REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 126 Of 2016

THOMAS NDONYE KIVUVA……………………………..…..APPELLANT

VERSUS

REPUBLIC ……...……………..……………………………..…..RESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Milimani Cr. Case 4940 of 2012 delivered by Hon. C.N. Ondieki, R.M. on 30th January 2014).

JUDGMENT

Background.

Thomas Ndonye Kivuva, herein the Appellant, was charged with two counts. In count I he was charged with the offence of attempted defilement contrary to Section 9(1)(2) of the Sexual Offences Act, No. 3 of 2006. The particulars of the offence were that on 28th October, 2012 at [Particulars withheld] area within Ongata Rongai township in Kajiado County intentionally attempted to cause his genital organ namely penis to penetrate the genital organ, namely vagina, of one D M, a child aged 11 years.

In count II he was charged with assault causing actual bodily harm contrary to Section 251 of the Penal Code. The particulars of the offence were that on 28th October, 2012 at [Particulars withheld] area within Ongata Rongai Township in Kajiado County, unlawfully assaulted D M thereby occasioning her actual bodily harm.

The Appellant was arraigned before a court of law and convicted on each of the counts in question. He was sentenced to ten years imprisonment in count I and a fine of Kshs. 10,000, in default serve 4 months imprisonment in count II.

Being dissatisfied with both the conviction and sentence, the Appellant filed the instant appeal. Alongside the written submissions he also filed additional seven grounds of appeal which he entirely relied on. The same were filed on 6th March, 2017. I summarize them into six as follows; that he was not properly identified, that the investigations were shoddy, that he was not furnished with prosecution witness statements, that his defence was not considered, that the case was not proved beyond a reasonable doubt and that relevant factors were not considered in sentencing.

Submissions.

In his written submissions, the Appellant submitted that during the trial he was not furnished with

prosecution witness statements which violated his right to a fair trial. On his identification he submitted that although the offence took place during the day and the complainant allegedly knew him, the evidence adduced on recognition was not sufficient to warrant a conviction. He particularly challenged the evidence of PW1 in this regard which he submitted was untruthful, contradictory and uncorroborated. He also was of the view that investigations were shoddy and that the investigating officer relied on hearsay evidence. On sentence, he submitted that the trial magistrate did not consider his mitigation that he was a first offender. The net result was to pass a harsh and excessive sentence in the circumstances. He submitted that the trial court improperly applied the law in passing a minimum sentence whereas it had the discretion to pass a sentence of less than ten years in count I.

Learned State Counsel, Ms. Nyauncho, for the Respondent submitted that the prosecution proved its case beyond a reasonable doubt. She submitted that the Appellant was properly identified by PW1 and her evidence was corroborated by PW3 who went to rescue her when she screamed for help. PW1 then informed PW3 and her mother, PW2 that it was their neighbor, 'Papa Mweni' who had attempted to defile her. In a short while the Appellant arrived in his house and PW1 duly recognized him. As such, he was identified by recognition. In addition, the Appellant was also identified by the clothes he was wearing on the day in question which clothes were produced as exhibits in court. Counsel submitted that the medical evidence adduced by PW6 and PW7 further corroborated both offences. She urged that the appeal be dismissed.

EVIDENCE.

The prosecution's case was that on the material day at about 6.00 p.m., PW1 was sent by her mother, PW2 to a neighbor's home to go and collect a battery. On her way back home, she started playing with children by the roadside. That is when the Appellant accosted her, tripped her from behind, held her hand and started pulling her backwards. He also snatched the battery she was carrying. He then dragged her to a nearby quarry. It is there that he attempted to defile her. She was dressed in a skin tight trouser and a skirt. He pulled them downwards but PW1 bit his finger. The Appellant relaxed and PW1 got an opportunity to scream. PW3 who was in her house nearby heard the screams and rushed towards the scene where she found PW1 crying. The latter told her that their neighbor one, 'Papa Mweni' had tried to defile her. She helped her carry the battery she had and escorted her to her mother's house where they reported the incident.

PW3 corroborated the evidence of PW1 and confirmed that PW1 told her that one 'Papa Mweni' had tried to defile her. PW2, her mother equally corroborated the evidence of both PW1 and 2. She confirmed that PW3 rescued her daughter and the latter reported that indeed it was 'Papa Mweni' who had tried to defile her. The said 'Papa Mueni' lived barely three doors from her house. Together with PW1, they walked to Papa Mueni's house where they found his wife. Shortly afterwards, the Appellant arrived and PW1 identified him as the assailant.

According to PW2, PW1 had described to her how the Appellant was dressed during the incident; he wore a jeans trouser, a shirt and a stripped vest. When the Appellant arrived at his house, he was dressed in the same manner that PW1 had described to PW2. PW2 then escalated the matter by reporting to the police after which the Appellant was arrested. It was the further evidence of PW1 that the Appellant pushed a Kshs. 50 note which was intended to induce her not to tell anyone. She handed over the money to her mother and the same was adduced in court as evidence.

PW4, PC Patrick Mbae of Gataka Police Post under Ongata Rongai Police Station was the arresting Officer. He confirmed he arrested the Appellant on 28th October, 2012 from his house where he was locked up after members of the public threatened to lynch him. **PW5**, PC Michal Choros was the investigating Officer. He summed up the evidence of prosecution witnesses. In addition, he produced the Kshs. 50 note that was given to him by PW2 and a Post Rape Care Form that was filled at Ongata Rongai Health Centre.

PW6 and **7,** Dr. Joseph Maundu of Police Surgery and Jackline Tsuma, a Clinical Officer at Ongata Rongai Health Centre respectively adduced the medical evidence in respect of PW1. PW6 who produced

the P3 Form examined PW1 on 30th October, 2012 and noted that she had injuries on her back side of the head, ear and chest. Her hymen was intact. He classified the injuries as soft tissue. PW7 treated PW1 on 29th October, 2013 and filled the Post Rape Care Form. The same showed that PW1 had suffered bruises at the back of the head, back of the ears and neck. Her inner side of the thighs too had bruises. Her hymen was intact.

After the close of the prosecution case, the trial magistrate ruled that a prima facie case had been established and put the Appellant on defence. He opted to give an unsworn statement of defence. He stated that while he was in his house on 28th October, 2012 one of his neighbour's, PW2 went to the house with the intent of fighting his wife. She started insulting his wife and when he tried to separate them the neighbour tore his clothes. The scene attracted neighbours and PW2 left and reported at the police station that he had tried to defile her daughter. He denied he committed the offfence.

Determination

After considering the evidence on record, I have arrived at the issues for determination to be whether the Appellant's right to a fair trial was infringed on and whether the case was proved beyond a reasonable doubt. The record of proceedings shows that the Appellant requested to be supplied with the prosecution witness statements both on 5th and 15th of April, 2013 and the court made orders accordingly. When the mater came up next for hearing on 23rd April, 2013, and upon the court asking him whether he was ready to proceed, he confirmed that he had been supplied with the witness statements. In cross-examining PW5, the investigating officer, he asked him why the complainant's statement indicated that the offence took place at 7.00 p.m. This definitely pointed to the fact that he had witness statements. His assertion to the contrary is therefore false.

On prove of the case, PW1 the complainant candidly gave an account of how when she was walking on the road at about 7.00 pm, the Appellant tripped her as a result to which she fell down. Thereafter, he pulled her into a quarry where she was also walking by. It is then that the Appellant tried to forcibly remove her skin tight and skirt with a view to defiling her. Before she was rescued by PW3 the Appellant had already laid on her and had removed her trouser half-way. She screamed for help and that is how PW3 heard her distress call and rushed to the scene and rescued her. It is PW3 who then escorted her to their house and handed her over to her mother, PW2. PW1 was categorical and undoubtedly told PW2 and 3 that the person who attacked her and attempted to defile her was 'Papa Mweni'.

Indeed, immediately PW1 arrived home, PW2 went straight to the house of 'Papa Mweni' which was barely three doors from their house. According to PW2, PW1 had described to her how the Appellant was dressed. On enquiring from his wife whom she found in his house, she confirmed that the Appellant was dressed in the same manner as PW1 had described to her. Shortly afterwards, the Appellant arrived dressed in a jeans trouser and a vest as described by PW2. I wish to note however, that the evidence of PW1 did not capture the manner in which the Appellant was dressed. It was only introduced by PW2 in her evidence in chief. She was therefore not corroborating any evidence of the key witness. As such, the same could not be relied upon to found a conviction against the Appellant. Nevertheless, there is no doubt that PW1 candidly and firmly stated that it was Papa Mweni their neighbor who attempted to defile her. No doubt, PW2 went straight to the house of the Appellant after the report was made to her and PW1 shortly afterwards identified him when he arrived home.

The submission of the Appellant is that it was dark being 7.00 p.m. and therefore the conditions of identification were not conducive. Although PW1 did not describe the nature of the lighting, I take cognizance of the fact that the Appellant having lived within the vicinity of PW1's home was well known to her. Although it may have been partially dark, I am unable to doubt that PW1 did not recognize the Appellant who was a person so well known to her. Therefore, the identification was by recognition which is more assuring and satisfactory as was observed by the Court of Appeal in the case of **Anjononi & Others vs Republic [1980] KLR 59**, that **"…. is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other"**

No evidence was tendered demonstrating that PW1 or 2 had any reason to implicate their neighbor for no apparent reason. In the circumstances, I find and hold that the Appellant was positively identified.

The next issue for determination is whether the Appellant intentionally attempted to cause penetration. PW1 testified that the Appellant tripped her then got hold of her and dragged her into the quarry by the road side. It is there that he lay on her, tried to remove her skin tight and skirt with a view to defiling her. With her wits, she bit the Appellant on the hand as a result of which the Appellant relaxed and PW1 was able to scream for help. By this time, her trouser(skin tight) was halfway down her body. By luck, PW3 heard her scream and answered to the call of distress. As she rescued her from the quarry, she informed her that it was 'Papa Mweni' their neighnour who had tried to defile her.

Of course there was no corroboration of her evidence for want of an eye witness. But I bear in mind that this being a sexual offence case against a minor child, the proviso to Section 124 of the Evidence Act confers the court with the power to convict an offender on the uncorroborated evidence of the minor child as long as it believes in the evidence of the minor. The learned trial magistrate did observe that PW1 was not only generous with her evidence but spoke the candid truth. On the part of this court, I also have no doubt that PW1 spoke the naked truth. Nothing therefore stopped the trial court from convicting the Appellant based on the uncorroborated evidence of PW1 with respect to count 1.

With regard to Count II, my summary of the evidence on record drives me to conclude that before the Appellant attempted to defile PW1, he tripped her which occasioned her some injuries on the shoulders. Further injuries were occasioned when he dragged her into the quarry before attempting to defile her. Her evidence was dully corroborated by PW6, Dr. Joseph Maundu of Police Surgery who produced her P3 form and PW7, Jackline Tsuma a Clinical Officer at Ongata Rongai Health Centre where PW1 was first treated. PW7 observed bruises on the back of her head, ears and neck. In corroborating the attempted defilement, PW7 observed bruises on the inner side of her thighs. She produced a medical report in this regard. Accordingly, I hold that the learned trial magistrate did not convict based on inconsistent or uncorroborated evidence. It is evident that the prosecution tendered cogent and water-tight evidence sufficient to found a conviction for both offences. The conviction was therefore safe.

On sentence, in count I the Appellant was charged under **Section 9(1)(2) of the Sexual Offences Act 3 of 2007.** **Sub section (1)** describes the offence of attempted defilement while **Sub section (2)** provides for the penalty of the offence which is upon conviction to imprisonment for a term of not less than ten years. The learned trial magistrate imposed the minimum mandatory penalty which I would not have any reason to disturb. With respect to count II, Section 251 of the Penal Code provides for an imprisonment term of up to five years. The learned magistrate having opted to impose a fine, ought to have been guided by **Section 28 (2) of the penal Code**. Having imposed a fine of Kshs. 10,000/= the default sentence ought to have been three months and not four months. This court will therefore have to alter the default sentence so as to reflect the legal penalty provided.

In the end, I find that the prosecution proved both counts beyond a reasonable doubt. The Appellant's defence did not ouster the prosecution strong evidence which I dismiss as lacking in merit. This appeal lacks merit and the same is entirely dismissed with respect to conviction. I also uphold the sentence in respect to count I. With respect to count II, I substitute the sentence with an order that the Appellant shall pay a fine of Kshs. 10,000/= in default serves three months imprisonment. In the event that the fine is not paid, the sentences shall run consecutively. The period that the Appellant remained in remand before the conviction of one year three months will be taken in to account in tabulating the jail term. It is so ordered.

DATED AND DELIVERED THIS 12TH DAY OF APRIL, 2017

G.W. NGENYE-MACHARIA

JUDGE

In the presence of;

1. Appellant in person.

2. M/s Sigei for the Respondent.