REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D. S. MAJANJA J.

CRIMINAL APPEAL NO. 130 OF 2018

BETWEEN

BISMARK KIRUI ....1ST APPELLANT

CHRISTOPHER KIPCHIRCHIR ....2ND APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the original conviction and sentence of Hon.R. Oanda, PM dated 14th July 2017 at the Magistrates Court at Kilgoris in Criminal Case No. 1780 of 2014)

JUDGMENT

1. The appellants, **BISMARK KIRUI** and **CHRISTOPHER KIPCHIRCHIR**, were charged, convicted and sentenced to 10 years' imprisonment for the offence of attempted defilement contrary to **section 9(1)** of the ***Sexual Offences Act*** ("the ***Act***"). The particulars were that 18th December 2014 at Oldonyorok Location in Transmara West of Narok County, they jointly, intentionally and unlawfully attempted to cause their penis to penetrate the vagina of SCR, a child aged 13 years.

2. The appellants appeal against the conviction and sentence on the grounds set out in their petition of appeal and written submissions filed on their behalf by their advocate. The thrust of their case is that the prosecution failed to prove the offence beyond reasonable doubt. Counsel for the respondent submitted that the prosecution proved all the ingredients of the offence of attempted defilement.

3. A determination of this appeal calls for an appreciation of the facts and as this is a first appeal, I am required to evaluate the evidence before the trial court and reach an independent decision as to whether or not I should uphold the decision of the trial court. In so doing allowance must be made for the fact that I neither heard or saw the witnesses testify.

4. The testimony of PW 1 was that on 18th December 2014 at about 9.00am, she had been sent to get her sister. Because she was not conversant with the area she passed by some hotel where she started seeking direction. The 2nd appellant agreed to escort her but instead took her to his home saying that he wanted to change his clothes. They found the 1st appellant who grabbed her and pulled her into the house where the 2nd appellant undressed and also undressed her. The 2nd appellant shut the door as she began screaming but the 1st appellant choked her so that she could remain quiet. Fortunately, people who heard the screams came and found them in the house and rescued her.

5. PW 2 was declared a hostile witness but in cross-examination, he stated that on the material day, he heard a child screaming and when he went to the scene, he saw the 1st appellant, whom he knew, running away from the scene. PW 3, a police officer, told the court that he arrested the appellants on the next day after being informed by members of the public that they were wanted for attempting to defile a child. The clinical officer, PW 4, examined PW 1 on 20th December 2014 and did not find anything remarkable. The investigating officer, PW 4 recorded the witness statement and caused the appellant to be charged.

6. Both appellants denied the offence in the unsworn statements. They stated that they were arrested for an offence that did not know about.

7. The crux of this appeal is whether the prosecution proved that the appellants had committed the offence of attempted defilement. **Section 9(1)** of the ***Act*** refers to an attempted defilement as follows;

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.

8. The Court of Appeal in ***Francis Mutuku Nzangi v Republic*** **NRB CA Crim. Appeal No. 358 of 2010 [2013] eKLR** elucidated the meaning of an attempt, as defined by **section 388** of the ***Penal Code (Chapter 63 of the Laws of Kenya)***. It stated as follows;

> *Our understanding of this provisions is that if a person conceives an idea or plan to commit an offence and sets out to effectuate the intention by taking definite steps or puts in motion a chain of events or state of things calculated to attain that objective as manifested by some open and discernible act or acts but fails to achieve his objective, he will be guilty only of an attempt to commit the offence. The attempt is proved whether or not that person did all the acts necessary to perfect the offence and quite irrespective of what intervening act or change of heart may have aborted the fulfillment. It also matters not that circumstances did in fact exist, unbeknown to the person, that would have rendered his success impossible.*

9. In other words, an attempted defilement is a failed defilement and that is why the intention to penetrate is a key ingredient of the offence (see ***Pius arap Maina v Republic*** **ELD HCCRA No. 247 of 2011 [2013] eKLR**). Under **section 2** of the ***Act***, *""penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person."* In ***David Aketch Ochieng v Republic*** **[2015] eKLR** Makau J., observed that:

> ***The appellant was charged and convicted with an attempted defilement contrary to Section 9 (1) of Sexual Offences Act No. 3 of 2006. What is attempted defilement? It can safely be stated to be the unsuccessful defilement. For a successful prosecution of an offence of attempted defilement, the prosecution must adduce sufficient evidence to the required standard to prove an attempted penetration....***

10. I am satisfied that the testimony of PW 1 was clear as to what took place. Her evidence was descriptive of what took place and was not shaken on cross-examination. There was no doubt that the assailants intended to commit acts of penetration. They had misled PW 1, locked her in the house, one the assailants had undressed and also undressed PW 1 and the other one held her to prevent her from screaming and escaping. All this evidence points to the fact that had the members of the public not intervened the act of penetration would have been complete.

11. The issue that has caused me considerable anxiety is the issue of the identity of the assailants. After she had been cross-examined by the appellant, PW 1 stated as follows in re-examination:

> *I just saw the accused on that day. It was around 11.00am. I did not know either of the accused before that day. Christina is the one who opened the door. She found me and the 2nd accused (the first appellant). When Christina opened the door the 2nd accused stood up and dressed and ran. Christina found me placed at the corner of the bed by the 2nd accused.*

12. I have read the judgment of the trial magistrate and he did not deal with the issue of identity of the appellant which was a live and fundamental issue. While I accept that the incident took place during the day and in conditions that were favourable for positive identification, the fact that PW 1 did not know the assailants prior to the incident called for caution in assessing the evidence. For all intents and purposes, the identification of the appellants at the trial was dock identification.

13. This case was probably a proper case for an identification parade. However, as I understand the law, they are not always mandatory and the trial court may rely on dock identification if there is sufficient evidence to assure itself that such identification is safe and free from error. In ***Muiruri & Others v Republic*** **[2002] 1 KLR 274** it was stated:

> *It is believed because an accused sits in the dock while witnesses give evidence in a criminal case against him, undue attention is drawn towards him. His presence there may in certain cases prompt a witness to point him out as the person he identified at the scene of a crime even though he might not be sure of that fact. It is also believed that the accused's presence in the dock might suggest to a witness that he is expected to identify him as the person who committed the act complained of...we do not think it can be said that all dock identification is worthless. If that were to be the case then decisions like* ***Abdulla bin Wendo versus Republic [1953] 20 EACA 166****,* ***Roria versus Republic [1967] EA 583*** *and* ***Charles Maitanyi versus Republic [1986] 2KLR 76*** *among others, which over the years have been accepted as correctly stating the law concerning the testimony of a single witness on identification will have no place in our jurisprudence. In those cases the courts have emphasized the need to test with greatest care such evidence to exclude the possibility of mistaken identification before such evidence is accepted and acted upon to found a conviction. We do not think that the evidence will be rejected merely because it is dock identification evidence. The court might base a conviction on such evidence if it is satisfied on facts and circumstances of the case the evidence must be true and is prior thereto the court warns itself of the possible danger of mistaken identification*. [Emphasis mine]

14. PW 1 mentioned that one of the people who came to rescue her was *Christina*. She was not called as she would have identified the assailants. The trial magistrate found the testimony of PW 2 corroborative as he testified that he saw the 1st appellant run from the house where PW 1 was screaming. The trial magistrate did not address himself to the fact that PW 2 had been declared a hostile witness hence his testimony was unreliable and could not be relied to corroborate PW 1's testimony. The law on hostile witnesses is now clear that the probative value of such evidence is negligible. The court in ***Abel Monari Nyanamba & 4 Others v Republic*** **NRB CA Criminal Appeal No. 86 of 1994 [1996]eKLR** noted that;

> *[T]he evidence of a hostile witness is indeed evidence though generally of little value obviously, no court found a conviction solely on the evidence of a hostile witness because his unreliability must itself introduce an element of reasonable doubt.*

15. Lastly, the evidence of the arresting officer, PW 3, and the investigating officer, PW 4 confirmed that the appellants were arrested on the day after the incident and not at the scene. There is no evidence to show how they were identified as the people who attempted to defile PW 1.

16. The trial magistrate failed to take into account the deficiencies in the evidence I have set before satisfying himself the identification of the

appellants was positive and free from error. Having reconsidered the entire evidence, I have come to the conclusion that the conviction is unsafe.

17. The appeal is allowed. Their conviction and respective sentences are set aside. The appellants are set free unless otherwise lawfully held.

DATED and DELIVERED at KISII on this 30th day of MAY 2019.

D.S. MAJANJA

JUDGE

Mr Kimaiyo, Advocate for the appellants.

Mr Otieno, Senior Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.