REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

HCCRA NO. 132 OF 2017

LOPOGHON PEYERE.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the Principal Magistrate's Court at Kabarnet Cr. Case no. 102 of 2015 delivered on the 10th day of June, 2015 by Hon. E. Kigen, RM]

JUDGMENT

1. This is an appeal from the conviction and sentence of the Appellant for 10 years for the offence of attempted defilement contrary to section 9 (1) as read with 9 (2) of the Sexual Offences Act, the particulars of which were that the Appellant had *"on the 2nd day of February 2015, at around 1700 hours at [Particulars Withheld] village in East Pokot Sub-county within Baringo County, intentionally and unlawfully attempted to cause his penis to penetrate the vagina of C K, a child aged 2 years."*

He was also charged in the alternative of the offence of indecent act contrary to [section 6 (b)] of the Sexual Offence Act no. 3 of 2006 particulars being, *"on the 2nd day of February 2015 at around 17 hours at [Particulars Withheld] village in East Pokot Sub-county within Baringo County intentionally and unlawfully did an indecent act to C K by touching her private parts namely vagina without her consent."*

The offence in the alternative charge should have been charged under section 11 (1) of the Sexual Offences Act, if the particular are correct.

2. Upon full trial Court in Criminal case no. 102 of 2015 delivered a judgment on 10/6/2015 finding the Appellant guilty as charged:

> "I have looked at the evidence of the witness before Court and I do find that the accused has been well connected to the committal of the said offence, medical examination revealed swollen labia of the minor as well as microscopy test revealed that the minor had contracted gonorrhea from the accused. Pw1 was a key witness found the accused in the act all proved its case beyond reasonable doubt and I do hereby proceed to find the accused guilty of the offence of attempted defilement contrary to section 9 (1) (2) of the Sexual Offences Act no. 3 of 2006."

3. The Appellant, being aggrieved with the decision of the trial Court, filed a Petition of Appeal on 8/3/2017 on the following grounds:

> a. That the trial Magistrate in her observation and findings relied so much on the trial evidence of Pw1 who knew me in advance and yet there were no supportive evidence to reveal the same.
>
> b. That the learned trial Magistrate convicted and sentenced me basing on Prosecution evidence which were poorly made, fabricated, speculated, contradicted and conspired among four family members.
>
> c. That the medical report as read on the P3 forms, the medical report testimonies in record did not corroborate that of the Complainant nor link me with the Complainant.
>
> d. That the learned trial Magistrate erred in law and fact by not taking in consideration that in the case of this nature physical description and exhibits were necessary as required by the provision of the law.
>
> e. That the learned trial Magistrate erred in law and facts by not considering that my defence and circumstances surrounding this case regarding the scene which is not clear. In this case, the Prosecution evidence was weak and could not support a conviction hence the trial was nullity and void.

f. That the grudge that was between me and Pw1's father was the real motive and genesis of a case that was not there.

g. That my defence was dismissed without proper consideration as provided by the provisions of section 169 of the Criminal Procedure Code.

4. The Appellant filed in Amended Grounds of Appeal on grounds that the learned trial Magistrate erred in law and fact by convicting him:

a. On a language he did not understand.

b. On facts that were contradictory, inconsistent, fabricated, coached and uncorroborated evidence.

c. No credible evidence proving attempted defilement.

d. Age of Complainant not properly proved. Complainant not in Court.

e. Not noticing the Medical Officer was incompetent.

f. The charges were defect dominated.

g. Did not comply with Article 50 (2) (g) (h) 2010 Constitution.

h. Without considering his case in general.

i. Denied him opportunity to sum up contrary to section 210.

j. That important witnesses were not brought to trial.

5. The Appellant stated in his Submissions that the Court erred in not asking him what language he preferred subject to Article 50 (2) and section 198 (1) of the Criminal Procedure Code. Pw3 and Pw1 talked in Kiswahili while Pw2 and Pw5 languages are not stated and cannot be cured under section 382 Criminal Procedure and the Authority of ***Kiyato v. R*** 1982 – 1988 KLR 418, ***Jackson Leskei v. R*** (2005) CRA NO. 313 Nairobi.

a. He submits that the evidence brought by the 3 family members is poor beyond salvage and below the threshold of beyond reasonable doubt; and gives many incidences of contradictory evidence. The evidence of Pw1 was not corroborated with the Complainant who was not identified nor brought as a witness.

b. That he submits that the tribulations facing him were debt based and that the phones accused brought were non-existent and taking the evidence of father, mother and son was wrong and not safe to convict.

c. The Prosecution relied majorly on infection that he infected a venereal disease termed as gonorrhea and he submits that there is no prove that the minor was indeed infected with a STD and was treated. There are no treatment chits or notes. The evidence of Pw4 is against the provisions under section 163 of Evidence Act.

d. He submits that there was no proper age assessment as his observations of teeth and treatment card are mere entries not supported by documentary evidence. That the person who made the health card is unknown or their expertise, no stamp and hence its of no evidentiary value.

e. He submits that the Clinical Officer is incompetent as he is not certified, qualified or registered under provision of section 7 of the Licensing Act Cap 260 LOK. He did not produce his identification, pin or work permit number.

f. He submits that the charge against him is defective as it is not under section 8 (1) of Sexual Offences Act as put in the Charge Sheet and judgment but under section 9 (1) (2) of the Sexual Offences Act. He cites ***Sigilai v. R*** [2004] KLR APP 80 where it was held:

> "The principle governing of the law of charge is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in clear and unambiguous manner so that the accused may be able to prepare his defence." In **Suleiman Juma alias Tom v. R** [2002] App 181 it was held:
>
> "In charging a person, the Prosecution must be extremely careful. As the consequences of a conviction are serious care must be taken when dealing with draft of the charges as it is the life of an individual at stake."

g. The Court also failed to comply with Article 50 (2) (g) (h) by not informing the accused of his right to be represented by an advocate. See ***Njuguna v. R*** [2007] EA 370.

h. The Appellant submits that the trial Court was required to evaluate the case as a whole to arrive at a fair decision but it failed to consider his defence contrary to section 169 of Criminal Procedure Code see ***Stephen Charo Maroo v. R*** [2015] eKLR, ***Jane***

Nyamule v. R [1953] CR Appeal no. 121 held:

> "Court has to explain why the defence is unacceptable…."

Thus he prays that his appeal be allowed, conviction quashed, sentence set aside and set me free at my liberty.

6. The Ass. DPP for Respondent submitted orally and stated that the appeal is opposed as the age of the Respondent was ascertained by the age assessment report produced by Pw5.

They submit that the evidence of Pw2 was corroborated by that of Pw1 on the issue that Appellant had come with 2 phones and that he had sent Pw2 for sweets. Pw1 followed Pw2 back home after he had been sent to buy sweets the second time and found the Appellant with the minor on the chest. The child's pant was on the ground and the appellants' trousers were on the knee, his penis erect and the child was wet on her private parts. This evidence was corroborated by Pw2 and Pw4. There were no penetration but presence of pus cells a sign of infection confirmed to be gonorrhea. The Appellant was also found to have gonorrhea and thus even though there was no penetration there is compelling evidence he attempted to defile. The sentence of imprisonment for 10 years is the minimum under section 9 (1) of Sexual Offences Act and thus the Appeal is dismissed.

Issue for Determination

7. The issues for determination are as follows:

1. Whether the offence of attempted defilement was proved; if not

2. Whether the offence of indecent act charged in the alternative was proved; and

3. Whether appellant was proved to have been the perpetrator of any of the offences.

Determination

8. The trial Court is to be commended for the use of the evidence by an intermediary procedure of section 31 of the Sexual Offences Act, proceedings whereof are set out in full below:

> "PW1
>
> I am BJ from Napikore I operate a Kiosk. On 2/2/15 I was at home when the accused brought his 2 phones for charging, he asked me to write the name Lopoyon on the phones.
>
> The accused told me he was going to sleep in my house but I refused and directed him to where the men sleep. I quarreled him and he left, I proceeded to the kiosk and the accused and found Edwin and gave him Ksh. 100/= to buy sweets and that he had also send him to ask me to call her so that I could give him his phone. I gave him two lollipops and gave him back his change of Ksh. 90 and went home and gave the accused his phones and he left to the opposite direction. Then the accused came back to the kiosk with Ksh. 40 coin and on asking he told me the accused had given him to buy 2 sweets I gave him 2 sweets and I followed him back home. I found the accused lying under the shade with the child, CC was lying on his chest, she is about 2 years.
>
> The child's pant was on the ground and his trouser was on the knee and his penis was erect and he had already spammed on himself.
>
> His penis was in the child's vagina and the child had sperms and semen on her private parts.
>
> The accused on seeing me dropped the child on the ground and ran away and throw the child on the ground as he pulled his pants up.
>
> He was wearing a green and black short and had a term short and also had a checked sheet on top of the short.
>
> I chased the accused up to where the accused was, he was arrested by members of the public including my husband the father of the said child took her to hospital he is called D.
>
> **Prosecutor** – The child having been declared a vulnerable witness we are praying that the intermediary be allowed to state what the child had told her since the child has refused to talk in Court.
>
> **Court** – I find it prudent that in the best interest of the minor, the intermediary he allowed to inform the Court what the child had told had told her as she had now been declared a vulnerable witness.
>
> My child speaks pokot and on asking her she told me that the accused had told her to remove her pant and when she cried the accused had given her lollipop and removed her pant and inserted his penis on her vagina.
>
> The child had a crack on her vagina and a lot of blood.

That's all.

CROSS EXAMINATION BY THE ACCUSED

I didn't have your debt.

My husband was within home on the Monday.

I didn't know you prior to the incident.

I found you on top of my child.

That's all."

However, in her testimony, Pw1 mixed the testimony as to what the child told that rather than would the child sought to testify before the Court so that she became a witness rather than an intermediary through whom the vulnerable victim/witness communicates with the Court in her testimony.

9. As settled in the Criminal Procedure Bench Book, 2018, in cases of an intermediary who who is also a witness in the case, the intermediary should give her testimony first before acting as an intermediary for the vulnerable witness so that the testimony is not doctored to coincide with that of the vulnerable witness if taken earlier.

10. I would for this reason consider the evidence of Pw1 in this case to be that of the mother of the complainant rather than that of the complainant who was declared vulnerable witness. Indeed, the victim of the Sexual Offence herein did not adduced any evidence at all. Only the mother (Pw1) gave evidence as to what she had witnessed and what the minor complainant had allegedly told her.

11. However, on the consideration of the evidence of the Pw1, her son Pw2 who testified that he had been sent by the appellant to buy sweets, confirming the story of the mother Pw1 and the evidence of Pw3 that he had seen his wife chasing the accused in the market asking him why he had defiled the child and had helped in the chase and arrest of the accused confirms the sexual assault by the appellant of the minor complainant who, though presented to Court when she was declared a vulnerable witness, never testified through the appointed intermediary, Pw1, the mother.

12. The medical evidence on examination of both the complainant and the appellant corroborated the evidence of Pw1 and Pw2 on the sexual assault of the complainant but not to the extent of defilement as evidence showed *"there was no penetration,"* as follows:

"PW4

Am Maxwell Yambila a Clinical Officer for the past 3 years currently attached to Nginyang Health Centre.

I recall on 2/2/15 a patient by the name C K who was to the hospital on allegation of defilement, we took urine and blood sample to the lab.

On examination – the clothes were not torn and there was no bleeding.

Had swollen labia majora.

But there was no penetration, the urine had pus cells, sign of Bacterial infection which in this case was Gonorrhea basing on the Morphology of the cells. We treated the child with infection and antibiotics.

The following day the accused Lopoghon Payere was brought to the hospital. **We conducted a urine test but prior to that he had discharge microscopy showed presence of pus cells which had the same microscopy cells as those of the minor**.

We treated the said patient. I filled the P3 forms on 2nd and 3rd February respectively.

I also signed the P3 forms.

I also filed the age assessment report. **I observed the teeth and also used the clinic card which showed that the minor was aged 2 years old**.

P3 for the dated 2/2/15 – Exh No. 1

P3 dated 3/2/15 – Exh No. 2

Age assessment report dated 3/2/15 Exh No. 3

That is all

CROSS EXAMINATION BY THE ACCUSED

The child was brought to the hospital on 2/2/15 at night and we took the tests.

You were also examined and given medication.

Re-Examination – Nil"

The Clinical Officer also assessed the age of the child at 2 years, a fact which was already established by the observation of the Court at the presentation of the minor child at the beginning of the hearing, when she was declared a vulnerable witness, the Court finding that:

"**I find that indeed the said witness, who is the complainant is of tender age and a minor aged about <u>2 years</u> old**."

13. PW5, the Investigating Officer of Nginyang Police Station confirmed receipt of the complainant on the same night following the arrest of the appellant at 5.00 pm on 2/2/2015, saying:

"On 3/2/15 at around 1.00 am I received the complainant by the name of D, in the accompany of his wife and child who came on allegation of the minor having been defiled."

14. The appellant gave an unsworn statement alleging a grudge with the complainant's father with whom he allegedly previously worked and to whom he had loaned some money as follows:

"DW1

I am Lopoyon Payere from Sisale. I used to guard safaricom booster, I am not married.

The offence is not true.

I recall I was employed with the complainant's father to guard the booster. He was later dismissed and blamed for his dismissal that I had reported him.

I am an orphan and have 3 siblings.

I came to Nginyang to buy clothes for my siblings when I met the complainants father who borrowed me Ksh. 6000/= to take his children to hospital.

He asked me to go home so that he could pay me.

I went to his house and found his wife who asked me to come later. I came after 2 days where I met the complainants' father who invited me for a meal. He told me that he didn't have money and that we meet in Nginyang market as he would sell his cow.

I came to the market but did not find him. I decided to go to his house only I found his wife and children, who informed me that the husband had gone to Bondeni. I gave the wife my phones to charge and I sat under a tree, I later went to Bondeni where I met the said complainant's father who told me to go back and wait for him in his house. I went back and sat under a shade. The complainant's father later came with his brother and asked me what I wanted I told him that I had come for my money, he took a stick and hit me furiously and chased me. Members of the public came and on asking the complainant's father to inform members that I had raped his wife. We tried to resolve the matter at home but he refused. He took a boda boda and we came to Nginyang police station where I was arrested.

The officers took me to a hospital where I was brought back and was not informed anything.

I was brought to Court where I was informed that I had defiled a minor which offence I don't know and I didn't commit to date.

That is all."

15. As settled by case law (see May v. R (1981) KLR 129) an unsworn statement has little evidential weight even though it must be considered together with the rest of the evidence by the prosecution as a whole to determine whether there is by such statement raised a reasonable doubt. See ***Odongo v. R*** [1983] KLR 301 and see rendition of ***Amber May v. The R*** [1979] KLR 38 where it is held:

"An unsworn statement made by an accused person in a criminal case (in accordance with section 211 (1) of the Criminal Procedure Code is not evidence as the expression is generally understood and hence, **although it should be taken into consideration in relation to the whole of the evidence, it has no probative value and the rules of evidence** (e.g. as to the exclusion of hearsay) cannot strictly be applied to it."

16. I would dismiss the unsworn statement of the defence, apart from its illogical statement that the complainant's father had borrowed and sought to pay money in the same breath, for its unexplained alleged sudden attack on the appellant by complainant's father and his brother on

allegations that he had raped his wife and the alleged refusal by the complainant's father to solve the matter at home. What matter was to be resolved at home? Is it the defilement of the complainant or the rape of the complainant's father's wife? The appellant's defence is incoherent and unpalatable and raises no reasonable doubt to the appellant's guilt established by the evidence led by the Prosecution.

17. For these reasons, I would convict the appellant for the offence of attempted defilement contrary to section 9 (1) and (2) of the Sexual Offences Act. On the facts, the appellant also committed the offence of indecent act which is charged in the alternative, but shown to be brought under the wrong section of the law.

18. I have perused the judgment of the trial Court and I find that she properly considered the evidence for the Prosecution and the statement of the defence as follows:

> "I have looked at the evidence adduced by both the prosecution and defence and do find three issues pending for determination before this Court:
>
> i. Whether the offence of attempted defilement has been prove.
>
> ii. Whether there is evidence linking the accused to the committed offence.
>
> iii. The defence adduced.
>
> It was the evidence of PW4 that he had examined a patient by the name CK and examination the said patient had a swollen labia majora. Microscopy examination revealed presence of pus cells sign of a bacterial infection which in the present was Gonorrhea.
>
> PW4 had further examined the accused who had a whitish discharged on his penis and microscopic examination had revealed presence of pus cells which was a sign of a bacterial infection which was gonorrhea.
>
> PW4 had also conducted an age assessment which showed that the minor was 2 years old.
>
> The evidence of CK. through her mother was that the accused had inserted his penis into her vagina after removing her pant. The evidence was corroborated by the evidence of PW2 who had witnesses the accused picked up CK and placed him on his groin and proceeded to insert his penis on her vagina.
>
> PW1 had arrived in time of witness the accused place his penis on CK's vagina, it is upon seeing her that he dropped the child and ran away.
>
> It is the accused evidence that he had gone to the said homestead to charge his phones and also to collect his debt which was owing.
>
> The child did not express herself and all evidence was from her mother.
>
> However, I find that what is important is for the prosecution to prove the offence of attempted defilement through credible evidence beyond reasonable doubt. I am satisfied in this case the prosecution discharged its burden. In this case the accused was caught with the minor who didn't have her pants on and the accused as well had his trousers pulled below the knee.
>
> Attempted defilement may be defined to mean failed defilement. Had the mother of the minor not appeared then the accused would have made good his intention.
>
> The accused has been well placed at the scene of crime by PW1 and PW2 and this is further confirmed by the accused who admits in his defence that he had actually visited the said homestead to charge his phones and also collect his money. He admits that he did not find PW3 and he decided to wait for him under the shade within the homestead.
>
> The accused was tested and found to have contracted Gonorrhea which he transmitted to the said minor.
>
> I have looked at the evidence of the witnesses before Court and I do find that the accused has been well connected to the committal of the said offence, medical examination revealed swollen labia of the minor as well as microscopy test revealed that the minor had contracted gonorrhea from the accused.
>
> PW1 was a key witness who found the accused in the act.
>
> All the above stated, I find that indeed the prosecution has proved its case beyond reasonable doubt and I do hereby proceed to find the accused guilty of the offence of attempted defilement contrary to section 9 (1) (2) of the Sexual Offences Act No. 3 of 2006."

19. The appellant's objection that he did not understand the language used by the Court and testimony of witnesses in Kiswahili is without merit because although the trial Court does not indicate on record that the accused understood Kiswahili language or that the proceedings of the Court in English/Kiswahili were interpreted in the language of the accused, the record clearly shows that the appellant did cross-examine the witnesses at length on the evidence adduced before the Court. How could this be possible if he did not understand the language used. Indeed, the appellant as shown as giving his lengthy unsworn statement but the language used is not disclosed. No prejudice is shown to have been suffered by the accused for the failure by the trial Court to indicate the language of interpretation or whether the accused understood the

Kiswahili language used by the Prosecution witnesses. It is a defeat curable under section 382 of the Criminal Procedure Code in the circumstances of this case.

Orders

20. Accordingly, for the reasons set out above, the Court makes the following orders:

1. The appellant's appeal herein is dismissed.

2. The sentence of 10 years imprisonment shall, however, commence on **4/2/2015** when the appellant was remanded awaiting trial, in terms of the Proviso to section 333 (2) of the Criminal Procedure Code.

Order accordingly.

DATED AND DELIVERED THIS 24TH DAY OF APRIL 2019

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent