REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 274 OF 2017

BONIFACE MUTISYA KILONZO..... APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the Senior Resident Magistrate Hon. P. Wambugu dated 07/07/2016 in Kilungu SRMCR No. 571 of 2016.)

JUDGMENT

1. **Boniface Mutisya Kilonzo** the Appellant herein was charged with the offence of "Attempted defilement" contrary to section 9 (1)(2) of the Sexual Offences Act No. 3 of 2006.

The particulars were that the Appellant on the 12th day of October 2015, in Mukaa district within Makueni county willfully and intentionally attempted to cause his male organ namely penis to penetrate the female organ namely vagina of **RK** a child aged 12 years.

2. He faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006.

The particulars being that he Appellant on the 12th day of October, 2015 in Mukaa district within Makueni county intentionally touched the vagina of **RK** with his penis.

3. After a full hearing the Appellant was found guilty, convicted on the main count and sentenced to (15) years imprisonment. He was dissatisfied and filed this appeal raising the following grounds:

a) **That,** the learned trial Magistrate erred in both points of law and fact when he convicted him for an allegation of an attempted offence where the prosecution failed to prove any specific intent.

b) **That,** the learned trial Magistrate erred in both points of law and fact by convicting him without considering that there was no evidence to prove the allegations of the attempted offence of defilement to the required standard in law of beyond reasonable doubt.

c) **That,** the learned trial Magistrate erred in both points of law and fact failing to observe that the prosecution case was full of contradictions and inconsistencies which rendered their case unbelievable.

d) **That,** the learned trial Magistrate erred in law and fact when he convicted and sentenced him without regard to his basic right for disclosure of the prosecution evidence which was intended to be brought against him as laid down in Article 50(2)(j) of the Constitution.

e) **That,** the trial Magistrate erred in both points of law and fact by convicting him without observing that he was prejudiced when substantial injustice occurred in his case as he was not represented by a lawyer as stipulated in the Constitution under Article 50(2)(h).

4. The evidence that was presented to the trial court was that the complainant who testified through an intermediary was born on 21st May, 2013. She lived with her grandmother Pw1 and was under the care of her house help (Pw2). It was Pw1's evidence that on 12th October, 2015 she came home after work and had supper. As she prepared the complainant to go to sleep, the child told her that the Appellant had taken her away as she played. He took her to the house where he undressed her and tried to insert his penis into her vagina. She confirmed this from Pw2.

5. She called the Appellant in the presence of Pw2 and her husband PN. Upon interrogating him, he admitted to have done what he was accused of and asked for forgiveness. He and the child were then taken to Sultan Hamud police station and then to hospital. She explained that the Appellant had worked for her for eight (8) months.

6. **Pw2 SNM** testified that on 15th October, 2015 the Appellant took away the complainant to his house. She was by then washing her son B. Later the child commented that B had a penis like the Appellant's. In the evening the child reported to Pw1 who asked the Appellant about it and he admitted to having done it.

7. **Pw3 Charles Mwendwa Mutiso** examined the child and found no injury on the body. The labia and hymen were intact. All other tests done were negative. His finding was that there had been no penetrative sexual act. He produced the filled P3 form as EXB1.

8. **Pw4 No.57137 Washington Okaka Corporal** the investigating officer produced the child's:

- Birth certificate EXB2

- Baptismal Card EXB 1

- Occurrence Book No. 3/14/10/15 – EXB 4

9. In his unsworn defence he said he used to work, as a herdsboy for Pw1. He stated that on the material day he was called at 5:00 pm and 9:00 pm and asked about this issue and he denied it. He was then taken to the police station and to the hospital. He denied committing the offence.

10. When the appeal came for hearing the Appellant relied on his written submissions. He argued grounds 1-3 together. He submitted that the complainant was 2 years and so could hardly speak. He wonders how she was elaborate in explaining what had happened to her.

11. He contends that there was no evidence that the child ever cried. He points out that the child, the complainant was playing with should have been called as a witness. He questions the court's decision to have the child testify through an intermediary.

12. On ground 4, he submits how Article 50(2)(j) of the constitution was violated by the prosecution's failure to supply him with witness statements. He cited the case of **Thomas Patrick Gilbert Cholmondley –vs- R (2008) eKLR** as his backup. He says he requested for witness statements but the same were never supplied. He also cites the cases of **Natasha Singh –vs- CB (2013) 5 SCC 741 & R –VS- Ward (1993)**

2ALL E.R 557 to support his argument on witness statements.

13. He has submitted that he was entitled to legal representation due to the seriousness of the offence. He referred to the cases of **Macharia – vs- R Hccr Appeal No. 12 of 2012; Dominic Kimaru Tanui –vs- R Hccr Appeal No. 12 of 2012 (2014) eKLR** and **W.M.M –vs- R Criminal Appeal No. 72 of 2012(2014) eKLR** all being High court decisions. Based on all this, he asked the court to find that he was highly prejudiced by the conduct of the trial and allow the appeal.

14. Mrs. Owenga counsel for the Respondent opposed the appeal submitting that the evidence was overwhelming and the Appellant was properly convicted and sentenced.

Analysis and determination

15. This is a first appeal, and it is this court's duty to re-evaluate and reconsider the evidence on record and arrive at its own conclusion. It should bear in mind that it did not see or hear the witnesses and give an allowance for that. In the case of **Kiilu & Anor. –vs- R (2005) 1 KLR 174** the Court of Appeal stated thus:

> ***(1) subject to certain well known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the probability of error.***
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> ***(2) 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 evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.***

16. This was reiterated in the case of **David Njuguna Wairimu –vs- R (2010) eKLR** where the Court of Appeal stated:

> ***"The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear***

that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision.

17. Having considered the evidence on record, the grounds of appeal both submissions and cited authorities, I find the issues falling for determination to be;

i. Whether the Appellant's rights under Article 50(2)(j) of the constitution were violated.

ii. Whether the case against the Appellant was proved beyond reasonable doubt – In other words whether the ingredients of the offence of attempted defilement were proved.

Issue no. (i) *Whether the Appellant's rights under Article 50 of the constitution were violated.*

18. Article 50(2)(h) and (j) provides:

Every accused person has the right to a fair trial, which includes the right –

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.

19. The Appellant reckons that he was entitled to a State advocate due to the seriousness of the charge he faced. It's not just about the seriousness of the charge alone. It must be shown that an injustice would occur if that service is not offered. That fact was never presented to the trial court. Secondly, before such an order is given there ought to be regulations in place plus funds for payment of such services. I am not aware of any such available regulations and funds.

20. On witness statements the Appellant made an application for witness statements on 30th November, 2015 saying:

"*I apply for adjournment as I have no statements. I have **3** statements*"

The court then made an order for him to be supplied with all other documentary evidence at his own cost. On 21st January, 2016 a similar order was made. When the matter came for hearing on 15th February, 2016 the prosecution indicated it had one witness in court. The Appellant told the court he was ready.

21. The matter proceeded and it was adjourned. The Appellant never raised any issue about statements. He cannot now turn around and say he was denied witness statements. The prosecution presented four (4) witnesses in court. The Appellant had initially said he had 3 statements. His silence as the matter proceeded meant he had been supplied with the 4th witness statement or he did not find it necessary. I find no merit in this submission.

Issue no. (ii) Whether the case against the Appellant was proved beyond reasonable doubt – In other words whether the ingredients of the offence of attempted defilement were proved.

22. The Appellant was charged with attempted defilement contrary to section 9(1) (2) of the Sexual Offences Act No. 3 of 2006 which is none existent. He ought to have been charged with attempted defilement contrary to section 9(1) as read with section 9(2). The Appellant was not prejudiced at all by the failure by the prosecution to separate the provision creating the offence and that for the penalty. He well understood what offence he faced.

23. I find this to be a defect which could have been dealt with under section 382 Criminal Procedure Code which provides:

"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any injury or other proceedings under this code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

This is buttressed by the Court of Appeal decision in **Fappyton Mutuku Ngui –vs- R (2014) eKLR.**

24. From the evidence tendered in court, Pw2 was employed by Pw1 as her house girl. Obviously, she was to take care of the complainant who is Pw1's granddaughter. She apparently came to Pw1's home with her own son. The evidence is that the complainant was aged about 2 years 5 months old when this incident is said to have occurred since she was born on 21st May, 2013.

25. Pw2 as the house girl did not explain to the court how the complainant left with the Appellant. Is she the one who allowed the child to stop playing with other children and go with the Appellant to his house? No evidence was given to show the place where the child was playing and with whom she was playing. How she was returned and by whom is not in the evidence.

26. When Pw1 returned they had supper together as a family. Pw2 sat pretty well and said nothing to Pw1 even after the complainant told her how her son B's penis is like Mutisya's. Pw1 and Pw2 never bothered to examine the child to confirm her story. The P3 form shows that the incident occurred on 12th October 2015 at 11:00 am. It was not until 14th October 2015 that a report was made at the police station and the child eventually taken to hospital on 14/10/2015 at 2:45 pm. Infact, the report made to the police was that the child had been defiled.

27. What evidence was presented to the court to confirm that the Appellant attempted to defile the child? Both Pw1 and Pw2 told the court that the complainant was too young to lie and so they believed what she said. The learned trial Magistrate agreed with them. Further that the Appellant admitted having committed the offence in the presence of Pw1, Pw2 and Pw1's husband.

28. The investigating officer (Pw4) a police officer who should know better how to handle confessions also said the Appellant admitted having committed the offence. Why did he not present him to an appropriate officer to take the confession? The court could not rely on such utterances as it did to convict the Appellant.

29. Attempted defilement is a failed defilement. The court must be shown that there was not only preparation but an attempt to execute the act of penetration. Preparation would be the commission of an indecent act by touching etc.

30. Section 388 of the Penal Code defines "attempt" as:

> ***(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.*
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> ***(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 fulfillment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.*
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> **(3)** *It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence*.

31. There are several decisions on this and I will mention just a few. See

> i. Benson Musumbi –vs- R (2019) eKLR.
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> ii. John Gatheru Wanyoike –vs- R (2019) eKLR.
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> iii. Geoffrey Shivonji –vs- R (2018) eKLR.

32. In the case of Daniel **Simiyu Wanyonyi –vs- R 2019 eKLR Justice Riech** stated this:

> "***This court when dealing with an appeal from a conviction of attempted defilement in Bungoma High court Criminal Appeal No. 176 of 2016 stated: when a court of law is faced with any charge on an attempted offence, case has to be taken to ensure that the attempt as opposed to mere acts of preparation, is proved since however strong the evidence may be if it only relates to actions in preparation to commit a certain crime, that cannot justify a conviction on an attempted charge. In the circumstances or clarity purposes, the evidence must be led which goes beyond the preparatory stages and right to the doorstep of possible commission of the offence. It ought to be demonstrated that the accused had committed the last act to the actual commission of the specific offence attempted. Likewise, the intention to commit the crime must also be proved."***

33. In the instant case the complainant is said to have reported that the Appellant used his penis and tried to penetrate her vagina. The doctor (Pw3) who examined the child found nothing to suggest any sexual activity on the child's body or genitalia (EXB1). There were no tears or any evidence of sexual penetration. In other words, the child was normal.

34. Justice Makau in the case of **David Aketch Ochieng –vs- R (2015) eKLR** observed the following on attempted defilement

> ***"The Appellant was charged and convicted with an attempted defilement contrary to section 9(1) of the 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 an attempted defilement, the prosecution must adduce sufficient evidence to the required standard to prove an attempted penetration. This may in my view include bruises, or lacerations from complainant's vagina, and/or bruises or lacerations of culprit's genital organ and finding made discharge such as semen or spermatozoa outside the complainant's vagina or innerwear without there being penetration. There was absence of penetration or evidence linking the culprit with the offence of attempted defilement."***

I agree with this observation.

35. In the instant case the trial court believed Pw1 and Pw2 without going beyond what they said. The medical evidence disapproved what

the child allegedly told Pw1. What the Appellant allegedly told Pw1 her husband, Pw2 and Pw4 cannot under the law amount to a confession. Pw2's evidence should not have been relied on without an explanation on how the child left her custody and how she returned. The child was the sole reason for her employment.

36. My evaluation leads me to the conclusion that the offence of attempted defilement was not proved to the required standard. I find the appeal to have merit and I allow it. The conviction is quashed and sentence set aside.

37. **The Appellant shall be released forthwith unless otherwise lawfully held under a separate warrant.**

Orders accordingly.

Delivered, signed & dated this 17th day of December 2019, in open court at Makueni.

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H. I. Ong'udi

Judge