CRIMINAL DIVISION

CRIMINAL APPEAL NO.55 OF 2016

(An Appeal arising out of the conviction and sentence of Hon. Shadrack M. Mwinzi – SRM delivered on 2nd March 2016 in Kibera CM. SO Case No.39 of 2016)

LUCAS BUNGOMA ONKOMBA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Lucas Bukomba Onkoba was charged with **defilement** contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act**. The particulars of the offence are that on the 18th day of April 2014 at Ole Kasai area in Ongata Rongai Township within Kajiado County, the Appellant, intentionally and unlawfully caused his penis to penetrate the vagina of D M, a child aged five years. In the alternative, he was charged with **committing an indecent act with a child,** contrary to **Section 11(1)** of the **Sexual Offences Act.** The particulars of the offence are that on the same date and in the same place, the Appellant intentionally and unlawfully touched the vagina of D M, a child aged five years with his penis.

When the Appellant was arraigned before the trial magistrates' court, he pleaded not guilty to the charge. After full trial, he was convicted of the main charge of **defilement** and was sentenced to serve life in prison. The Appellant was aggrieved by his conviction and sentence and has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction. He faulted the trial magistrate for relying on evidence which, in his view, was inconsistent and contradictory to convict him. He took issue with the fact that the court failed to put his defence into consideration before arriving at the decision that he had indeed committed the offence. In conclusion, he submitted that the medical evidence adduced in court did not establish an act of defilement and that the prosecution did not prove its case beyond reasonable doubt. In the premises therefore he urged the court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, the Appellant presented his written submissions to the court for consideration. Ms. Atina, learned counsel for the State, opposed the appeal. She submitted that the prosecution was able to prove all the ingredients of the offence beyond any reasonable doubt. She submitted that there was evidence of penetration on the complainant which was corroborated by the medical evidence adduced before the trial court. She further stated that the complainant was a minor and that she had properly identified the Appellant as he was well known to her prior to the incident. It was her assertion that the evidence before the court was cogent, consistent and credible. Finally, she submitted that the trial court considered the defence of the Appellant and urged the court to dismiss the appeal.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced

by the prosecution witnesses and by the defence before the trial court, so as to arrive at its independent determination of whether or not to uphold the conviction of the Appellant. In so doing, the court is mindful of the fact that it neither saw nor heard the witnesses as they testified and therefore cannot give an opinion as regarding the demeanor of the said witnesses **(**see **Okeno -vs- Republic [1972] EA 32)**.

In the present appeal, the issue for determination by the court is whether the prosecution established a case for this court to convict the Appellant on the charge of defilement of a child to the required standard of proof beyond any reasonable doubt.

The facts of the case as assessed by the court are as follows: the complainant, Ms. D M, was at the time a child aged five years. Her age was confirmed by her mother, PW2 R K, who produced a birth certificate indicating that the complainant was born on 28th June 2009. According to the complainant's testimony, on 18th April 2014, while at home, the Appellant called her to his house. The house is located near their home. The Appellant then closed the door and removed the complainant's clothes. He then warned her not to tell her mother about the incident and placed her on his bed. The Appellant then removed his trousers and while covering the complainant's mouth and holding her neck, placed his penis inside the complainant's vagina. The complainant complained of pain. The Appellant stopped the sexual assault.

At that same time, PW2 had just arrived home from her friend's house and saw the complainant's sandals at the Appellant's doorstep. She called out her name with the intent to send her to the shop. It was then that the Appellant opened his door for PW2, who then saw the complainant with her bikers in her hand. PW2 raised alarm and quickly locked both the complainant and the accused inside the house. She called out for help. People quickly responded to her cries. A neighbour then called the police and the Appellant was arrested and taken to Kisasi Police Station. The complainant was then taken to Nairobi Women's Hospital, where she was medically examined, treated and discharged and a report prepared to that effect. At the Police Station, the late CPL Gichuki was assigned to investigate the case. After concluding his investigations, he formed the view that indeed a case had been established for the Appellant to be charged with the offences herein.

When the Appellant was put on his defence, he denied committing the offence and told the court that on the day the offence was committed, he left work at 6.30am. When he got back home, he received a call that a colleague was unwell and he went to assist from 8.00am to 1.00pm and then went back to his office to collect advance pay. He then went back home and borrowed a jiko from the complainant's mother. He stated that he went to take a bath but when he came back, someone had locked him in and was screaming after which people came and arrested him. He stated that the complainant's parents later asked him for money in order to settle the matter. The mother asked for Kshs.200,000/= while the father asked for Kshs.150,000/=. In essence, it was the Appellant's defence that the charge against him was lodged by the parents of the complainant in order to extort money from him.

Upon re-evaluating, the facts of this case, it is clear to the court that for the prosecution to prove its case on the charge of defilement of a minor, it was required to establish that there was penetration; that the complainant was a minor and the identity of the perpetrator.

In the present appeal, the Appellant stated in his submissions that in the absence of incriminating evidence in the form of a certified medical report indicating that there was penetration, the trial court ought to have given him the benefit of the doubt and acquitted him on the charge of defilement. It is important to note that medical evidence is neither mandatory nor the only evidence upon which an accused person can properly be convicted. The court can convict on the evidence of the victim alone, if it believes the victim and records the reason for such belief. **Section 2** of the **Sexual Offences Act** defines ***"penetration as the partial or complete insertion of the genital organs of a person into the genital organs of another person."*** From the record of the trial court, the medical evidence adduced indicated that there was partial penetration.

The evidence of PW3 and PW4, both certified medical practitioners, indicated that the external genitalia of the complainant was normal, there were no lacerations and that indeed the complainant's hymen was intact. However, PW3 stated that the complainant's vagina was tender and hyperemic, while PW4 stated

that the hymen was reddish in color, showing that there was impact on it. It is important to note that a slight penetration constitutes a valid penetration within the meaning of the act and consequently warrants a conviction. The complainant told the court that the Appellant removed his clothes and put his ***"thing for urinating in my thing for urinating. I felt pain."*** However this evidence was disproved by medical evidence. What is clear from the evidence adduced is that the Appellant may have attempted to sexually assault the complainant but was prevented from completing the assault by the intervention of the complainant's mother who went to fetch the complainant from the Appellant's house.

In the present appeal, the trial court conducted a *voire dire* examination in compliance with **Section 19** of the **Oaths and Statutory Declarations Act (Cap.15)**, in order to satisfy itself that the child possessed sufficient intelligence to understand the nature of the proceedings and that the child appreciates the need of telling the truth and the importance of taking the oath. The provision under **Section 124** of the **Evidence Act** is to the effect that the courts shall no longer be hamstrung by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful **(**See **Mohammed vs Republic [2006] 2 KLR 138).**

In the present appeal, the complainant identified the Appellant as the person who had attempted to defile her but did not complete the act. The Appellant was well known to her. They were neighbours and he occasionally escorted her to school. In fact, he was the one who called her and opened his door for her to allow the complainant to enter the house. Her evidence, as appears from the record of the trial court was cogent, vivid and consistent in the description of what the Appellant had done to her. It was corroborated by the testimony of PW2 who found the complainant in the Appellant's house in circumstances that clearly indicated he wanted to sexually assault the complainant.

The sole evidence of a child complainant in a sexual offence is enough to warrant a conviction because the offence in itself is private in nature.

This court is of the view that the defence put forward by the Appellant does not dent the otherwise strong evidence adduced by the prosecution connecting him with the crime. His culpability on the offence of **attempted defilement** contrary to **Section 9(1)** as read with **Section 9(2)** of the **Sexual Offences Act** was established to the required standard of proof beyond any reasonable doubt. His appeal on conviction on the more serious charge of **defilement** contrary to **Section 8(1)** of the **Sexual Offences Act** is set aside and substituted by a conviction by this court of the lesser but cognate offence of **attempted defilement** contrary to **Section 9(1)** of the **Sexual Offences Act**.

As regards sentence, **Section 9(2)** of the **Sexual Offences Act** provides for a term of imprisonment of not less than ten (10) years. The life imprisonment sentence is therefore set aside. The complainant was five (5) years old at the time the offence was committed. Taking into consideration the entire circumstances of the case, this court sentences the Appellant to serve ten (10) years imprisonment with effect from 2nd March, 2016. It is so ordered.

DATED AT NAIROBI THIS 25TH DAY OF MAY 2017

L. KIMARU

JUDGE