REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 13 OF 2018

BETWEEN

ELKANA MACHARIA NJOROGE .....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence dated 2nd May, 2018 by Hon. R. Kefa, Resident Magistrate in Nyeri CMC Cr. Case (S.O) No. 7 of 2017)

JUDGMENT

Introduction

1. The appellant herein, Elkana Macharia Njoroge was arraigned before the Chief Magistrate's Court in Nyeri on a charge of ***attempted defilement contrary to section 9(1)[as read with section 9](2) of the Sexual Offences Act, number 3 of 2006,*** the particulars of which are that on the 17th day of February, 2017 at around 0700hrs at XY Academy within Ruirii sub-location in Kieni West District within Nyeri County unlawfully and intentionally attempted to cause his penis to penetrate the vagina of M. N. K a child aged 9 years.

2. In the alternative, he was charged with ***committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act, No. 3 of 2006.*** The particulars of the offence are that on the same day and at the same time in the same place, he intentionally and unlawfully committed an indecent act with M.N.K by touching her vagina with his penis.

3. The appellant pleaded not guilty to both the main and alternative counts, whereupon the prosecution called six (6) witnesses in support of its case. At the close of the prosecution case the appellant was put on his defence. He gave sworn evidence and also two (2) witnesses in support of the defence case.

Judgment of the Learned Trial Court

4. Upon careful analysis of all the evidence on record, the law, the submissions and the circumstances of the case, the learned trial court was satisfied that the prosecution had proved its case against the appellant on the main count beyond reasonable doubt and proceeded to find the appellant guilty as charged. The appellant was accordingly convicted of the offence of attempted defilement and upon conviction he was sentenced to nine (9) years imprisonment.

The Appeal

5. The appellant, being dissatisfied with both conviction and sentence, filed this appeal in person on 15th May, 2018 but on 16th May, 2018, the appellant's counsel, Mr. Gori of Ombogi & Co. Advocates filed a '**Supplementary Petition of Appeal'** premised on the following grounds:-

> ***1.*** **The learned magistrate erred in law and fact in sentencing the appellant for the offence charged when there was no adequate evidence to prove the charge.**
>
> ***2.*** **The learned magistrate erred in law in finding that the appellant committed the offence of attempted defilement of a girl contrary to section 9(1) and (2) of the Sexual Offences Act number 3 of 2006 when there was no adequate evidence to support that finding.**

3. **The learned magistrate erred in law and fact by relying on the evidence of the prosecution which was not enough to establish a case against the appellant beyond reasonable doubt.**

4. **The learned magistrate erred in law and fact in accepting and relying on evidence from the prosecution which ought not to have been received and/or admitted on record.**

5. **The learned magistrate erred in law and fact by totally disregarding the appellant's evidence and further [by] placing credence on extraneous matters not material to the case and thereby finding that the prosecution had established its case beyond reasonable doubt.**

6. **The learned magistrate erred in law and fact by failing to appreciate that the testimony of the appellant was cogent, truthful and justified.**

7. **The learned magistrate misapprehended the law in sentencing the appellant to serve a term of nine years imprisonment which sentence was excessive in the circumstances.**

8. **The learned magistrate erred in law and fact by failing to appreciate the mitigation given by the appellant.**

6. In summary, the eight (8) grounds of appeal, in my considered view raise three issues/complaints and these are that there was no evidence to prove the charge against the appellant, that the appellant's defence and mitigation were not considered and thirdly that the sentence was excessive in the circumstances of the case. It is the appellant's prayer that the appeal be allowed, conviction quashed and sentence set aside and/or reviewed.

7. For the reason that this is a first appeal, this court is under a duty to reconsider and evaluate the whole of the evidence afresh and come to its own conclusions. It is this process of reconsidering and evaluating the evidence afresh that will help this court in determining whether or not the findings by the learned trial magistrate are anchored in the law and supported by the facts. In exercising this appellate jurisdiction however, this court has to remember and make an allowance for the fact that it has not seen and heard the witnesses who gave evidence during the trial. Generally see ***Okeno versus Republic [1972] EA 32***.

The Prosecution case

8. From the evidence of the 6(six) prosecution witness, the following is the prosecution case: M.N.K, who was a standard 3 pupil at XY Academy left her home at about 6.00am on 17th February, 2017. She was picked by a bus and arrived at the school at about 7.00am and went straight to her class. After about four minutes, the appellant called her to the staff room. The appellant was her Science and Mathematics Teacher. When M.N.K got to the staff room, she found the appellant standing upright with his trouser zip opened. He then carried her in his arms and sat on a chair and made M.N.K to sit on his lap with her back to him. Then the appellant started pushing her on her shoulders for about five minutes. He then let her go back to class. MNK testified that she felt pain at the back and front of her private parts.

9. On the following day MNK reported the incident to her mother A.W.N.K, who testified as PW2. According to PW2, MNK reported to her that she (MNK) was feeling pain around her lower abdomen and that she could not pass stool. MNK also reported to PW2 that on the 17th February, 2018, while in the staff room, the appellant who had made her sit on his lap pressed his penis against her buttocks. PW2 called the head teacher of XY Academy and reported the incident before making a report at Nairutia Police Station. The police took PW2 together with MNK to Mary Immaculate Hospital. At the hospital, it was confirmed that MNK was not defiled but that the appellant had only sought to have his sexual satisfaction.

10. Teacher EMN of XY Academy testified as PW3. She is the one who received the complainant from PW2. PW3 in turn informed the head teacher one JWK, who was PW4. Though, PW4 sought to meet PW2 together with MNK at the school, this did not happen. On 24th February 2017, the appellant was arrested from the school compound.

11. PW5, Edwin Ngare Irungu, a clinical officer at Mary Immaculate Hospital testified on behalf of his former colleague Henry Kinuthia who had examined MNK, but who had since left the hospital for further studies. He testified that from the P3 report, there was no evidence of any injuries on MNK's body, thought in his view, lack of such evidence did not rule out attempted defilement. During cross examination, PW5 stated that "**when a child is wearing clothes, the penis cannot touch the vagina."**

12. PW6 was number 93568 PC Christine Mwicha, attached to Nairutia Police Station. He is the one who investigated the case. He also issued the P3 form and accompanied the complainant to the hospital where she was examined and the P3 form filled. PW6 stated that from her investigations the appellant tried to defile MNK after he made her sit on his laps in the staff room. After gathering the information, the appellant was arrested and charged. PW6 produced MNK's birth certificate – Pexhibit 2 – which showed that MNK was born on 30th November, 2007, and was thus 9 years old at the time of the alleged incident. The P3 form was produced as Pexhibit 1.

The Defence Case

13. The appellant gave sworn evidence in which he denied committing the offence. His testimony was that on the material morning he was in the staff room when MNK took her book to him for marking. After marking the book, MNK left. He stated that the staff room where he is alleged to have committed the offence is an open space and that if he had done anything he would have been seen by other people. He denied all the allegations of having his trouser unzipped and putting MNK on his lap. The appellant's two witnesses A.W, a driver at XY Academy and C.N.G, a female teacher at XY Academy supported his case.

Issues for Determination

14. There being no dispute that the appellant and the complainant, together with other teachers of XY Academy were in the school on the material day and at the material time, the only issue is whether an attempt was made by the appellant to defile MNK, the complainant.

Analysis and Determination

15. Upon careful analysis of all the evidence on record, the grounds of appeal together with the oral submissions by counsel, I am not satisfied that the prosecution proved its case against the appellant to the required standard. As submitted by counsel for the appellant, and rightly so in my view, the complainant's evidence is at variance with the particulars of the charge, and the benefit of that variance goes to the appellant. The record clearly shows that at no time did complainant remove her clothes. Secondly, the complainant alleged that when she was put on the chair, she sat with her back to the appellant and in that position, her vagina would not have been in a position of being accessed by the appellant. The record also shows that according to the complainant the appellant pressed her on the shoulders, so when evidence is given that the complainant had pains on her lower abdomen and private parts, such evidence is again at variance with the description of how the incident actually happened.

16. Although the appellant may have tried to do 'something' to the complainant it seems unlikely to me that he could have done it in the open staff room where the complainant alleged to have found the appellant's trouser zip unfastened and his '**black thing'** hanging between his legs.

Conclusion

17. In conclusion, I have reached the conclusion that this appeal must succeed. Accordingly, the appeal is allowed, conviction quashed and sentence set aside. Unless he is otherwise lawfully held, the appellant shall be released from prison custody forthwith.

18. It is so ordered.

Judgment written and signed at Kapenguria

RUTH. N. SITATI

JUDGE

Judgment delivered, dated and countersigned in open court at Nyeri on 20th day of December, 2018

HON. A. MSHILA

JUDGE.

In the Presence of

Wangari for state

None for respondent

Rahab – Court Assistant