**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KIAMBU**

**CRIMINAL APPEAL NO. 18 OF 2018**

**ISAAK KONGO GIKONDU**.............................. **APPELLANT**

**VERSUS**

**REPUBLIC** .....................................................**RESPONDENT**

*(Being an appeal arising from Limuru criminal case No.991/14 delivered on 22nd December 2016 by Hon. K.M. Nyalale, SPM)*

**JUDGMENT**

1. The Appellant Isaac Kongo Gikondu was on the 8th December 2014 charged with the offence of attempted defilement **Contrary to Section 9(1) (2) of the Sexual Offence Act No.3 of 2006**, particulars being that on the 23rd November 2014 at [particulars withheld] Lari District within Kiambu County attempted to defile one PNM a child aged 12 years (hereinafter referred to as the "victim") with alternative charge of Indecent Act with a child contrary to **Section 11 (1) of the Act.**

He was convicted and sentenced for the main charge of attempted rape to serve ten years imprisonment.

This appeal is against both the conviction and sentence.

2. The appellant has challenged the totality of the prosecution's evidence as being contradictory inconsistent and not sufficient to sustain a conviction and the sequential sentence.

3. The offence of attempted defilement is defined under **Section 9(1)** as read with **Section 9(2) of the Sexual offences Act No. 3 of 2006** as

> *9(1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed as attempted defilement.*
>
> *9(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*.

4. I have considered the victims and other prosecution witnesses evidence. The victim stated her age as 12 years. No proof of age was adduced. It was her evidence that on the 23rd November 2014 together with other two girls were requested by the appellant, while at a church function to follow him under threat of a gun which he did not show them to his one roomed house.

The victim testified that at the appellant's compound, there were ten rooms and one was open with two people inside.

5. It was her further evidence that while inside his house she was placed on his bed while the other two girls sat on a chair that he tried to defile her but when he inserted his penis in her vagina she felt pain told him to let her go. She testified that she left the house and found her brother outside waiting for her.

6. She did not report the incident and was surprised that after six days, her father asked her what she was doing in the appellant's house and therefore took her to the hospital and got the appellant arrested upon identification by the victim.

7. I have also considered the Doctor's medical evidence. The victim was examined on the 29th November 2014 six days after the alleged attempted defilement.

The doctor noted bruises on her external genitalia but no discharge upon a high vaginal swab. Pus and bacteria were also noted and no spermatozoa, concluding that there was no actual penetration. The report is dated 2nd December 2014.

8. **PW2** father of the victim took the victim to a doctor for examination upon hearing from a woman neighbour that his daughter had pain while walking and that she had gone to the appellant's house.

9. In his unsworn defence the appellant denied having known the victim nor attempting to defile her but placed blame on one G who had borrowed money from him and who with (PW2) caused his arrest due to his insistence requests for payment of his money.

10. It was upon the above evidence that the trial magistrate convicted the appellant for the offence of attempted defilement and sentenced him to suffer 10 years imprisonment.

11. As the first appellate court my duty is to re-consider and re-evaluate the evidence afresh and come up with an independent finding – **Okeno -vs- Republic (1972) EA 32.** The victim stated to have been 12 years old and in class seven. She no doubt understood what she was testifying in court as she stated that she learnt reproductive health in school. I am minded that no document was produced in proof of age which is a very critical aspect when an offence under the Sexual Offences Act is concerned as stated in **Hilary Nyongesa –vs- Republic (2010) e KLR –** (Mwilu J as she then was).

12. The events of the material day in my opinion raised serious doubts in my mind as to whether the alleged offence was actually committed upon the victim by the appellant. The victim testified that there was a celebration function at the church where the victim and the other two girls were called out by the appellant under threat of a gun that was not shown to the girls. Without a doubt there must have been many people in that church function. The girls did not scream or raise any alarm. They simply followed him, to his one roomed house within a compound of ten houses and as alleged by the victim one roomed house with two people was open. Why then would the three girls not have shouted for help? In the house while the appellant attempted to defile her the other two girls sat there watching and waiting for their turn but and did not raise an alarm.

13. The victim testified that when she told the appellant that she was feeling pain, the appellant let her go out of the room, and found her brother waiting for her. Why would she not have told the brother of the attempted defilement then and presence of the other two girls in the appellant's room?

Her evidence is that she informed nobody. There were two people in another house in the same compound as stated in her testimony.

She did not tell them. This in my opinion is not consistent with the conduct and behaviour of a 12 year old young girl who has undergone the traumatizing experiences of attempted defilement.

14. I have considered the doctor's conclusion upon clinical examination that there was no sign of penetration to the victim's vagina save for some bruises on the external genitalia and discharge, being pus and bacteria, and no spermatozoa noted.

The doctor's conclusion was that there could have been attempted defilement as no penetration occurred.

15. The two other girls who allegedly underwent the alleged ordeal under the appellant were not called to testify to collaborate the victim's evidence and no reason was advanced for their failure. Although **Section 124 of the Evidence Act** empowers the court to convict on the basis of evidence by a complainant if satisfied she is telling the truth, that truth is miserably lacking in this case. I do not believe the victims testimony. It raises serious doubts as to whether there was an attempted defilement by the Appellant.

16. Nobody testified to having seen the victim and the other two girls following the appellant into his house despite the fact that as alleged, there was a church function where the girls were found and commandeered into the appellant's house, nor other people in the appellant's compound despite evidence that there were people in open houses (rooms). There is no explanation why the woman neighbour who is alleged have told the father of the victim (PW2) that she saw the victim coming from the Appellant's house testified.

17. It is trite that the burden of proof in a criminal case rests with the prosecution to establish the guilt of an accused person beyond any reasonable doubt. Generally, the accused assumes no legal burden of establishing his innocence – **Mkendeshwo –vs- Republic (2002) 1 KR 46.**

18. For the court to justify circumstantial evidence as is the case in this appeal and the inference of guilt the facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.

This was the holding in **R -vs- Kipkering Arap Koskei & Another (1949) 16 EACA 135**, and cited in **Patrick Barasa Wawire -vs- Republic (2016) e KLR** as well as in **Joseph Amunga Ochieng -vs- Republic (2015) e KLR** where the court held that an accused person has no obligation to prove his innocence or the truth in his defence – **See Section III (1) of 119 of the Evidence Act**.

19. The accused person is entitled to an acquittal of the offence with which he is charged with if the court is satisfied that the prosecution's evidence or the defence creates a reasonable doubt as to the guilt of the accused person – **Republic -vs- Michael Muriuki Munyuri (2014) e KLR.**

20. The circumstantial evidence adduced by the prosecution in my opinion does not satisfy the tests that from such circumstances there is a definite tendency unerringly pointing towards the guilt of the accused, that taken cumulatively, it does not form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else – **Court of Appeal in Abanga** *alias* **Onyango -V- R CR. A No. 32 of 1990 (UR).**

21. For the foregoing, and having serious doubts on the credibility of the prosecution's evidence, I find that the prosecution failed to prove the charge against the appellant to the required standard, beyond reasonable doubt.

Consequently I find the appeal meritorious. I set aside the appellant's conviction and sentence and set him at liberty unless otherwise lawfully held.

**Dated and signed at Nakuru this 27th Day of March 2019.**

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**J.N. MULWA**

**JUDGE**

**Dated, signed and delivered at Kiambu this 10th Day of April 2019.**

**……………………………………**

**C. MEOLI**

**JUDGE**