REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 274 OF 2014

THOMAS ONDIEK MIGIKA.....APPELLANT

VERSUS

REPUBLIC.....STATE

(Being an appeal from the Judgment of Honourable H.M. Nyaga, Senior Principal Magistrate, delivered on 5th November, 2014 in Molo Senior Principal Magistrate's Court Criminal Case No. 706 of 2013)

JUDGMENT

1. The Appellant, Thomas Ondieki Migika, was charged before the ***Molo Senior Principal Magistrate's Court in Criminal Case No. 706 of 2013*** with a single count of defilement of a child contrary to section 8(1) as read together with section 8(2) of the Sexual Offences Act. The particulars of the offence are that on 02/05/2013, at Elburgon in Molo District within Nakuru County, the Appellant is alleged to have caused his penis to penetrate the vagina of D N, a child of 14 years.

2. In the alternative, the Appellant was alleged to have committed an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars were on 02/05/2013, at Elburgon in Molo District within Nakuru County, the Appellant is alleged to have intentionally and unlawfully caused his penis to come into contact with the vagina of D N, a child of 14 years.

3. The Appellant denied the charges and a fully-fledged trial ensued. The Prosecution called four witnesses. The Learned Trial Magistrate found that the Appellant had a case to answer and put him on his defence. He gave an unsworn statement. The Learned Trial Magistrate then convicted him of the lesser but cognate offence of attempted defilement and sentenced him to ten years imprisonment.

4. The Appellant is dissatisfied and filed the present appeal.

5. The Appeal was opposed by the State. Mr. Motende appeared for the State and made oral submissions in support of the conviction and sentence. The Appellant filed written submissions and indicated to the Court during the hearing of the appeal that he had nothing to add orally.

6. This being the first appeal, this court has the duty to re-evaluate the all the evidence given at trial and come to its own independent conclusions. This Court is not to merely confirm or disconfirm particular hypothesis made by the Trial Court. Even then, this Court must be acutely aware that it neither saw nor heard the witnesses as they testified and, therefore, it must make an allowance for that. See ***Okeno v R [1972] EA 32*** and ***Kariuki Karanja v R [1986] KLR 190***.

7. At the trial, the Complainant testified as PW1. She said she was eighteen years old at the time. The Learned Trial Magistrate indicated that she appeared to be 16 or 17 years old. The father, who testified as PW1, testified that she was 16 years old. The P3 Form indicated that she was 14.

8. The Complainant's testimony was that on 04/05/2013, she was coming from church when her uncle, S M, gave her some money buy some fruits from a fruit vendor who was nearby. At the fruit vendor's she found the Appellant who offered her some oranges. He also followed her as she headed home. He convinced her to go to his house which was nearby. At the house, the Appellant allegedly removed her clothes; then removed his and proceeded to have sex with her. That encounter was, testified the Complainant, cut short when her uncle, M, burst into the room by pushing the door open.

9. M, the Uncle, testified as PW6. He stated that he had seen the Complainant speaking with the Appellant near the fruit vendor's stand that afternoon immediately after paying for fruits for the Appellant. He saw them again speaking a short while later as he took a boda boda and his curiousity was aroused. When he came back from his business, suspecting something was amiss, he inquired where his niece had gone. A villager offered to lead him to where they had gone. They happened to the Appellant's house. On peeping inside, S M testified that he saw the Appellant and the Complainant on the bed. There was a curtain that was moving back and forth. S M assumed they were having sex. He immediately made a call to his brother, the Complainant's father, and the OCS. The father, J M, arrived first.

10. With the father arrival of the father, S M now forced the door open. J M, who testified as PW1, said that he saw the startled Complainant scrambling to put on her dress. The Appellant attempted to flee but was restrained by S M and J M.

11. Both the Complainant and the Appellant were led to the Police Station where the Complainant was referred to Elburgon Nyayo Hospital for treatment and examination. Corporal Joseph Githuka was at the Elburgon Police Station when the report was made. He locked up the Appellant and escorted the Complainant to the Hospital.

12. At the hospital, the Complainant was seen by Dr. Magaregikenyi. He did a physical examination and took a vaginal swab to send the Government Chemist. He also took the Appellant to the hospital and a blood sample drawn. Dr. Magaragikenyi was not available to give evidence as he had long left his position at the local hospital. However, Dr. Francis Thaithi Blano was on hand to produce the P3 from on his behalf. Dr. Thaithi testified that he had worked with Dr. Magaregikenyi for more than two and a half years and was familiar with his handwriting. The P3 Form was duly admitted as Exhibit 2. Dr. Magaregikenya concluded after examination that although the hymen of the Complainant was broken it was not of recent onset. He further concluded that although there was evidence that some blunt object had entered the vagina in chronic fashion, such penetration was not acute. This medical-speak for saying that the doctor did not find any evidence that the Complainant's vagina had been penetrated in the period immediately before the examination.

13. Anne Wangeci Nderitu, a Government Analyst who testified as PW3 confirmed this conclusion with her own conclusion that she found no spermatozoa in the vaginal swab sent to the Government Chemist for analysis.

14. Faced with this evidence and put on his defence, the Appellant gave a straight denial in his unsworn statement: He did not commit the offence; and S M, the uncle, is a liar.

15. The Learned Trial Magistrate had no hesitation in finding that although there was no penetration, the Appellant was guilty of attempted defilement.

16. It is clear that on the basis of the medical and scientific evidence presented to the Court that there was no proof of penetration. As such, the offence charged – defilement – could not be sustained. The question is whether the Learned Trial Magistrate was correct to return a verdict of attempted defilement on the facts.

17. The Prosecution was required to prove three critical ingredients to establish the offence:

a. That the Complainant was under-age – in this case less than eighteen old (See section 9(1) of the Sexual Offences Act);

b. That there was an attempt by the Appellant to penetrate the genital organs of the Complainant (see section 2 of the Sexual Offences Act for the definition of penetration); and

c. That it was the Appellant who attempted the penetration.

18. The age of the Complainant was proved through oral testimony by the Complainant and her father (PW3). The P3 form also established that the Complainant was less than eighteen years old.

19. On appeal, the Appellant says that the age of the Complainant was not proved. He relies on ***Hillary Nyongesa v R (Eldoret High Court Crim. App. No. 123 of 2009)*** and ***John Cardon Wagner & Others v R [2009] eKRL***. He argues that the inconsistencies in the age given for the Complainant was fatal.

20. Our case law has now established that the age of a Complainant for purposes of sexual offences can be established by any credible evidence. The Court of Appeal in ***Mwalongo Chichoro Mwanjembe v Republic, [2015] eKLR*** has recently stated this:

> **…**the question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. See ***Denis Kinywa v R, Cr. Appeal No.19 of 2014*** *and* ***Omar Uche v R, Cr. App.No.11 of 2015***. We doubt if the courts are possessed of the requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decision of the Court of Appeal of Uganda in ***Francis Omuroni v Uganda, Crim. Appeal No.2 of 2000***. *We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable…*

21. In the present case, the Prosecution was required to prove beyond reasonable doubt that the Complainant was less than eighteen years old. In my view, it did. It did matter so much whether she was 14 as the P3 Form stated; or 16 as her father (PW1) testified; or 17 as the Complainant testified. The fact is that the Complainant was a child as defined in the Sexual Offences Act.

22. The other major complaint raised by the Appellant on appeal is that the charge sheet was, in his view, fatally defective. The complaint seems to be that the Appellant thinks that the charge sheet should have contained the words "intentionally and unlawfully"

23. The Court of Appeal had occasion to deal with this question in **JMA vs Republic [2009] KLR 671**. The High Court had quashed a conviction on the main charge of defilement and found the appellant guilty on the alternative charge because the charge sheet did not contain the words "intentionally and unlawfully" making the main charge fatally defective. On that question, the Court of Appeal held that:

> This was a case in which the superior court should have invoked the provisions of Section 382 of the Criminal Procedure Code to cure the irregularity which on the facts and circumstances of this matter was minor.

24. The same applies here. In any event, looking at the wording of sections 8 and 11 of the Sexual Offences Act, I am not persuaded that the words "unlawfully and intentionally" are necessary. The sections are quite clear that any penetration or attempt at penetration on a child, without more is a violation of the act; it is *per se*, unlawful.

25. In the present case, the Learned Trial Magistrate found that the main charge had not been proved but found that a lesser offence – that of attempt – had been proved. The Learned Magistrate was correct and was permitted by section 179 of the Criminal Procedure Code to convict under section 11 of the Sexual Offences Act because the offence of attempting to commit defilement (which was proved by the evidence) is a lesser and minor cognate offence of the offence of defilement.

26. In my view, the question of identification is not in issue in the present case: the Appellant was caught red-handed; arrested on the spot and escorted to the Police Station. His attempts at denial were correctly thrown out by the Learned Trial Magistrate: there is no inherent possibility on the facts that the Appellant's denial was possibly true.

27. The sentence imposed by the Learned Trial Magistrate is the minimum permitted by the statute under the law.

28. Consequently, the appeal herein is without merit. It is dismissed. The conviction entered by the Learned Trial Magistrate is upheld and the sentence affirmed.

29. Orders accordingly.

Dated and delivered at Nakuru this 21st day of June, 2018

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(PROF.) J. NGUGI

JUDGE