REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 23 OF 2018

EDWARD KIPTOO SIGEI.................APPELLANT

VERSUS

REPUBLIC.......................................RESPONDENT

JUDGMENT

1. The appellant, **Edward Kiptoo Sigei**, was charged 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 (*'the Act'*). The particulars of the charge are that on 8th April 2016 at 2.00 p.m. in Transmara sub-county within Narok County unlawfully and intentionally attempted to cause his penis to penetrate the vagina of DNT a child aged 7years.

2. In the alternative the appellant faced a charge of committing an indecent act with a child, contrary to section 11(1) of the Sexual Offences Act in that on 8th April 2016 at 2.00 p.m. in Transmara sub-county within Narok County intentionally touched the vagina of DNT a child aged 7 years.

3. The court found the accused guilty of the charge of indecent act and he was sentenced to 20 years imprisonment. The accused has lodged an appeal against conviction and sentence. The grounds of the appeal were that the sentence meted was excessive and the appellant questioned the manner in which the trial court arrived at the conclusion of guilt.

4. As a first appellate court, I am required to evaluate the evidence on record afresh and come to my own independent conclusions and inferences. In doing so, I have to bear in mind that I did not have the opportunity to see any of the witnesses testify to determine their demeanor and to give due allowance to that fact. (***See the case of OKENO –VS- REPUBLIC (1972) EA 32***).

5. The prosecution called 5 witnesses JNN (Pw1), DN (Pw2), MT (Pw3), SCN (Pw4) and DO (Pw5).The appellant gave sworn testimony and did not call any other witness.

6. The trial court conducted *voire dire examination* and found that Pw2 was intelligent enough to give sworn evidence. Pw2 recalled that Pw1 gave her Kshs 25/- to buy soap and ball gum. On her way home she met the accused on the road who pulled her by the hand, covered her mouth and took her to a sugar plantation. She testified that the appellant strangled her, lay on top of her and that she felt pain. Pw2 testified that she later stood up and went home found Pw1 and told her what transpired. Pw3 then took her to hospital. The appellant was well known to her, he lived in a police officer's home next to theirs and herd's cattle.

7. Pw1 recalled that on 8th April 2016 at 1:00 p.m. the appellant went to her home and she gave him food. The appellant was known to her as he is a herd's boy to her brother in law. As the appellant ate Pw1 sent Pw2 to the shop to buy some soap and ball gums. Pw2 testified that the appellant then left claiming he was tired and in need of a rest. Pw1 testified that Pw2 took an abnormally long time to return from the shops and she asked Lemayian to go look for Pw2, at that moment they saw Pw2 who had blood all over her head approach. Pw2 informed her that she had been strangled by the accused. She immediately raised an alarm and people came. Pw2 told them that that the appellant took her to the sugar plantation and removed her pant.

8. Pw3 upon hearing screams rushed to Pw1's house and found Pw1 crying. She took Pw2 to hospital. Pw5 testified that Pw2 complained of being defiled and upon examination he found that the Pw2 was restless and her clothes were soiled. There were bruises on the neck, the thorax and abdomen had no bruises. Both the upper and lower limps had no injuries. On examination of the genitalia the labia minora and majora were intact. There was discharge of blood from the mouth and lab results did not find spermatozoa cells but epithelial cells were seen. He came to a conclusion that there was attempted rape. Pw4 was the investigating officer got information from Enoosaen patrol police base where the accused had been arrested. He took the appellant's statement and carried out investigations. The appellant was charged with the offence. Birth certificate of Pw2 indicated that she was 7 years old.

9. The accused in his defense stated that he did not commit the offence and that he was framed for the offence.

10. When appeal was set for hearing the appellant relied entirely on his written submission while the prosecution made oral submissions. The appellant submitted that the 20 year imprisonment term was excessive, the prosecution evidence was flawed and was not proved beyond reasonable doubt Mr. Otieno for the prosecution submitted that the complainant identified the appellant whom she knew, the appellant then took her to the sugar plantation and Pw2 described the ordeal. Medical evidence was inconclusive and did not support the charge of defilement and it is for those reasons that the prosecution preferred attempted defilement. Mr. Otieno submitted that the evidence before the trial court was sufficient to convict on attempted defilement. He urged the court to therefore enter a conviction on attempted defilement.

11. The appellant was charged with the offence of attempted defilement contrary to **Section 9(1) (2)** of the Sexual Offence Act no. 3 of 2006**. Section 9(1)** of the ***Sexual Offences Act*** defines the offence of attempted defilement as follows; *a person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement*. The Penal Code defines an attempt to commit an offence in Section 388 (1) 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."*

The prosecution in a case of attempted defilement must prove the age of the complainant, positive identification of the accused, and then prove steps taken by the accused to execute the defilement which did not succeed. In an offence of attempted defilement it is not necessary to prove penetration. Pw5 testified that upon examination of the genitalia, the labia minora and majora were intact with no proof of bruises or lacerations. The Court of Appeal in ***Tyson George Ngowa v Republic [2017] Eklr Criminal Appeal No 16 of 2017***upheld the High Court's decision in ***Tyson George Ngowa v Republic [2016] eKLRCriminal appeal 40 of 2015***where medical evidence adduced showed that the minor's hymen was intact and there were no injuries on her genitals. The first appellate court was of the view that for the offence of attempted defilement there was no need for physical evidence such as bruises or lacerations on the complainant's private parts or thighs or any part of the body for the offence of attempted defilement to be proved. I concur with this view.

12. Pw2 gave an elaborate account on what transpired after the appellant got a hold of her on her way home. The trial court conducted *voire dire examination* before Pw2 gave her sworn testimony. Pw2 testified as follows:

> *'…on returning I met Kiptoo on the road, he pulled me by my hand. I tried to resist he covered my mouth. He took me inside the sugar cane plantation. Kiptoo is the person on the dock. I know Kiptoo he lives at the police officer's home, he herd's cattle. The officer's home is close to our home. In the sugarcane he started strangling me as he lay on me. I had worn a full dress on that day. I also had a pant. I don't know about what he did to my pant. Kiptoo removed my pant, these are my shoes that I had worn on that day.'*

13. During cross examination Pw2 stated that the appellant did *bad manners* to her and that she felt pain. The trial court found that evidence of Pw2 was credible. It was Pw1's testimony that when Pw2 came home she told her that the appellant strangled her and removed her pant. Pw1 also testified that they found Pw1's pant and shoes at the sugarcane plantation. Pw5 also testified that Pw2 appeared restless after the ordeal. I find that Pw2's evidence was corroborated by evidence of Pw1, Pw3 and Pw5. Pw2 gave evidence that the appellant took her by the hand to a sugar plantation, covered her mouth, strangled her, removed her pants, lay on her and did bad manners, she testified that she felt pain in the groin area.

14. In proving an attempt to commit an offence the prosecution must prove *mens rea* and *actus reus* which constitute the avert act which is geared to the execution of the intention. In ***Abdi Ali Bere – vs – Republic (2015) EKLR*** the court observed that *actus reus* must be more than mere preparation to commit the act as there is a difference between preparation mere preparation to commit an offence and attempting to commit an offence. In this case Pw2 gave evidence that the appellant removed her pant, lay on her and did bad manner to her and she therefore felt pain. Pw4 also testified that during the incident Pw1 lost consciousness, and when she regained consciousness she went home to Pw1. I agree with the argument of the prosecution that it proved the offence of attempted defilement beyond reasonable doubt.

15. Pw1 testified that the incident act happened during broad day light and the appellant was a person well known to her. However even where the accused is known to the complainant, the court is bound to exercise caution when admitting such evidence. The Court of Appeal in the case of ***Wamunga vs Republic (1989) KLR 426*** stated as under;

> "*It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favorable and free from possibility of error before it can safely make it the basis of conviction."*

Evidence of both Pw1 and Pw2 show the appellant was person known to the complainant and in fact the appellant had come to their home at around 1:00 p.m. and was served with lunch. The incident took place immediately after the appellant had finished his food and I find that the circumstances were favorable for positive identification.

16. Section 9(2) of the Sexual Offences Act provides that 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. The mandatory minimum sentence is 10 years' imprisonment. In ***Republic v Timothy Ndolo Ngulu [2018] eKLR*** Odunga J. observed as follows.

> "*[14] This court would need to consider some cases which will assist it to reach a just decision in regard to the sentencing of the accused. In the case **R vs. Scott (2005) NSWCCA 152** Howie J Grove and Barr JJ stated:*
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> "*There is a fundamental and immutable principle of sentencing that this sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the*

circumstances of the crime committed…One of the purposes of punishment is to ensure that an offender is adequately punished…a further purpose of punishment is to denounce the conduct of the offender."

17. There is no doubt that Pw1 was a child and the age proved by the prosecution, the mandatory sentence for attempted defilement is ten years imprisonment. The conviction by the trial court is hereby set aside and I convict the appellant of attempted defilement contrary to **Section 9 (1)** and **9(2)** of the **Sexual Offences Act No. 3 of 2006**.Taking into account the circumstances leading to the offence, the appellant is sentenced to 15 years imprisonment.

Dated, signed and delivered at Kisii this 14thday of March 2019.

R. E. OUGO

JUDGE

In the presence of;

Appellant In person

Mr. Otieno Prosecution Counsel/ Respondent

Rael Court clerk