REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.22 OF 2017

(An Appeal arising out of the conviction and sentence of Hon. H.W. Nyaga – CM delivered on 20th January 2017 in Makadara CMC. CR. Case No.4512 of 2014)

FREDRICK ONYANGO….....APPELLANT

VERSUS

REPUBLIC….....RESPONDENT

JUDGMENT

The Appellant, Fredrick Onyango was charged with the offence of **attempted defilement** of a child contrary to **Section 9(1)** as read with **Section 9(2)** of the **Sexual Offences Act**. The particulars of the offence were that on 22nd September 2013 at [particulars withheld] Estate in Nairobi County, the Appellant intentionally attempted to cause his penis to penetrate the vagina of F K, a child aged 4 years. He was alternatively charged with **committing an indecent act with a child** contrary to **Section 11(1)** of the **Sexual Offences Act.** The particulars of the offence were that on the same day and in the same place, the Appellant intentionally and unlawfully committed an indecent act with F K, a child aged 4 years by touching her private parts, namely vagina. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted of the main count. He was sentenced to serve seventeen (17) years imprisonment. The Appellant was aggrieved by his conviction and sentence. He has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of an incurably defective charge sheet. He faulted the trial magistrate for convicting him and sentencing him to serve a custodial sentence yet he was a child within the meaning ascribed to that term by the law at the time of his arrest and arraignment before court. The Appellant insisted that he was 17 years old at the time the offence was committed. The Appellant was aggrieved that he was convicted on the basis of evidence that was insufficient, inconsistent, contradictory that did not establish the charge that was brought against him to the required standard of proof beyond any reasonable doubt. The Appellant faulted the trial magistrate for failing to properly evaluate the entire evidence that was adduced and thereby arrived at the erroneous decision to convict him. The Appellant was aggrieved that his defence was not considered by the trial court before the verdict finding him guilty of the offence was reached. For the above reasons, the Appellant urged the court to allow the appeal, quash the conviction and set aside the custodial sentence that was imposed upon him.

During the hearing of the appeal, the Appellant presented to court written submission in support of his appeal. He further made further oral submission urging the court to find that the prosecution had not established the charge against him to the required standard of proof beyond any reasonable doubt. He reiterated that he was a child at the time the offence was allegedly committed and could not therefore be sentenced to serve a custodial sentence. He urged the court to take into account that he did not have the benefit of being represented by counsel and therefore could not have adequately and sufficiently articulated his case. He urged the court to reach the finding that he should have been sentenced to serve a term in a Borstal institution. He therefore urged the court to allow his appeal, quash his conviction and set aside the sentence that was imposed upon him.

Ms. Akunja for the State opposed the appeal. She submitted that the Appellant raised the issue of his age during trial. An age assessment was undertaken. It was established that the Appellant was an adult at the time the offence was committed. She urged the court to dismiss the Appellant's assertion that he was a child at the time the offence was committed. As regard the substance of the appeal, she submitted that the prosecution did establish to the required standard of proof that the Appellant had attempted to defile the complainant to the required standard of proof beyond any reasonable doubt. She stated that when the complainant was examined by a medic soon after the incident, a dried discharge was found on her thighs. Although medical evidence did not establish penetration, the prosecution established to the satisfaction of the trial court that the Appellant had indeed attempted to defile the complainant. As regard sentence, she agreed with the Appellant that the sentence imposed on him was harsh and excessive in the circumstances and should have been ten (10) years instead of seventeen (17) years that was imposed by the trial court. She therefore urged the court to dismiss the appeal, save for the concession made on sentence.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. As was held by the Court of Appeal in **Njoroge –Vs- Republic**

[1987] KLR 19 at P.22:

> ***"As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570)".***

In the present appeal, the issue for determination court is whether the prosecution proved the charge of **attempted defilement** contrary to **Section 9(1)** and **(2)** of the **Sexual Offences Act** to the required standard of proof beyond any reasonable doubt.

This court has carefully re-evaluated the evidence adduced before the trial magistrate's court. It has also considered the submission made before this court during the hearing of this appeal. It was clear from the evidence and the judgment of the trial court that the trial magistrate relied on the testimony of the complainant to convict the Appellant. The Appellant at the time was aged 4 years according to the clinical card that was produced by her mother PW2 C N. This is what the trial court said in respect of the evidence of the complainant:

> ***"The girl stated that the accused undressed her and then did "tabia mbaya" to her. She made a gyrating gesture while showing the court where the act was done. She did so by touching her "private parts". For a child of FK's age, one cannot expect her to use explicit language to describe sexual intercourse. When she uses the term "tabia mbaya" I understand her quite clearly to mean having sexual intercourse, an act of penetration. In my view, the evidence of FK points to actual penetration, but as I shall expound shortly, the state preferred the offence of attempted defilement. As usual in sexual offences, the only evidence of identification is from the victim alone. FK was in no doubt as who did the act to her. She demonstrated what she did by gyrating in court. This is a very young girl. It is highly unlikely that she would make up such a story. This was a person she knew well and could not have mistaken him for someone else. After listening to the complainant and having observed her, I believe her testimony to be true and made in good faith."***

Unfortunately, this finding as was made by the trial magistrate is not supported by other evidence. Immediately the mother of the complainant was informed by the complainant what had allegedly happened, she took the complainant to MSF Clinic at Mathare where she was examined by Purity Kajuju, a Clinical Officer on the same day. On examination, she did not see any injury on the complainant's private parts. Her hymen was intact. She noted dried discharges on the inner surfaces of the thighs. She did not however state what this discharge was. The medical report was produced as an exhibit before the trial court by PW3 Irene Nyagurachi on behalf of Purity Kajuju. The Appellant was further examined by PW4 Dr. Joseph Maundu of the Police Surgery. He saw nothing remarkable that pointed to the complainant having been sexually assaulted.

It was clear to the court that the trial court relied on the evidence of a 4 year old to convict the Appellant. This court is aware that children of such age are impressionable and are likely to be influenced to state a given version to the court as directed by adults having authority over them. The Appellant explained that it was not unusual for the complainant and her mother to go to their house. They used to go to their house to watch television. On this particular day, when the complainant went to the Appellant's house, and indicated her wish to watch the television, the Appellant demurred. She left the Appellant's house. When her mother saw her, the complainant was undressed. When she inquired who had undressed her, the complainant responded that it was **'Onyi'**. Onyi is the nickname of the Appellant. The complainant mother immediately arrived at the conclusion that it was the Appellant who had undressed the complainant.

No evidence was adduced by the prosecution to establish that the complainant had contact with the Appellant only and no one else. In the premises therefore, this court is not persuaded, even if a finding was reached that the complainant had been indecently assaulted, that the prosecution's evidence excluded every other person in the block of houses other than the Appellant. The prosecution's evidence in that regard raised reasonable doubt that it was the Appellant and no one else who could have committed the offence. This court is not prepared to make a finding that the prosecution established to the required standard of proof beyond reasonable doubt that the Appellant had contact with the complainant.

The upshot of the above reasons is that the appeal has merit and is hereby allowed. The Appellant's conviction is quashed. He is acquitted of the charge. He is ordered set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 13TH DAY OF JUNE 2018

L. KIMARU

JUDGE