



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL APPEAL NO. 226 OF 2013
FRANCIS KIPSANG CHEMASE.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

(An Appeal from the Judgment of the Resident Magistrate Honourable M.D IRERI DM II PROOF in Eldoret Criminal Case No. 4536 of 2011, dated 20th April, 2012)

JUDGMENT

1. The appellant *Francis Kipsang Chemase* was charged with the offence of defilement contrary to *Section 8(1)* as read with *Section 8(2)* of the *Sexual Offences Act*. It was alleged that on 10th December 2011 at [particulars withheld] village in Keiyo south District of the Rift Valley Province, he unlawfully and intentionally caused penetration of his genital organ into the genital organ of *B.K* (Name withheld) a boy aged 7 years.
2. The appellant also faced an alternative count in which he was charged with the offence of committing an indecent act contrary to *Section 11(1)* of the *Sexual Offences Act*. The particulars thereof were that on the same date and place, he unlawfully and indecently allowed his genital organ to come into contact with the genital organ of *B.K*, a boy aged 7 years.
3. After a full trial, he was convicted of the lesser offence of attempted defilement contrary to *Section 9(1)* of the *Sexual Offences Act*. He was sentenced to twenty years imprisonment.
4. The appellant was aggrieved by his conviction and sentence hence this appeal. He filed his petition of appeal on 25th November 2013 but on 23rd June 2016, he was granted leave by this court to amend his grounds of appeal under *Section 350* of the *Criminal Procedure Code*.
5. In his amended grounds of appeal which he referred to as “supplementary grounds of appeal”, the appellant listed eight grounds which can be condensed into three main grounds. He complained that he was convicted on the basis of evidence which was not sufficient to prove the offence beyond any reasonable doubt; that the trial magistrate erred in law and fact in disregarding his defence and in failing to provide him with witness statements despite several requests.
6. At the hearing, the appellant appeared in person. He relied on home made written submissions which he filed together with the amended grounds of appeal on 10th March 2017.
7. Before the hearing date, the appellant was served with a notice by the state under *Section 354(3)* of the *Criminal Procedure Code* (CPC) notifying him that the state intended to apply to have his sentence

enhanced if his appeal was not successful. The appellant despite the notice chose to prosecute his appeal.

8. The appeal is opposed by the state. Learned prosecuting counsel *Miss Odour* in her submissions urged the court to find that the appellant was wrongly convicted and sentenced for the offence of attempted defilement while the evidence tendered by the prosecution proved the offence of defilement beyond any reasonable doubt.

She urged the court to invoke its powers under *Section 354* of the *C.P.C* and set aside the sentence imposed by the trial court which in her view was unlawful and substitute it with a sentence of life imprisonment.

9. This being a first appeal to the High Court, I am reminded of the duty of the first appellate court which is to revisit and to re-evaluate the evidence presented to the trial court to arrive at its own independent conclusions. In undertaking this task, I should remember that unlike the learned trial magistrate, I did not have the advantage of seeing or hearing the witnesses and give due allowance for that disadvantage.

See: ***Okeno V Republic (1932) EA; Kiilu & Another V Republic (2005) KLR 175; Kinyanjui V Republic (2004) 2 KLR 364.***

10. I have considered the grounds of appeal, the evidence before the trial court and the parties rival submissions. I have also read the judgement of the learned trial magistrate.

11. I wish to deal first with the appellant's complaint that the trial magistrate erred when he denied him provision of witness statements in the course of the trial.

It is my finding that this claim is not supported by the proceedings of the lower court. The record shows that the appellant never expressly applied to be provided with witness statements. He only sought adjournment on 9th January, 2012 on grounds that he had not been supplied with those statements. The court in granting the adjournment nevertheless directed that the appellant be assisted by an organization referred to as "CLEAR Office" to make copies of witness statements and the charge sheet. The appellant did not thereafter complain to the trial court that he had not been able to obtain the said statements.

Having not applied for witness statements and having not given the court feedback regarding whether or not he had obtained the witness statements pursuant to the order of 9th January 2012, the appellant cannot now turn around and claim that the court denied him an opportunity to be supplied with those statements. Nothing therefore turns on that ground of appeal.

12. Regarding the claim that the trial court disregarded his defence, the record, particularly the judgement of the learned trial magistrate reveals that the trial court carefully considered the appellants defence but dismissed it as untrue, a mere denial and an after thought. I thus find no merit in that complaint.

13. Turning now to the crux of the appeal, which is the appellants contention that he was convicted on the basis of uncorroborated, contradictory prosecution evidence which did not prove the offence of attempted defilement beyond reasonable doubt, I find that though there were slight contradictions in the evidence adduced by PW1 and PW2 who were the key prosecution witnesses, the contradictions related to minor details regarding who between PW2 and his brother took the victim to hospital for examination. This discrepancy was not material and did not affect the prosecution's case.

14. After my own re-appraisal of the evidence, I find that the complainant's age stated to be 7 years in the charge sheet was not disputed.

The complainant (PW1) after a brief voire dire examination narrated how the appellant, a person he knew before as a neighbour lured him out of a house on the material day by promising to give him Ksh 60 and on following him for about 100 metres, he sodomised him. PW2 heard his cry for help, rushed to the scene and found the appellant in a compromising position with the minor. He was lying on top of PW1 without his trousers and PW1 did not have his shorts. PW2 recalled that on seeing him, the appellant ran

away. He was however arrested on the following day and handed over to PW4 P.C *Ali Jattan* who was the investigating officer at Kaptagat police station.

15. The evidence of these two witnesses was corroborated by the evidence of PW3 *Dr. Cynthia Cheptoi Kibet* who on examining PW1 found that his anal area was tender. She concluded that there was no evidence of penetration but there was attempted defilement.

16. Given the evidence of PW2 and that of PW3, I find no reason to fault the findings of the learned trial magistrate that the evidence adduced before him proved beyond doubt the offence of attempted defilement and not the offence of defilement. There is also no doubt that the appellant was positively identified as the victim's assailant given that it is not disputed that the appellant was well known to both PW1 and PW2 prior to the material date and from PW2's evidence, the offence was committed around 3pm in broad daylight. It is not contested that the appellant was a neighbour to both witnesses and a friend to PW2. I therefore agree with the learned trial magistrate that given the above facts, there could not have been the possibility of mistaken identity in this case.

17. The claim that the appellant was framed with the offence by PW2 due to an existing grudge was expressly denied by PW2. In any event, the victim in this case was PW1 not PW2 and there is no indication from the evidence that PW1, a minor aged 7 years had any reason to give false evidence against the appellant.

18. Under *Section 180* of the *Criminal procedure code*, the learned trial magistrate had the power to convict the appellant with the offence of attempted defilement although he had not been charged with it.

As stated earlier, after analyzing the evidence on record, I have come to the same conclusion as the learned trial magistrate did that the evidence proved beyond doubt the offence of attempted defilement and not the offence of defilement as submitted by the state. It would appear that the appellant was disputed and had to run away before completing the offence when PW2 appeared at the scene. I am thus satisfied that the appellant was properly convicted.

19. On sentence, *Section 9(2)* of the *Sexual Offences Act* prescribes a mandatory minimum sentence of ten years imprisonment for a person convicted of the offence of attempted defilement. In this case, the appellant was sentenced to twenty years imprisonment.

20. The record shows that the appellant is not a first offender. He has one previous relevant conviction. In the circumstance, it cannot be said that the sentence of ten years imprisonment was manifestly harsh or excessive. I find that the sentence was lawful and reasonable. The same is hereby affirmed.

21. For the forgoing reasons, I do not find any merit in this appeal. It is accordingly dismissed.

It is so ordered.

C.W GITHUA

JUDGE

DATED, SIGNED and DELIVERED at **ELDORET** this 30th day of May, 2017

In the presence of:

Appellant

Ms Kigegi for the state

Lobolia court clerk