REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

CRIMINAL APPEAL NO 88 OF 2016

FORMERLY ELD HCCRA NO. 120 OF 16

PETER CHIRCHIR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Appeal from the original conviction and sentence in the Principal Magistrate's Court

at Kabarnet delivered on the 19th day October, 2016 by Hon. E.M Ayuka, RM]

JUDGMENT

1. The appellant was convicted for two counts of attempted defilement c/s 9(1) (2) of the Sexual Offences Act No. 3 of 2006 and assault causing actual bodily harm c/s 251 of the Penal Code and sentenced to imprisonment for 10 years and 12 months for the two counts, respectively, the sentences running consecutively from 19/10/16.

2. The appellant appealed on the following grounds:

> *"GROUNDS OF APPEAL*
>
> *1. That the learned trial magistrate erred in both law and fact in failing to recognize that the evidence tendered was inconsistent and contradictory hence the prosecution witnesses were not credible and reliable.*
>
> *2. That the learned trial magistrate erred in both law and fact in failing to hold that, there was a pre-existing grudge between our family and the witness pretending to be the first person to the scene which led to all these fabrication and allegation.*
>
> *3. That the learned trial magistrate erred in law and fact in ignoring to hold that the investigation to this case was shoddy such that the investigating officer only relied on hearsay.*
>
> *4. That the learned trial magistrate erred in law and fact by failing to note that the prosecution the burden of proof should always rests on prosecution side.*
>
> *5.That the learned trial magistrate further erred in law and fact in failing to recognize that the crucial witnesses such as the parents to the complainant were not arraigned to the court.*
>
> *6. That, the learned trial magistrate failed in law and fact in failing to hold that there were not any exhibits produced in the court such as cloth to clear ant doubt.*
>
> 7. *That your honour I pray to be provided with court proceedings in advance to enable me supplement more grounds to urge the same during the hearing."*

3. The DPP conceded the appeal and submitted as follows:

> *"Miss Macharia, Ass. DPP*

Appeal is not opposed.

Appellant conviction of attempted defilement contrary to section 9 (1) (2) of the Sexual Offences Act and assault contrary to section 251 of the Penal Code. He was sentenced to 10 years and 12 months respectively and the sentences were to run consecutively.

We don't oppose the appeal as evidence is contradicting.

PW1 stated that she was at home on 7/2/2016 at about 12.30pm when the appellant attacked her and attempted to defile her.

Appellant attempted to remove the top b louse and skirt at page 16 line 1, she states that her clothes were not torn and the appellant had unbuttoned the blouse.

She further states that the skirt was tight and the appellant unzipped but did not remove it. PW1 further stated she was rescued by PW2, 3 and 4.

At P. 17 line 3, PW2 states that the complainant had her clothes removed. At p.22 line 6, pw4 on cross examination stated "you tore the victim's blouse".

The evidence of PW1, PW2, PW3 and PW4 on the condition of the clothing of the complainant after incident is contradicting.

There is also contradiction by the witnesses PW2, 3 and 4 as they entered the bedroom to rescue the complainant. At P.16 PW2 states that it was John Boswon PW4 who entered the bedroom while the rest of the witnesses PW2 and PW3 remained in the sitting room.

PW3 at P.20 on the other hand (lines 4 and 5) states that they all rested and entered the house and in the inner room they caught the accused with the victim.

PW3 insinuates that they all entered the bedroom. He further states at P.20 line 6 that when they entered the inner room, the accused had hold the complainant by the neck. That evidence was not given even by PW1 herself.

PW1 stated that she was gagged by the appellant. She does not talk of sustaining any injuries.

At P.16 line 12 and 13. PW2 states that she saw the complainant who had been assaulted and had pain on her neck and she also had a swelling.

PW5 is the clinical officer who examined the complainant. He states that complainant has slight tenderness on the ulterior neck and it was also swollen.

At P.26 .the lines 11 and 12. Pw5 further states that the complainant had injuries on the interior of the legs. This evidence was not given by the complainant and the P3 form and treatment notes produced and there is nowhere shown that she had injuries in interior of the legs.

All these contradiction create doubt in the prosecution evidence and they ought to have been given to the benefit of the appealed.

Appellant was sentenced to 10 years and 12 months respectively for attempted defilement and assault to run consecutively. This is against sentencing directions that offences for the same transaction should run concurrently.

We urge the court to allow the appeal."

4. Having considered the appeal on the basis of the evidence presented to the trial court, as required of a first appellate court by the well known principle of ***Okeno v. R*** (1972) EA 32, the court, I would agree with the DPP and consider that the contradictions on the evidence of the Prosecution witnesses is such as to create a doubt in the prosecution's case both on the charges of attempted defilement and assault.

5. In addition the general principle of sentencing that sentences for offences committed in the same transaction should be served concurrently is violated by the order of the trial court's order that the sentences do run consecutively. See ***Odero v. R,*** (1984) KLR 621, (Bratt and Mbaya, JJ.) where the court explained the principle as follows:

*"In cases where a person has been charged with and convicted of two or more counts involving the **same transaction,** the practice is to direct that the sentences should run concurrently: see **R v Fulabhai Jethabhai & Another** (1946) 13 EACA 179. We think that in the instant case the three counts for which the appellant was convicted were a series of offences founded on the same facts and **committed in the course of the same transaction.** That is why the three counts were joined in one charge as is envisaged by section 135(1) of the Criminal Procedure Code (cap 75). The phrase **"same transaction"** was considered by the former Court of Appeal in **Rex v Saidi Nsabuga s/o Juma and another** (1941) 8 EACA 81 and explained again by the same court in **Nathani v R** (1965 EA 777). The court said that the proper construction of the phrase **"same transaction"** is that:-*

"if a series of acts are so connected together by proximity of time, criminality or criminal intent, continuity of action and purpose or by the relation of cause and effect as to constitute one transaction, then the offences constituted by these series of acts are

committed in the course of the same transaction."

6. Even if the appellant had been properly convicted the sentences in the two counts should have been ordered to run concurrently.

Orders

7. Accordingly, for the reasons set out above, the conviction of the appellant for the offences of attempted defilement contrary to section 9 (1) (2) of the Sexual Offences Act is quashed and the sentences of imprisonment for 10 years and 12 months, respectively, for the two counts are set aside.

8. There shall, therefore, be a direction that the appellant be released from custody forthwith unless he is otherwise lawfully held.

DATED AND DELIVERED ON 1ST DAY OF AUGUST, 2018.

EDWARD M. MURIITHI

JUDGE

Appearances: -

Appellant in person.

Ms. Macharia, Ass. DPP for the Director of Public Prosecutions.