REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL APPEAL NO.21 OF 2017

(Appeal Originating from Nyahururu CM's Court Cr.No.2483 of 2010 by: Hon. Mikoyan - Ag. SPM.)

CHRIS MANG'ERA ARUNG'A……..……..APPELLANT

-V E R S U S –

REPUBLIC…….……RESPONDENT

J U D G M E N T

Chris Mang'era Arunga, the appellant herein was convicted by **Hon. Mikoyan Ag. SPM** for the offence of ***defilement Contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act No.3 of 2006***.

The particulars of the charge were that on 2/10/2010 at [particulars withheld] Administration Police Line in Nyandarua, intentionally and unlawfully caused his genital organ i.e. penis to penetrate the genital organ i.e. vagina of **W.M.K**. a girl aged 17 years. Upon conviction the appellant was sentenced to serve twenty years imprisonment.

In the alternative, the appellant faced a charge of ***committing an indecent act with a child Contrary to Section 11(1) of the Sexual Offences Act.*** No finding was made on the alternative charge.

Being aggrieved by both conviction and sentence, the appellant filed this appeal through the firm of **Lawrence Mwangi Advocate** who identified 10 grounds of appeal dated 22/5/2013 which I summarize as hereunder:

> ***(1) That the court erred by convicting the appellant for offence of defilement contrary to section 8(1) as read with Section 8(4) whereas the complainant was not a minor;***
>
> ***(2) That the court erred by relying on treatment note for J N who was not the complainant herein;***
>
> ***(3 That the court erred by relying on the evidence of PW4 who was not the maker of the treatment notes – MFI.1(d);***
>
> ***(3) That the court erred by ignoring the testimony of PW4 that there was no penetration;***
>
> ***(4) That the complainant's evidence was not corroborated;***
>
> ***(5) That the court erred by convicting the appellant based on a defective charge.***

The appellant therefore prays that the conviction be quashed and the sentence be set aside.

Mr. Mong'are, learned counsel for the State opposed the appeal and urged the court to dismiss the appeal.

At the hearing of the appeal, Mr. Mwangi submitted that at the time of the incident the complainant was aged 18 years 11 months hence an adult; that the appellant was certified mentally unstable and yet no psychiatrist report was availed to the court before the hearing commenced; that failure by the appellant to testify in his defence does not in any way weaken the defence case; that the complainant never demonstrated that there was any penetration; that the treatment notes did not belong to the complainant as they were in the names of J N; that there was no forensic evidence to corroborate the complainant's testimony and further that the medical evidence exonerated penetration. Counsel further urged that the police officer that the complainant had gone to see, one Otieno was never called to corroborate her evidence. Counsel relied on the decision of: ***H.C.C.247/2011 Pius Maina v Republic CR.A.247/2011*** where the court found the totality of the evidence to be below the standard of proof.

In opposing the appeal, Mr. Mong'are argued that the birth certificate produced in court confirms the complainant to have been a minor; that the names on treatment notes have an error and not fatal to the prosecution case; that there having been no objection to production of the medical report an objection cannot be raised at this stage.

As for the act of penetration, counsel argued that PW1 clearly stated that after the struggle there was penetration and her evidence was corroborated by human bites, torn biker which was evidence of use of force. He submitted that the evidence adduced was not circumstantial but direct; counsel denied that the charge was defective and that there was an amendment done. He urged the court to find that there was attempted defilement of the complainant if there was no penetration.

This being the first appeal it behoves this court to re-examine, review and evaluate the evidence tendered in the trial court afresh and arrive at my own findings. However, this court has to bear in mind the fact that it did not have the privilege of seeing or hearing the witnesses to assess the demeanor, an opportunity that the trial court had. (*See* ***Okeno v Republic (1972) EA 32***).

With the above in mind, I must review the evidence on record. The prosecution called a total of 5 witnesses while the appellant opted to remain silent in his defence.

PW1, W.M.K. recalled that on 2/10/2010 had left her phone to be charged by one D O, as she proceeded to the library at [particulars withheld]. About 4.30 p.m., she went to the AP lines to look for the said O, she did not find him but found his next door neighbor, he enquired about O and the phone, that the person got in the house but came out, grabbed her by the neck and pulled her into the house, tore her biker as he tried to penetrate her; that he removed the towel he had and inner wear, there was a struggle and in the process he bit her; that he managed to penetrate but did not ejaculate; that during the struggle she was screaming, people came and knocked on the door and he took a panga and chased them. He threatened to kill her and she screamed the more, people next broke the door and took away the panga which was produced in court. She reported to Ol-Kalou Police Station and went for treatment at the Ol-Kalou District Hospital. The P3 she was issued with was filled.

PW2 CPL Michael Ile Keisi of A.P. Camp Ol-Kalou was called to the camp where he found other officers had surrounded the house of APC Arunga (the appellant) and a girl was screaming inside the house; they found the door locked, forced it open and the appellant came out armed with a panga and they ran off but that the PW1 managed to come out while crying. He interrogated PW1 who informed him how she came to collect her phone from one O.

PW3 APC Faith Wambui Kamau was at the A.P. lines on 2/10/2010 when she heard screams from the house of the appellant and went to check, found the door closed; that a girl was screaming from therein that the door was forced open, the appellant came out brandishing a panga and the complainant came out but she did not go near to establish if she was injured.

PW4 Peter Nginyo a Clinical Officer at Ol-Kalou District Hospital filled the P3 form on 4/10/2010; he found that she had just completed her monthly period, her biker was torn, she had 2 bite marks on the left hand and a bite mark on the right lateral aspect of the neck. He did not find any injuries to the genitalia or spermatozoa; the hymen had an old perforation; he concluded that there was no penetration but an attempt.

The investigating officer in this case, **PC Mike Magena** took over the case from **IP John Aridi**. He recorded statements, took possession of the panga that the appellant chased people with, the treatment notes and P3 form.

After the close of the prosecution case, the appellant was called upon to enter his defence but he opted to remain silent which is his right under section 211 of the Criminal Procedure Code.

The appellant was convicted for the offence of 8(1) as read with section 8(4) of the Sexual Offences Act. The critical ingredients forming the offence of defilement are; the age of the complainant; proof of penetration and positive identification of the assailant.

Before I go on to consider these key issues, I will deal with some peripheral issues that the defence raised in their appeal.

The court record speaks for itself that when arraigned before the court; the appellant seemed to have some mental problems and was referred for psychiatrist intervention. From the time plea was taken on 5/10/2010, the trial did not commence till 15/3/2012, over 1½ years later. It is the appellant's contention that there was no psychiatrist report that he was able to stand trial.

On 6/2/2012 Mr. Kaburu told the court that there was a letter from the psychiatrist indicating that the accused was mentally stable and requested for a hearing date. The court noted that there was a letter dated 1/2/2012 and fixed the matter for hearing on 12/3/2012 and 15/3/2012. I have seen the letter dated 1/2/2012 authored by Dr. Njau the psychiatrist at Rift Valley Provincial General Hospital. The letter said in part "***I reviewed the above named on 1st February, 2012 at Rift Valley Provincial General Hospital, Nakuru and on mental assessment I found him to be mentally stable. He has marked improved on treatment, he has no perception or thought disorder; he understands the charges he is facing; he is capable of following the court proceedings and defending himself…..Chris is an adult male who is currently stable and he is fit to stand trial***."

I must point out that though an earlier order had been made by the psychiatrist that the appellant be taken to Mathari Mental Hospital for treatment, he was never taken there. I am satisfied that there was a psychiatrist report authorizing the court to proceed with the trial.

The appellant was represented by, Mr. Kaburu, who would have objected if he was not satisfied with the Psychiatrist Report. I find the objection raised by the defence to be totally misplaced.

The complainant testified that she was born on 17/11/1991 and was 17 years and 11 months at the time of the offence. PW1's birth certificate was produced in court as evidence P.Exh.1 and indeed it states that PW1 was born on 17/11/1991. As of 2/10/2010 when she was allegedly defiled she was about 19 years old. I have no idea why she said she was 17 years and even the trial court never seemed to have done simple mathematics to subtract 1991 from 2010, which is 19 years. I therefore do agree with the defence submission that as of 2/10/2010 PW1 was an adult. In an offence of defilement, the victim must be under 18 years of age and the age of the victim determines the sentence to be meted in the event of a conviction. I find that from the onset the appellant was charged under the wrong provisions of law.

The question is whether the evidence has proved the commission of another offence. Having seen the complainant's birth certificate indicating her age followed by her evidence, the prosecution ought to have substituted the same under Section 214 of the Criminal Procedure Code to indicate the proper charge meaning that right from the onset, there was a defect in the trial. The question is whether the defect was curable by dint of section 179 of the Criminal Procedure Code. Section 179(1) Criminal Procedure Code

provides as follows:

> ***"When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it."***

I have referred to the decision that was cited by the defence ***David Mwangi Njoroge CRA.193/2013*** where J. Ngenye addressed a similar issue and cited the case of ***Rashid Mwinyi Nguisya and another v Republic MSA CRA.45/1997 (1997 KLR)*** where the Court of Appeal considered the application of Section 179 Criminal Procedure Code and said:

> ***"In short this means that apart from recognizing that Section 179 sets out the principle of law applicable in a trial with respect to conviction for offences other than those charged and that this general principle shall apply as such, notwithstanding, that sections 180 – 190 deal with special cases in a trial……Section 179 of the Criminal Procedure Code cannot be in derogation of the appellate powers of the High Court contained in Section 354(3)(a) of the same code."***

The court of Appeal further considered the same issue in ***Kalu v Republic (2010) 1 KLR*** when it observed:

> ***"With the greatest respect to the learned judge there was no law which would authorize a judge on appeal to convict a person with an offence with which that person was never charged. All the provisions of the Criminal Procedure Code which are under the heading:- "Convictions for Offences Other Than Those Charged" and beginning with Section 179 up to Section 190 deal with situations in which a court is entitled to convict on a minor and cognate offence where a person is charged with a more serious offence. Thus it is permissible to convict a person charged with capital robbery under Section 296(2) of the Penal Code for the offence of simple robbery contrary to Section 296(1) of the Code. It is also permissible to convict a person charged with murder under Section 203 of the Penal Code with manslaughter under Section 202 as read with Section 205 of the Penal Code. That is because the offence of manslaughter, for instance, is a minor and cognate to that of murder. But where there is no charge of murder at all, and the only charge available on the record is that of manslaughter, it would be courageous for a trial court to convert that charge into murder simply because the evidence on record proves murder."***

Having considered the application of Section 179 Criminal Procedure Code, I revert back to the evidence before the court.

PW1 vividly narrated how she went for her phone at the A.P. Lines [particulaes withheld] Police Station, enquired from the appellant who grabbed her pulled her to his house, tore her biker in an attempt to engage in sexual intercourse with her. Her screams attracted PW2 and PW3 to the scene. They corroborated PW1's evidence on how they heard screams emanating from the appellant's house on asking him to open, he came out with a panga chased them but they came back broke in and rescued PW1.

PW1 was taken to the hospital on the same day 2/10/2010 and there is a record of treatment notes P.Exh.No.1(d) to which the defence objects because the names initially written on the cheat was 'Joyce Njeri' but was cancelled to read Winnie Kamau – PW1. When that document was produced in court and reference made to it, the appellant counsel did not object to it and counsel cannot take this court back and raise an objection thereof. Besides, I believe the document relates to PW1 because the reference number on it – FFC [particulars withheld] is the same one on the P3 form P.Exh.(e) at Part II. The author must have filled in another name but cancelled it and used it when attending to PW1. That ground must fail.

Now coming back to what happened to PW1 while in the appellant's house, the question is whether there was penetration. It was the defence submission that penetration never occurred. Section 2 of Sexual Offences Act, defines penetration as:

"..Penetration means the partial or complete insertion of the genital organ of a person into the genital organ of another person."

PW1 stated in detail that she fought back as the appellant tried to penetrate her genitalia.

PW1 went on to say "***he was not able to fully penetrate***". Later in re-examination, PW1 said "***he did not penetrate, but I could feel it at the orifice.***"

PW4 who examined PW2 about 2 days later was of the view that there was no penetration but there was an attempt with injuries to the body.

Having considered the evidence of PW1 and 4, I find it doubtful that the appellant did penetrate PW1. It seems the appellant attempted to get to PW1 but was interrupted by PW1's struggle and screams which attracted those who came to PW1's rescue..

PW1 stated that she was bitten by the appellant during the struggle. PW4 confirmed that indeed PW1 had human bite marks, on the hand and neck, with a torn biker. I am satisfied that the appellant visited force on PW1 when trying to subdue her in order to engage in a sexual intercourse with her. From the evidence on record, the appellant attempted to rape PW1.

In the case of ***Benard K. Chege V Republic Cr.A.120/2011 (Nyeri)*** the court had occasion to address its mind and define the ingredients of incomplete offences also described as inchoate offences. Inchoate crimes are incomplete crimes which must be connected to a substantive crime in order to obtain a conviction. Such crime requires that the accused have the specific intention to commit the underlying crime which must be inferred from the circumstances of such case. So far, there to be an attempt to commit a particular offence, the person must:

(1) Intend to commit the offence;

(2) Begin to put his intent to commit the offence into execution;

(3) Do some event act which manifests his intention, that is, the accused performs an act which is capable of being observed by another and makes clear his intention to commit the offence. (Barbelar (1977) QBD 80).

In the instant case, the appellant intentionally and unlawfully, grabbed PW1, pulled her in his house, bit her three times in a bid to subdue her, tore her biker and tried to penetrate her genitalia but was interrupted by PW2, 3 and others who came to the scene. This intention is clear, to rape PW1.

The question then is, since the appellant had not been charged with the offence of attempted rape, can Section 179 Criminal Procedure Code apply? I have already considered the applicability of Section 179 Criminal Procedure Code. It can only be invoked where the evidence discloses a lesser offence than that which accused is charged. The Black's Law Dictionary 9th Edition page 1186 defines cognate offence as "***A lesser offence that is related to the greater offence because it shows several of the elements of the greater offence and is of the same class or category.***"

In this case both defilement and rape are sexual offences. For both offences, one of the ingredients is proof of penetration. Whereas defilement involves children under 18, years, no proof of consent is required. Rape involves adult victims and there has to be lack of consent. Besides, under section 4 of the Sexual Offences Act, upon conviction, one is liable to be sentenced to not less than 5 years imprisonment but can it be enhanced to life imprisonment depending on the circumstances of the case. Defilement is a more serious offence that attracts a sentence of 15 years to life imprisonment depending on the age of the victim. An attempted rape is obviously a crime of less consequence than rape or defilement.

The appellant exercised his right and remained silent in his defence. The fact that the appellant said nothing in his defence does not in any way lessen the burden placed on the prosecution to prove its case

beyond any doubt. I am satisfied that the offence of attempted rape has been proved beyond any reasonable doubt.

In the end, I am satisfied that the appellant is guilty of the offence of attempted rape. I therefore quash the conviction on the offence of defilement, set aside the sentence and instead, convict the appellant for the offence of attempted rape contrary to section 4 of Sexual Offences Act. I sentence the appellant to a period of 7 years imprisonment from the date he was imprisoned on 14/5/2013.

Dated, Signed and **Delivered** at ***NYAHURURU*** this ***13***th day of ***October,*** 2017.

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R.P.V. Wendoh

JUDGE

PRESENT:

Ms. Bosibori - Prosecution Counsel

Soi - Court Assistant

Appellant - present

Mr. L. Mwangi - for appellant