



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 2 OF 2018

JOHN KIOKO MUNYAMBU.....APPELLANT.

VERSUS

REPUBLIC.....RESPONDENT.

*(An appeal from the original conviction and sentence Chief Magistrate's court at Makadara*

*Criminal Case 3839 of 2015 at the delivered by Hon. H. M. Nyaga, CM on 14<sup>th</sup> December, 2017).*

JUDGMENT.

Background.

1. The Appellant herein was charged with the offence of attempted defilement contrary to Section 9(1) as read with Section 9(2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 21<sup>st</sup> December, 2015 at Mathare North Area one within Nairobi County, unlawfully and intentionally attempted to cause penetration of his genital organs into the vagina of ER, a child aged 5 years. In the alternative he was charged with an indecent assault to a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006 in that on 21<sup>st</sup> December, 2015 at Mathare North area one in Nairobi County, unlawfully and intentionally committed an indecent act with ER, a child aged five years, by touching her private parts namely vagina.

2. The Appellant was arraigned in court and at the conclusion of the trial found guilty in the main count. He was consequently sentenced to 23 years imprisonment. He has preferred the present appeal against the conviction and sentence. His amended grounds of appeal were filed contemporaneously with the written submissions on 23<sup>rd</sup> October, 2018. They were that; (i) the sentence passed was exorbitantly in excess of the minimum provided in law, (ii) the learned magistrate erred when he found that the elements of the offence of attempted defilement were not proved to warrant a conviction, (iii) the trial magistrate erred when he failed to observe that there was no corroboration of the evidence of PW1 and other witnesses, and (iv) the honorable magistrate showed open bias towards the Appellant.

3. The Appellant represented himself while Ms. Nyauncho acted for the State. The respective submissions shall be considered in the determination.

Evidence.

4. **PW1**, RE was the complainant then aged 5 years and in pre-unit at [Particulars Withheld] academy in Mathare North. She knew the Appellant who had done *tabia mbaya* (bad manners) to her during the school holiday. She stated that she was outside near her grandmother's house when the Appellant took her to his house where he defiled her. In cross examination she said that she was with one M and G who the Appellant gave Kshs. 10/- to buy marbles. The complainant's mother **PW2**, JMG, recalled that on 21<sup>st</sup> December, 2015 she went to work before returning at noon when she realized that PW1 was not in the house. Her mother, **PW3**, informed her that she was playing with her cousins but the two boys returned at around 1:00 pm without her and she questioned where they had left her and they informed her that they had left her with one *Mnyanyi*, which was the Appellant's nickname. They went to the place and came across the child who then led her to the Appellant's house whom when confronted and informed her that he was simply repairing the child's slipper. She got suspicious of the Appellant's behavior and asked her mother to talk to PW1 and in the course of the questioning the child narrated what had transpired at the house. She then took the child to the clinic and later reported the matter to the police. In cross examination, she stated that she used to see the Appellant in the estate but did not know his name. Further, that the Appellant had fled after they reported the matter but was later traced. **PW3**, VW, was the maternal grandmother and her evidence mirrored that of PW2

5. The brother **PW4**, MS, identified the Appellant as the man he had seen near their home. He recalled that the man asked PW1 to escort him. They followed him to a house where he told him and his small brother, **PW5**, to go away before giving them Kshs. 10/- to buy marbles. They left PW1 with the Appellant and went home to alert PW3 and led them to the house. In cross examination, he stated that he saw the Appellant on the day in question. **PW5**, DG corroborated the evidence of PW4.

6. **PW6**, EK, was a clinical officer based at MSF- France clinic and produced a medical report filled by Selina Nyambu, a colleague. The report in question was filled on 22<sup>nd</sup> December, 2015 with findings that there were no injuries noted on the genitalia while the hymen was intact. There was also no discharge noted and tests revealed no spermatozoa. She also produced a Post Rape Care form filled pursuant to the examination.

7. **PW7**, Dr. Joseph Maundu the police doctor, examined the complainant on 23<sup>rd</sup> December, 2015 and noted no physical injuries on the body and the external genitalia was found to be normal.

8. **PW8**, CPL Fosilla Wanja, the investigating officer summed up the evidence of the prosecution witness. She stated that the Appellant was arrested by Administration Police Officer. She produced PW1's Health Card.

9. **DW1**, Appellant in his sworn evidence testified that he lived in Baba Dogo and was gainfully employed as a mason. He recalled that on 21<sup>st</sup> December, 2015 he was working around Roasters and in the evening he was on his way home at around 5.00 p.m when he was arrested at Allsopps for no apparent reason. He later learnt of the present charges against him. He denied the charges. In cross examination, he stated that he had never met the complainant and reiterated that he did not know why he was arrested.

### **Determination.**

10. After considering the evidence at hand and the submissions by the respective parties. I find that the following issues arise for determination:

i. Whether the offence was proved beyond reasonable doubt

ii. Whether the sentence passed was harsh and excessive.

11. The court after the *voire dire* examination found that the complainant's evidence "**will be received without oath or affirmation.**" Contrary to this finding the Appellant was allowed to cross examine her on 13<sup>th</sup> April, 2017. By allowing the cross examination, the court failed to appreciate the import of a *voire dire* examination as provided under Section 19(1) of the Oaths and Statutory Declarations Act. It is intended to assess whether the child understands the meaning of the reception of an oath and of speaking the truth. The court having ruled that she would be sworn implied that she had failed both tests. It was meaningless and bordered on being prejudicial to her to then subject her to cross examination. The court only ought to have relied on her evidence in chief to arrive at a finding of whether it believed in her evidence. In reevaluating the evidence on record, this court will do just that.

12. The Appellant was convicted of committing the offence of attempted defilement contrary to Section 9(1) of the Sexual Offences Act. The Appellant submitted that elements of the offence were not proved and he relied on **David Aketch Ochieng v. Republic[2015] eKLR** to set out the elements of the offence. He submitted that there was no evidence that the Appellant had done "*tabia mbaya*" to her. He questioned the finding by the trial court that the evidence on record actually disclosed defilement. He submitted that the evidence of PW1 was not corroborated and that he had been jailed simply due to suspicion. He pointed to the medical evidence which he submitted exonerated him of any wrongdoing. However, the trial court in delivering its decision found that all the elements of the offence were proved to the required standard and set out the speech in **R v. Lifchus[1997] 3 SCR 320**, to buttress his point that:

***"...the standard of proof beyond a reasonable doubt is inextricably intertwined with the presumption of innocence, the basic premise which is fundamental to all criminal trials, and that the burden of proof rests on the prosecution throughout the trial and never shifts to the accused... A reasonable doubt is a doubt based on reason and common sense which must logically be derived from the evidence or absence of evidence. While more is required than proof that the accused is probably guilty, a reasonable doubt does not involve proof to an absolute certainty."***

13. The present offence has three elements, namely; (i) proof that the complainant was a child when the offence occurred, (ii) proof of identification of the accused as the perpetrator of the offence and (iii) proof that there was an attempted act which would have caused penetration. With regards to proof that the complainant was a child when the offence occurred, a Child Health and Nutrition Card was adduced in court which indicated that she was born on 2<sup>nd</sup> November, 2010 and was therefore five years old when the offence occurred thus clearly a child under the provision of the Children Act.

14. With regards to the identification of the Appellant, PW2, the complainant's mother, testified that when she got home she could not find her child but was informed that the child was playing alongside her cousins. However, the cousins returned alone and informed her that the child had been left with one *Mnyanyi*. She instructed the children to lead her to the place they had left the complainant which they did and at the gate to the house they came across the complainant who led them to the Appellant's house. The evidence of the cousins, PW4 and PW5, was that they saw the Appellant for the first time on the day in question when he led the complainant towards a house. They followed closely behind and at the house they were asked by the Appellant to leave and they were given money to buy marbles to that end. The evidence of PW3 was that she used to see the Appellant around the estate but did not know his name. Further, it is clear that all the witnesses allegedly saw the Appellant at his house on the material day when they were led there by PW4, PW5. This evidence sufficiently pointed to the Appellant as the culprit and therefore identification parade would not have served any purpose.

15. Additionally, PW1, PW2, PW3, PW4 and PW5 all identified the Appellant in the dock as the perpetrator of the offence. With regards to

the circumstantial evidence PW4 and PW5 affirmed that the child was led to a house by the Appellant and they led PW2 and PW3 to the same house. The evidence of PW2, PW3, PW4 and PW5 was that at the gate to the compound they met the complainant who then led them to the Appellant's house where PW2 had a conversation with the Appellant in which he informed them that he was repairing the complainant's slipper. The evidence by the witnesses was cogent and clearly pointed to the same house as the place where the complainant had been led.

16. A crucial pointer to the complainant's presence in the house was offered by PW2 who testified that as she questioned the Appellant the complainant informed her that she had left her toy in the house and when she asked for the whereabouts of the toy the Appellant went back into the house and passed it to her. This is clearly a corroborative piece of evidence that the child was in the house. I have no shred of doubt in my mind that the Appellant was positively identified.

17. The third element involves the proof of an attempted act that would cause penetration. Given the foregoing circumstantial evidence, it is clear that the complainant was in the house of the Appellant on the material day. What remains to be determined is whether the Appellant committed an act that would cause penetration. The complainant stated that the Appellant took off her pants and did "*tabia mbaya*" to her at the crouch area. That he was seated and he made her sit on him. Under Section 2 of the Sexual Offences Act, penetration may be partial or complete insertion of the genital organ. In the present case, there was no evidence that the Appellant did an act that intended to insert his genital organ into that of the complainant with the only evidence adduced being the complainant's submission that the Appellant did "*tabia mbaya*" to her. Given the dearth of evidence, the court finds that the third element was not proved. This is also informed by the medical evidence which found no evidence of partial or complete penetration.

18. However, the Appellant came into contact with the child's genitalia in the course of doing the "*tabia mbaya*" which act disclosed the offence of indecent act with a child under Section 11(1) of the Sexual Offences Act. The offence is defined under Section 2 of the Act as follows;

***“(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 phonographic material to any person against his or her will;”***

19. Under Section 354(3) of the Criminal Procedure I hereby quash the conviction for the offence of attempted defilement and substitute the same for a conviction for the offence of committing an indecent act with a child and convict the Appellant accordingly.

#### **Sentencing:**

20. The Appellant submitted that the sentence passed was way above the minimum sentence provided in law. He pointed to the speech made by the magistrate during his sentencing to submit that the trial magistrate showed open bias in his sentencing. Further, that the minimum sentences provided in the Sexual Offences Act was harsh, citing **Yawa Nyale v. Republic[2018] eKLR**. He urged the court to reduce the sentence.

21. I shall not delve into the propriety of the sentence having found the Appellant guilty of a different offence other than the one he was convicted for. He was a first offender and a sentence of ten years is sufficient deterrence. I thus sentence him to serve ten years imprisonment less the period of two years and fourteen days he spent in remand custody before the conviction. It is so ordered.

**Dated and Delivered at Nairobi this 22<sup>nd</sup> day of November, 2018.**

**G.W. NGENYE-MACHARIA**

**JUDGE**

#### **In the presence of:**

1. *Appellant present in person*
2. *M/s Atina for the Respondent*