**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MACHAKOS**

**CRIMINAL APPEAL 55 OF 2015**

**JAMES NZUKI KITHUMBI…..……....…APPELLANT**

**VERSUS**

**REPUBLIC…….…….....RESPONDENT**

**(An appeal arising out of the conviction and sentence by Hon. C. K. Kisiangani RM delivered on 7th April 2015 in Criminal Case No. 373 of 2014 in the Chief Magistrate's Court at Machakos)**

## JUDGMENT

## The Appeal

The Appellant was convicted of, and sentenced to serve ten (10) years imprisonment for the offence of attempted defilement, contrary to section 9(1) (2) of the Sexual Offences Act. The particulars of the offence were that on 6th March 2014 at [particulars withheld] town in Machakos District within Machakos County, he intentionally attempted to cause his penis to penetrate the vagina of M B, a child aged six and a half years. The Appellant had also been charged with an alternative offence of an indecent act with a child contrary to section 1(1) of the Sexual Offences Act.

The Appellant being aggrieved has appealed the conviction and sentence meted by the trial magistrate. The Appellant's grounds of appeal are stated in his Petition and Memorandum of Appeal filed in Court on 15th April 2015, as well as in his Amended Supplementary Grounds of Appeal and submissions dated 23rd November 2016and additional submissions dated 29th March 2017. The grounds of appeal are that:

1. THAT the particulars of the of the main charge giving rise to the conviction are defective in that the phrase "intentional and unlawful" has been omitted .

2. THAT the trial magistrate misdirected himself when convicting the Appellant without observing that the entire evidence was marred with conflicting testimonies

3. THAT the trial court erred in law and fact when failed to note that most of the essential witnesses were not summoned to support the charge that were leveled against the Appellant.

4. THAT the learned magistrate shifted the burden of proof from the prosecution side and placed it on the Appellant.

The Appellant in his submissions argued that he was charged with attempted defilement while the evidence adduced reflected that PW2 was defiled. Moreover, that the particulars in the main charge do not include the words "Intentionally and unlawfully" as provided for under section 3 of the Sexual

Offences Act. The Appellant contended that in a case of this nature, it is only the doctor who could determine whether the incident had really taken place by examining both the victim and the defendant, and the evidence of PW4 who was the doctor and the P3 and P.R.C forms confirmed that the act was that of defilement and not of any attempt.

In addition, that PW1 in her evidence alleged that she was called by some girls to go back home because something had happened to her daughter, and that the girls were staying with the Appellant and are the one who caught him in the alleged act of attempted defilement. However, that the prosecution did not give any tangible reason for not calling them as witnesses, and the failure to call these two girls (M and M) where key witnesses in this case weakened the prosecution case as was laid in the case of **Wendo vs Republic, (1953) E.A. 166.**

The Appellant submitted that that the evidence of PW2 was that of single witness and as he was denied the opportunity to cross examine her because she was a minor, it could have been important for the prosecution side to bring on board thee credible witnesses who were mentioned by PW1 so as to collaborate the evidence of PW2.

Lastly, the Appellant contended that the trial court failed in its mandate by not examining the complainant through *voire dire* examination contrary to section 125 of the Evidence Act and section 19 of Oath and Statutory Declaration Act . It was alleged that the trial court did not adhere to the law with respect to the PW2 who was 6½ years but adjourned the case and stood down the witness, and on resumption, did not put the witness under *voire dire* examination but proceeded on to take her evidence.

Ms Rita Rono, the learned prosecution counsel, filed written submissions dated 15th February 2017 wherein it was contended that Prosecution called in a total of five witnesses who were able to procure the evidence that was quite necessary for the conviction of the Appellant. The counsel set out the testimony of the various witnesses, and submitted that from the evidence, the offence was committed in broad day light when circumstances were favorable for the identification.

**The Evidence**

As this is a first appeal, I am required to re-evaluate the evidence tendered in the trial Court, and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

The Prosecution called five witnesses to testify. PW1 was R M, the complainant's mother who stated that on the 6/3/14 at around 3pm she was at work when one of the girls who lived with the Appellant called her to go back home. PW1 testified that she lived in the same compound with the Appellant and that when she went to the Appellant's house she found the complainant outside their house shaking, and the Appellant told her he had been playing with the child. She reported the incident to the police and took the complainant for medical examination.

PW2, the complainant, stated after a *voire dire* examination that on 6/3/14 at around 3pm she was going home from school when she saw the appellant who a neighbor and he was preparing chicken. The Appellant then called her, and her testimony as to the events that thereafter happened as been reproduced later on in this judgment.

PW3 was PC Darius Mbongo, the investigating officer who testified that a report was made to the police station by PW1, and that he visited the scene and found the Appellant without his inner wear and a clear fluid being discharged from his genitalia. Further, that the complainant was in shock thus could not speak. He then arrested the Appellant.

The next witness was Dr. Ondiek Dorothy (PW4) a medical officer at Machakos Level 5 Hospital who produced the P3 form filled by Dr. Bagwasi who had since left the Machakos Level 5 Hospital. She stated that on examination, the genital organs of the complainant and in particular the labia majora and

minora were normal. The last witness (PW5) was PC Siken Wasili who was attached to Kyumvi Police station and who produced the complainant's birth certificate as an exhibit.

**Analysis and Determination**

The issues raised by the grounds of appeal and arguments made by the Appellant and Prosecution are firstly, whether the Appellant was convicted on the basis of a defective charge; secondly if so, whether he was convicted for the offence of attempted defilement on the basis of sufficient and satisfactory evidence.

On the first issue, the Appellant argued that the charge was defective as the particulars thereof did not include the phrase "intentional and unlawful" the offence was not supported by the evidence that was presented by the Prosecution. The first question as to whether a charge is defective is to be examined in light of the requirements of the law as regards the framing of charges as stated in section 134 of the Criminal Procedure Code which provides as follows:

> **"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."**

In addition it was held in **Sigilani vs Republic, (2004) 2 KLR, 480** that:

> ***"The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence."***

The charge sheet in the present appeal did clearly indicate that the Appellant was charged with the offence of attempted defilement, contrary to section 9(1) (2) of the Sexual Offences Act. The particulars of the offence were that on 6th March 2014 at [particulars withheld] town in Machakos District within Machakos County, he intentionally attempted to cause his penis to penetrate the vagina of M B, a child aged six and a half years.

In order to find out if there was an error made in this respect in this appeal, one must interrogate the elements of the offence of attempted defilement. Section 9(1) of the Sexual Offences Act refers to an attempted defilement as an act which would cause penetration. It states as follows:

> **"(1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement. "**
>
> **(2) A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years."**

The key element of the offence of attempted defilement is the attempt to commit an act which would cause penetration which is clearly stated in the particulars of the charge, and the charge correctly states both the section creating the offence and the penalty section. The charge was therefore properly drafted and disclosed an offence known in law and the relevant particulars.

As to whether the evidence adduced before the trial Court did disclose the offence of attempted defilement, the Court of Appeal in **Yongo vs Republic** ***[1983] KLR, 319*** did hold that a charge that is not disclosed by evidence is defective under section 214 of the Criminal Procedure Code and stated as follows in this regard:

> **"In our opinion a charge is defective under Section 214(1) of the Criminal Procedure Code where:**

**(a) it does not accord with the evidence in committal proceedings because of inaccuracies or deficiencies in the charge or because it charges offences in the charge not disclosed in such evidence or fails to charge an offence which the evidence in the committal proceedings discloses; or**

**(b) it does not, for such reasons, accord with the evidence given at the trial; or**

**(c) it gives a misdescription of the alleged offence in its particulars."**

Section 2 of the Sexual Offences Act in this respect defines penetration as "the partial or complete insertion of the genital organs of a person into the genital organs of another person", while section 388 of the Penal Code defines an attempt as follows;

**"(1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.**

**(2) It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfillment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.**

**(3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence."**

In **Francis Mutuku Nzangi v Republic [2013] eKLR**, the Court of Appeal explained these provisions as follows;

**"Our understanding of this provisions is that if a person conceives an idea or plan to commit an offence and sets out to effectuate the intention by taking definite steps or puts in motion a chain of events or state of things calculated to attain that objective as manifested by some open and discernible act or acts but fails to achieve his objective, he will be guilty only of an attempt to commit the offence. The attempt is proved whether or not that person did all the acts necessary to perfect the offence and quite irrespective of what intervening act or change of heart may have aborted the fulfillment. It also matters not that circumstances did in fact exist, unbeknown to the person, that would have rendered his success impossible."**

The offence under section 9(1) of the Sexual Offences Act is therefore committed when a person attempts to causes penetration with his genital organs, manifested by facts that point to an act of penetration. However, in an offence of attempted defilement, no penetration takes place, and this is what distinguishes the offence from that of defilement.

The complainant's (PW2) evidence in this regard on 23rd May 2015 was as follows:

**"…I know James Nzuki. We do not live together. On 6/3/2014 at around 3 pm I had left school. I was going home. I had gone to say hallo to mzee. I saw James Nzuki. He was preparing chicken stuff. He did bad manners to me. He came to our window and called me twice. I came out. He took me to his house. I came out. He took me to his house. He sat me on a chair. He peeped twice then removed my pans and his. I was in his house. He removed his thing and inserted in me. I did not scream. I felt pain. He inserted his kalamu in me. He did bad manners. I told my mother on that day. I was taken to hospital on that day…."**

This testimony of PW2 proved beyond doubt that there was an attempt at penetration by the Appellant, who was known to the complainant before the incident and was seen and identified by the complainant during the incident which happened during daytime. It is clear from the evidence that the Appellant did

undertake actions with the aim and intention of inserting his genital organ into the complainant's genital organ.

The medical evidence by PW4 and the P3 and Post Rape Care form produced as exhibits showed that there were no bruises on PW2's genital organs, which was only indicative of no penetration having taken place. There was therefore insufficient evidence that there was defilement for this reason. However, PW2's account of what happened, including the medical evidence that spermatozoa was found in her urine was sufficient evidence of attempted penetration, and the evidence therefore did disclose the offence of attempted defilement.

The Appellant alleges that the evidence of PW2 was given contrary to section 19 of the Oaths and Statutory Declarations Act which provides as follows:-

> **"where in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person understand the nature of an oath, his evidence may be received, though not on oath, if in the opinion of the court or such a person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced in writing in accordance with Section 233 of the Criminal Procedure Code shall be deemed to be a deposition within the meaning of that Section."**

In the case of **Julius Kiunga M'rithia vs. Republic, [2011] eKLR**, the court held -

> **"Under Section 19 of the Oaths and Statutory Declarations Act, (Cap. 15, Laws of Kenya), where a child of tender years is called as a witness in a proceeding there are two things the trial court must be severally satisfied about -**
>
> **(1). whether the child understands the nature of an oath; or**
>
> **(2). if the child in the opinion of the court does not understand the nature of an oath, whether the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth."**

The procedure for conducting a *voire dire* examination was set out in **Fransisco Matove vs. Regina [1961] E.A**. as follows: the trial magistrate should question the child to ascertain whether the child understands the nature of the oath, and (2) if the court does not allow the child to be sworn, it should record whether or not, in the opinion of the court the child is possessed of sufficient intelligence to justify the reception of evidence, and understands the duty of speaking the truth.

In the present appeal, I have perused the record of the trial Court and note that on 6th May 2015, PW1 who was the complainant's mother produced her birth certificate to show that the complainant was born in 2007 and was 6½ years old. After her evidence, a *voire dire* examination of PW2 then took place in which she was asked various questions by the trial magistrate, including what her name was and which class she was in, to which she indicated that she was in standard one. When she was asked what happens when she does not say the truth PW2 indicated she did not know, and the trial magistrate then recorded as follows :

> **"The child herein does not understand the value of oath since she is of tender years. She will give unsworn testimony. She is of enough intelligence to testify".**

PW2 then proceeded to give unsworn testimony and was stood down after she the prosecution indicated she had refused to speak. On 23rd May 2015 the case came for further hearing and PW2 continued to give unsworn testimony after the Prosecutor indicated that she had been stood down.

The record of the trial shows that the magistrate followed the requisite procedure and recorded the *voire dire* examination of PW2, and there was thus compliance with provisions of Section 19 of the Oaths and Statutory Declarations Act. Since the purpose of a *voire dire* examination is to determine whether a child of tender years understands the nature of an oath to determine whether or not he or she should give sworn or unsworn testimony, and once this is established there is no need to undertake *voire dire* examinations every time the child testifies. The evidence of PW2 is admissible and can be relied upon.

There was also no need for corroboration of PW2's evidence by the two girls who the Appellant alleges should have been called as witnesses. This is for reasons that the evidence of PW1 was sufficient on its own under section 124 of the Evidence Act in this regard provides as follows as regards corroboration of a victims evidence in a sexual offences case:

> **"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.**
>
> **Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."**

PW2 was consistent in her evidence upon being recalled to continue with her testimony, and this Court is satisfied that she was telling the truth. Being a child of tender years of 6½ at the time and having undergone a traumatic experience, her previous reluctance to testify was normal in the circumstances. In addition, section 143 of the Evidence Act provides that no particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact, and her evidence as corroborated by the medical evidence was sufficient to prove the fact of attempted defilement by the Appellant.

The Appellant also alleges that he was not given the opportunity to cross-examine PW2 because she was a minor. However, the trial record shows that on 23rd May 2015 after PW2 gave her evidence in chief, the proceedings were as follows:

> "**Cross-examination:**
>
> **Nil**
>
> **Re-examination:**
>
> **Nil"**

The Appellant was thus given the opportunity to cross-examine but chose not to ask any questions, and he cannot now claim that his rights were infringed in this regard.

On the appeal against the sentence, I note that the even though the Appellant was a first offender, the minimum sentence for the offence of attempted defilement of a child is ten years' imprisonment, and this Court therefore has no discretion to revise or reduce the sentence imposed upon the Appellant.

I accordingly find the Appellant's appeal not to have merit and uphold and affirm the conviction of the Appellant for the offence of attempted defilement, contrary to section 9 (1) (2) of the Sexual Offences Act and confirm the sentence of ten years imprisonment imposed upon the Appellant for this conviction.

It is so ordered.

**DATED AT MACHAKOS THIS 19TH DAY OF JUNE 2017.**

**P. NYAMWEYA**

**JUDGE**