrogated Pw2 who told him that the appellant had called her into a house under construction and stripped her jeans halfway and unzipped his trousers, however before he could do anything Kamama, who was her friend walked in on them and the appellant abandoned his mission. The matter was reported to the Machakos Police Station and he recorded a statement and was given a P3 form.

11. A Voire Dire interview was conducted on the complainant and when the court was satisfied that she had sufficient intelligence to give evidence on oath, she was put on the witness stand. **Pw2** testified that on **the material day** at 4.00 p.m., she was playing near a house under construction when the appellant called her with a hand signal into the house and then he lowered her trouser and panty and he touched her on her thigh but not on her private parts. Suddenly Kamama appeared from nowhere and she later fled and followed by the appellant. She testified that the appellant did not remove his trouser or unzip and when she got home she told her aunt that a caterpillar had walked on her because she felt pain on her thigh area. When her mother came home, her aunt told her and she confessed the appellant's actions and her father later reported to the police station. She testified that she had seen the appellant within the locality but didn't know him by name.

12. It was further the evidence of **PW2** that she did not report the matter immediately for fear of being reprimanded and that she also did not scream.

13. **PW3, AN,** testified that she was the complainant's step mother and on the **2.1.2015** at 4 pm the complainant reported that a caterpillar had walked on her thighs and she contacted her father having noticed that the complainant had difficulties in walking. She checked her private parts and noticed that she had a pimple between her thighs that she kept scratching and when the complainant's father returned the complainant informed him of the actions of the appellant thus they went to the Machakos Police Station. They then proceeded to the General Hospital. The complainant described the assailant and was able to know it was him and was arrested after the complainant identified him.

14. **Dennis Kyalo (PW4)** testified that he was an inspectorate officer and on 2.1.15, he was on patrol when he received a call from **PW1,** who informed him that his daughter had been defiled. He stated that he responded immediately, and on arrival at the scene, he arrested the appellant and took him to Machakos Police station.

15. The Inspectorate Officer, **Antony Mutisya (PW5)** stated that on the **2.1.15** he was in the company of Pw4 when they rushed to the crime scene to arrest the appellant after receiving a call about the actions of the appellant against the complainant.

16. **PW6** was **Pc. Mose**, the Investigating Officer in the case. He testified that he was on duty at Kyumbi Police Station on **3.1.2015** when the he was instructed to pick up the appellant from Machakos Police station. After investigations, he charged the appellant. He further stated that Kamama who witnessed the incident refused to record a statement because her parents refused her to do so. It was further the evidence of **PW6** that there is bad blood between Pw2's parents and the appellant's employers and he did not know why Pw1 contacted Pw4 first instead of the police.

17. Pw7, was, **Dr. Janet Muia** from Machakos Level 5 Hospital who sought to tender a P3 form on behalf of her colleague. Her evidence was that JN a nine year old girl, presented herself for examination for attempted defilement and that there was nothing to show that there was attempted defilement. Her hymen was intact, and accordingly the PRC form that was filled in showed that there were some blood cells at the outer wall of the vagina and these could have been caused by an abrasion. The P3 Form which was filled in was tendered as the Prosecution's **Exhibit No. 1.** and the medical notes as Exhibit 2.

18. In his defence, the Appellant gave an unsworn statement and told the lower court that on 2.1.15 he was at Kyumbi buying Chicken feed and he returned home at 6.30 pm and he was arrested at 10.30 p.m by Pw1, Pw4 and Pw5. His version was that Pw1 had once threatened to harm him because he was in bad terms with the appellant's employer. He questioned why Pw1 reported to the County Inspectorate officer instead of Kenya Police.

19. From the foregoing summary of the evidence adduced before the lower court, the pertinent question to pose in this appeal is whether there was sufficient evidence that was adduced before the lower court to prove that the appellant was liable for the offence of attempted defilement;

20. 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"**

21. The prosecution in an offence of attempted defilement must prove the other ingredients of the offence of defilement except penetration; it must prove the age of the complainant, positive identification of the assailant, and then prove steps taken by the assailant to execute the defilement which did not succeed. Attempted defilement is as if it were a failed defilement, because there was no penetration. Attempt to commit an act is defined as

> **388 (1) where a person intending o 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"

22. In the orders to prove an attempt to commit an offence, the prosecution must prove the **mens rea** which is the intention and the actus reus which constitute the overt 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 difference between mere preparation to commit an offence and attempting to commit an offence. This was observed in the case of **see Abdi Ali Bere v Republic (2015) eKLR.**

23. The evidence in support of the charge is the one given by PW1 the father of the complainant and the complainant. In his evidence Pw1 stated **that** on 2.1.15 his wife told him that the complainant had difficulties walking and was in a bad mood. Later he interrogated Pw2 who told him that the appellant had called her into a house under construction and stripped her jeans halfway and unzipped his trousers but however before he could do anything Kamama, who was her friend walked in on them and the appellant abandoned his mission. The matter was reported to the Machakos Police Station and he recorded a statement and was given a P3 form.

24. On being cross examined by the appellant, the witness stated that the complainant told him that the appellant attempted to defile her and Kamama who saw them did not record a statement out of fear. He also confirmed that there was a land dispute between his family and the appellant's employer.

25. The child complainant had testified that on **the material day** at 4.00 p.m., she was playing near a house under construction when the appellant called her with a hand signal into the house and who lowered her trouser and panty and touched her on her thigh but not on her private parts.

26. I have considered the judgment of the learned trial magistrate. She relied on the evidence of PW.1, PW.2 and PW.3. In her judgment the trial magistrate stated;

> **"From the onset, I found that there was corroboration and consistence in the Prosecution's evidence starting with JN's narration of what happened to that stated by Pw1 and Pw3. She was clear on the extents to which the aggressor reached during the incident. I found that despite the said Kamama not recording her statement, there was sufficient evidence to rule that the accused person worked at the home of Pw1's neighbour which had an unfinished house. It was at this house that was the scene of crime when JN stated that he lowered her trousers and panty before touching her thighs."**

27. Though the evidence of Pw1 and Pw3 are consistent and corroborate each other, the said evidence however does not support the charge that the appellant had attempted to defile the complainant but rather the prosecution evidence shows that the appellant used to reside near the complainant's home and infact the testimony of Pw1, Pw2 and Pw3 does not reflect the conduct of someone who is distressed from the commission of an aberrant activity if at all it happened. I wonder why someone would report a matter to a county inspectorate officer instead of the police. I also wonder why a key eye witness did not testify or record a statement despite the fact that we have apt laws on witness protection. I also note that there was bad blood between the families which kept resonating in the evidence and the doubts were not cleared. Further, the appellant's alibi was not shaken in any way by the prosecution evidence. Therefore it is possible that he was not even around the crime scene at the material time. This being a criminal matter where culpability must be proved beyond all reasonable doubt I find there was doubt in the prosecution evidence and the benefit of such doubt must be ruled in favour of the appellant. The failure to call the eye witness and the existence of bad blood between complainant's parents and appellant's employer created doubts on the prosecution's case.

28. In the result, I find that the appellant's appeal has merit and must succeed. I am therefore satisfied that the conviction was not supported by evidence on record. I consequently allow the appeal, quash the conviction of the attempted defilement and set aside the sentence. The appellant is ordered to be set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

Dated, signed and delivered at **Machakos** this **26th** day of **March, 2019.**

D. K. KEMEI

JUDGE