REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 99 OF 2014

JOSEPH MUASYA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

[An appeal from original conviction and sentence in the Chief Magistrate's Court at Machakos in criminal case no. 684 of 2013 delivered on 6th June 2014 by Hon L. Simiyu, Ag. SRM]

JUDGMENT

The appellant was charged with the offence of attempted defilement contrary to section 9(2) of the Sexual Offences Act the particulars of which were that he on 30th June, 2013 in Mwala District within Machakos County unlawfully attempted to cause his penis to penetrate into the vagina of MM, a girl aged 14 years. The appellant also faced a charge of indecent act contrary to section 11(1) of the Sexual Offences Act, in the alternative. Upon full trial where the prosecution called five witnesses and the accused testifying in his defence, the learned trial magistrate convicted and sentenced the accused/appellant to 12 years imprisonment.

The appellant lodged an appeal on the following amended supplementary grounds of appeal:

> ***1. The learned trial magistrate erred in both law and fact by holding that the prosecution had proved its case to required standards needed in an offense of attempted defilement.***
>
> ***2. The learned trial magistrate erred in both law and fact by holding that the appellant's defense was insufficient to shake the prosecution's evidence.***
>
> ***3. That the learned trial magistrate erred in both law and fact by overlooking the grudge that led to the appellant being implicated in the case.***
>
> ***4. That the learned trial magistrate erred in both law and fact without considering that the investigations done were shoddy and all witnesses were trained, coached and tailored to defeat justice.***
>
> ***5. That the learned trial magistrate erred in both law and fact by convicting the appellant on a case full of contradictions and inconsistencies contrary to provisions of section 163 (1) (c) cap 80 Laws of Kenya.***
>
> ***6. That the learned trial magistrate erred in both law and in facts by failing to observe that the medical exam was unsatisfactory as it was gathered after the lapse of time as required by the law to support an attempted defilement.***

As a first appellate court, this court is required to reconsider and re-evaluate the evidence on record, bearing in mind that it did not see or hear the witnesses, before making a determination of its own (***Okeno v R*** *[1972] EA. 320 and* ***Mohamed Rama Alfani & 2 Others Vs Republic****, Criminal Appeal No. 223 of 2002.)*

The Prosecution witnesses gave evidence as follows:

> **(PW1) MM1** who is the complainant's mother stated that on the material date, her daughter **MM2** told her that the appellant had gone into their house, grabbed her, threw her on the bed and tried to defile her. She stated that her other child **M M3**, knocked on the door and this is when the appellant threw the complainant through the window. PW1 stated that **MM3**confirmed to her that he had seen his sister out through the window after which she went to report the incident to the police. PW1 was asked to take the complainant to the police station which she did. PW1 testified that the accused was his father's employee. She said that she took her daughter to Mwala district hospital where she was examined and returned to the police station. She stated that her daughter was born in the year 2000 and was 14 years at the time of the offence. She was taken to Machakos Level 5 Hospital for age assessment. She

said that the doctor did not tell her what had happened but the complainant (**PW2**) stated that there was attempted penetration. She stated that the appellant removed her under-pant and attempted to push his penis into her vagina when he was interrupted by a knock on the door by **MM3**. PW1 stated that **MM3**told her that the appellant threw out the complainant's underwear which was a short like under-wear. She testified that before the incident, the appellant had lived with them peacefully for 2 years.

On cross-examination, PW1 stated that she did not have anything against the appellant before the incident, that she did not know if the accused/appellant asked for pay from her father. She stated that the doctor confirmed that there was no penetration and noted that there were no other people around the house but the complainant had been grabbed about 5 meters away from the house.

(PW2) MM2 aged 13 years at the time. She told the court that she was a class 7 student and on the material date she was at home alone with her brother. She stated that the accused gained access to their house by knocking the door but as soon as he entered he grabbed the complainant and covered her mouth so she could not scream. She stated that he is a man known to her as an employee of her grandfather. She told the court that the accused took her to his room about 3 meters from the main house. She stated that the place was deserted and it was in this house that he undressed her by removing her skirt and underwear. She said that she suddenly heard a knock on the door by her brother **MM3**and this is when the appellant threw the complainant out through the window. PW2 told the court that the accused had initially sent her brother **MM3**to buy airtime. She stated that she dressed up before she was thrown out of the window. She further testified that **MM3**had saved her when he called out her name. When the accused/appellant threw her out of the window, **MM3** asked what accused was doing to her and she responded that the accused wanted to defile her. She told the court that both her parents were not home at the time of the incident but when her father got home at 2.00 pm she reported to him, he took her to Mwala hospital.

On cross-examination, PW2 stated that she screamed when the appellant grabbed her arm but no sound came out as he had covered her mouth.

(PW3) MM3who confirmed that the accused/appellant lived within their compound and had been employed by their grandfather. PW3 told the court that on the material date at about 2 00 p.m. the appellant sent him to buy airtime. He stated that when he returned from the shop he did not find his sister at the table where he left her. He stated that this caused him to look for her and as he called out her name, he saw the accused/ appellant throw her through the window. He stated that he asked him what he was doing to which he was silent. He testified that **MM2** told him that the appellant had tried to defile her and added that he saw the appellant throwing **MM2**'s underwear to her. He stated that **MM2** was taken to the hospital when she told her father of the incident when he returned home.

On cross- examination he stated that he only used approximately 3 minutes to go to the shop and when he called out her name, the appellant immediately threw **M M2** out the window. He told the court that no other person was at the scene of this timed incident.

(PW4) Damaris Nyabuto, a clinical officer with 4 years experience who examined the complainant stated that the P3 form was filled on 1/7/2013 of a girl named **MM2** aged 12 years. She stated that the complainant had reported attempted defilement by a person known to her. From the medical examination, there were no injuries suffered by the complainant who reported the matter after 1 day. She confirmed that she filled the P3 form on 01/07/13 and further tests at Mwala District hospital showed no blood, no trauma or sperm. PW4 stated that upon examining her she found no evidence of penetration and this was confirmed by the complainant's father who accompanied her to the hospital that the defilement did not take place.

(PW5) P.C No. 90871 Thomas Kinyua told the court that he is attached to Masii Police Station and had been involved in the investigations of the case. PW5 stated that on the material date, the OCS informed him that there was a man who had been detained at Mwala AP camp. He told the court that he went there accompanied by corporal woman Kamata and found out that the accused had attempted to defile a minor. He stated that he saw the minor at the station accompanied by her father. He stated that he got feedback that the complainant had already been medically examined. He rearrested the accused and bonded the witnesses to give statements which he recorded on 1st July 2013.

PW5 had the minor's age assessment done which found her to be about 14 years of age.

When put to his defence, the accused **(DW1)** testified that he lived in Kitie in Mwala and worked as a casual laborer and that on the material day, he had asked for his pay and was to leave Mwala but at 2.00 p.m. complainant's father accused him that he had tried to defile her daughter. He stated that the incident was reported and he was held at Masii Police station and later charged. He stated that he had worked for the family for 3 years and had been charged following a family dispute. On cross-examination by the prosecution, the appellant maintained that the charges were as a result of a family dispute. He states that he has a home and family in Mwingi and that on the material date, he was not present between 8 am and 4 pm. He states that he ordinarily did not speak to his employer's children.

In arguing his appeal, the appellant stated that the evidence adduced had been fabricated, contradictory and that the complainant had been trained and coached. In the same breath, the appellant claims that his defense evidence was not regarded or else it would have shaken the prosecution case and hence the case was not proven beyond reasonable doubt.

The issue for determination in is appeal is whether the main charge of attempted defilement, or the alternative charge of indecent act, was proved against appellant beyond a reasonable doubt, the required standard of criminal trial.

Proof beyond reasonable doubt was defined in the case of ***Miller -v- Minister of Pensions*** *[1947]* **2 ALL ER 372** *where* ***Denning J****. (as he then was)* stated:

"It need not reach certainty, but it must carry a high degree of probability, proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the

course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favor which can be dismissed with the sentence "of course it is possible, but not in the lease probable." the case is proved beyond reasonable doubt, but nothing short of that will suffice."

It is trite law that the burden of proof beyond reasonable doubt must be discharged by the prosecution.

The respondent stated in their submissions that unlike in mere identification of the accused person/appellant in the instant case is one of recognition as the appellant is a person well known to PW1, PW2 and PW3. They add that the incident took place in the day time and therefore, there was sufficient light to recognize the accused. Respondent cited the case of ***Anjononi & others v. R*** (1981) eKLR [1980] KLR 59, where the Court stated;

"…recognition of assailants is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailants in some form or other."

With respect, there was no question of identification of the appellant who was known to the witnesses as an employee of the complainant's grandfather in the same home and the incident having occurred during the day with no issue arising as to unfavorable conditions of identification. In any event, the identification evidence of PW2 was corroborated by the evidence of PW3.

As regards medical evidence, the appellant urged that it was unsatisfactory having been gathered after a lapse of time. The respondent responded that defilement cases, attempted defilement and rape cases could be proved by way of oral evidence alone without medical examination reports. They cited the case of ***Kassim Ali v. R*** CRIMINAL APPEAL NO. 84 OF 2005 where the Court of Appeal held that:

"*[T]he absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence.****"***

I respectfully agree with this conclusion. See also the Court of Appeal decision in ***Dennis Osoro Obiri v. R*** **CRIMINAL APPEAL NO. 279 OF 2011 (NAIROBI)** where the Court stated:

"…The appellant secondly contends that there was no medical evidence adduced to link him with the defilement of PW1. In our view, such evidence was not necessary the moment the trial court found that there was sufficient medical evidence to prove that the [complainant] had been defiled and that the [complainant's] evidence was trustworthy as to the identity of the person who had defiled her."

In this case, the Court also cited ***Geoffrey Kioji v. R****, CRIM. APP. NO. 270 OF 2010 (NYERI)* where it was held:

"Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."

The prosecution witnesses gave their testimonies to the effect that the complainant was grabbed by the appellant and he took her to his room where he undressed her by removing her skirt and underwear. PW3 saw the appellant pushing the complainant through the window of his house following his unexpected return into the compound and calling out his sister's name when he couldn't find her. He also saw the appellant throwing the complainant's underwear to her. The fact of throwing the complainant's underwear does not detract from the complainant's evidence that she had dressed up before being thrown out, as this could have meant putting on her skirt which the appellant had removed together with her underwear, and no reasonable doubt thereby arises.

In arguing his appeal further, the appellant's submissions were that the evidence adduced was contradictory and that the grudge he had with the family was overlooked and not investigated. He states also that the evidence of PW2 who is the complainant was coached and tailored to defeat justice.

The alleged grudge did not emerge in the case from the appellant's evidence or any of the witnesses, and the appellant did not substantiate it. Even if there was a dispute, it would have to be weighed against the prosecution evidence, which was straightforward and consistent, of the fact that he had undressed the complainant in preparation to perform a sexual act with her before he was interrupted by PW3. Any existing grudge between the appellant and his employer was immaterial to the occurrence of the offence. He cannot claim that the incident was fabricated by the complainant PW2 when there was the presence of another witness, her brother PW3, sufficient to implicate him.

The appellant's defense could not raise any doubt as against the consistent testimony of the complainant **PW2** and her brother **PW3** against whom no allegation of grudge was made by the appellant. The appellant's defence that the defilement case was untrue and has come as a result of a family grudge is empty as no possible reasonable explanation was suggested why the children would testify against the appellant. The appellant does not give any details pertaining the said dispute that would occasion his employer's retaliation in this way. Evidence before this court does not show that the two witnesses PW2 and PW3 testified pursuant to a plan by the accused's employer, the witnesses' grandfather with whom he allegedly had a pay dispute.

<u>Conclusion</u>

The evidence adduced establishes that had the appellant not been interrupted by the complainant's brother he would have proceeded to commit a sexual act with the complainant, the nature of which the evidence does not conclusive indicate. The appellant could have been minded to commit an act manifesting itself in one or the other of least two offences under the Sexual Offences Act, such as defilement contrary to section 8, if he used his genital organ to cause ***penetration,*** and sexual assault contrary to section 5 of the Act, if the appellant penetrated the complainant using part of his body other than his genital organ.

The age of the complainant was only of relevance to the offences of defilement and indecent act contrary to section 11(1) of the Sexual Offences Act which require that the complainant be a child. The offence of sexual assault under section 5 of the Act is not age specific. Even for the offences which require proof of the complainant's age as a minor, the evidence produced left no doubt that the complainant was a child, as the mother PW1 indicated that she was born in the year 2000 and was 14 at the time of the trial. That the age assessment dated 27/3/2013 gave the girl's age as 14 years while the reporting police officer requesting examination in the Medical Examination Report form P3 gave it as 12 years is of no consequence as the offences charged under section 9(2) and 11(1) of the Act are as against a child without reference to specific age.

Medical evidence was really not necessary in this case of attempted defilement and indecent act, unless it showed that there was actual defilement which would make it a case of defilement rather than attempted defileme nt or that there were injuries consistent with attempted penetration, which would only further support the present charges. That the medical evidence availed did not indicate any penetration or other injuries does not preclude attempted defilement and indecent act.

There was, however, no evidence that the appellant had removed his own clothes, or his genital organ, to give an indication of his readiness to commit an act of defilement, which within the meaning of the Sexual Offences Act requires ***penetration*** defined as follows:

> *""penetration" means the partial or complete* ***insertion of the genital organs of a person*** *into the* ***genital organs of another person****;"*

The evidence of the complainant who witnessed the act alleged to constitute attempted defilement was that -

> *"The accused got hold of me by my arm and covered my mouth by with another hand. The accused is employed by my grandfather. He took me to his bedroom n another house 3 metres away. There were no people outside.* ***In his bedroom he undressed me by pulling off my underwear. Suddenly, my brother*** **MM3** ***knocked on the door and Mbuvi (appellant) threw me through the window.*** *Accused had initially sent away* **MM3***to buy for him airtime.* **MM3***spoke. Accused threw me through the window so that* **MM3***does not see me."*

In these circumstances, the Court cannot find the offence of attempted defilement proved, and I, consequently, do not find a basis in the prosecution evidence for the conclusion by the trial court in the Judgment of 6th June 2014 that *"The accused person undressed the complainant and* ***attempted to push his penis into her vagina*** *[and] he is guilty as charged on the main count for attempted defilement…."*

There was, however, evidence of the commission of the offence of indecent act charged in alternative charge. The appellant did commit an indecent act with a child within the meaning of section 11(1) of the Sexual Offences Act. As defined in the Act, **"'indecent act'** means an unlawful intentional act which causes-

> *(a)* ***any contact between any part of the body of a person*** *with the* ***genital organs, breasts or buttocks of another****, but* ***does not include an act that causes penetration.***
>
> (b) exposure or display of any pornographic material to any person against his or her will".

From this definition of indecent act, it is clear to the court that the appellant must have committed the offence on the evidence before the Court by the complainant PW2. In removing the complainant's skirt and underwear the appellant's hand must have touched the complainant's genital organ of the vagina, as charged, and or the buttocks. Although the particulars of the indecent assault charge indicate that the offence was committed by the touching by the appellant of the complainant's *"private parts (vagina)…using his penis"*, there is no prejudice within the meaning of section 382 of the Criminal Procedure Code as the appellant was already charged with the offence of indecent assault and only the part of the appellant's body involved in the commission of the offence is different.

Orders

Accordingly, for the reasons set out above, the appellant's case has merit, to the extent that there was no conclusive evidence of alleged attempted defilement, and the trial court's conviction and sentence on the appellant for the offence of attempted defilement contrary to section 9(2) of the Sexual Offences Act are, respectively, quashed and set aside. The appellant is, however, convicted on the alternative charge for the offence of indecent act contrary to section 11 (1) of the Sexual Offences Act, and sentenced to serve an imprisonment term of ten (10) years from 6/6/2014, the date of the sentence in the trial Court.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 8TH DAY OF MARCH 2018.

KEMEI J.

JUDGE

Appearances:

Appellant in Person.

Mr. Machogu, Prosecution Counsel, for the Respondent.