REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CRIMINAL APPEAL NO. 153 OF 2017

JACKSON NDOLO KIKAVI.......................APPELLANT

-VERSUS-

REPUBLIC...RESPONDENT

(From Original Conviction and Sentence in Criminal Case No. 1589 of 2013 of the Resident Magistrate's Court at Makindu)

JUDGEMENT

INTRODUCTION

1. The appellant 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 the 24th day of November 2013 at Corner Bar lodging in [particulars withheld] within Makueni County, the appellant willfully and unlawfully attempted to cause his genital organ namely penis to penetrate into the female genital organ namely vagina of N.M, a child aged 13 years.

2. The appellant faced a second count of **sexual offences relating to a position of authority contrary to section 24(1) of the Sexual Offences Act, No.3 of 2006**. The particulars were that on the same day and at the same place, the appellant being in a position of authority as senior teacher, xxxxx School took advantage of his position to seduce N.M, a class seven pupil at the said school to have sexual intercourse with her.

3. There was an alternative charge of **committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006**. The particulars were that on the same day and at the same place, the appellant willfully and unlawfully touched the vagina of N.M, a child aged 13 years with his penis.

PROCEEDINGS BEFORE THE TRIAL COURT

4. PW1 (N.M) was the complainant, after being subjected to *voir dire* she testified that she was 14 years old and a class 8 pupil at xxxxx Primary school. On 24th November 2013, she attended xxxx Church with her friend M.M (PW2). They left church and went to the market where the appellant had asked PW1 to meet him so that he could send her to her grandmother. While at the market, they borrowed a phone from one Muema and called the accused who told them to wait as he was on his way.

5. The appellant arrived in a 'Mutongoi' bus, greeted the two girls and asked them to follow him. They went to a place where the appellant opened the door. They entered and sat on a bed. The accused then

told PW2 to leave after which he asked PW1 to remove her shoes. She refused. Shortly thereafter, two people found them. At that time, the appellant had removed his shoes. The two people took PW1 and appellant to Emali police station where PW1 recorded a statement. They were then taken to the hospital for examination. According to PW1, the appellant had given PW2 money. PW1 knew the accused as he had taught her mathematics in class seven. On cross-examination, she stated that the accused did not touch her on the material day.

6. PW2 (M.M) testified that she was a class 7 pupil at xxxx Primary School. On the material day, she was at the church with PW1. After church, PW1 told PW2 that she was going to meet up with her aunt. When they got to the stage, they met the accused who asked them to follow him. PW2 asked PW1 where they were going and she responded that they were going to buy something from the shop. The appellant went a different way and the two girls took a different way but they emerged at a gate where they found the appellant. PW1 told PW2 that the appellant wanted to send her to her grandmother. PW2 questioned why the appellant was sending her from there. PW1 then told PW2 to wait for her as she went into the appellant's house. PW2 however ran away. Shortly thereafter, police officers arrested the three and took them to Emali police station.

7. PW2 recorded her statement as PW1 was taken to the hospital for examination. PW2 was also examined. They recorded their statements at Emali police station. According to PW2, it was the appellant who called PW1. On cross examination, PW2 stated that the appellant gave her money in silver form but she dropped it. She also stated that PW1 borrowed a Phone from Muema and called the appellant twice. PW2 did not know that PW1 was calling the appellant, she thought she (PW1) calling her aunt.

8. PW3, C M M testified that on 24th November 2013, she was at work in corner bar club. The appellant went there and asked to book a room. PW3 told him to wait for her to finish sweeping. After about 15 minutes, the appellant returned with two girls, was shown the room and he gave PW3 kshs 200. PW3 went out and saw a police officer, she informed him about the appellant and the two girls because she suspected that the appellant had bad intentions on the children. The officer went to the club with two of his colleagues and arrested the appellant while at the backside of the club. PW3 testified that the appellant and the girls were seated outside as she was yet to allocate a room to him. At the time of arrest, the appellant was with one girl as the other one had ran away.

9. V K N (PW4), a pastor at Faith Ministries testified that on 24th November, 2013 he was preparing to go to church. On the way, he saw police officers running and followed them. He found an officer shaking a door of one of the rooms at Corner bar. They got out a man and a girl and took them to Matiliku Administration Police post. He followed them there. Afterwards, they took the suspect to Emali. On cross examination, he stated that he was not certain whether the appellant had defiled PW1 but he came out of the room without shoes.

10. PW5, M K, a mason was PW1's father. He testified that on 24th November 2013, PW1 left for church in the company of PW2. At 11.00 a.m., he was informed by S K that PW1 had been arrested with the appellant. He went to Matiliku AP post in the company of his wife and found the appellant locked up. PW1 had been taken to hospital. He went to the hospital and found that PW1 had been examined. They returned to the AP post but were referred to Emali police station where he recorded his statement. On cross examination, he stated that his mother and the appellant's mother were from the same clan and that his son was a friend of the appellant. He said that his son had lived in the appellant's house while on tuition. He denied having asked the appellant for money in order to finish the case.

11. PW6, M M K is the mother of PW2. She testified that on 14th November 2013, she heard about a case involving the appellant and the minors from a fellow congregant. She was told that PW2 had been arrested with a teacher at lodging. She went to Matiliku AP post and found that PW2 had been taken to the hospital and examined. She accompanied them to Emali police station where she was interrogated. She then went home with PW2 and left PW1with her parents at the station.

12. PW7 was Sergeant Thomson Ochieng' Pesa. He recalled that on 24th November, he was at the station

when he received a call from his boss, Inspector Nicholas Makanga. He was informed that someone had been seen roaming the market with underage girls. Together with his colleague Fredrick Barongo, they went to where the said person was. They found him with the underage girls and took them to the station for interrogation. On cross examination, he admitted that he did not break any door on the said date but found the appellant within the premises of Corner bar. Further, he said that he was not aware of any issues/grudges between the appellant and the witness who was allegedly a pastor.

13. PW8 was Dr. Khalid of Malindi District Hospital. He testified that on 25/11/2013, he examined PW1 who was in good general condition. The approximate age of the injury was one day. She had been placed on antibiotics. The degree of injury was classified as harm. There was no visible bruising of the labia majora and minora. The hymen was broken but the injury was an old tear. There was presence of discharge.

14. PW9 was Chief Inspector Jane Mochoa, the OCS of Kiambere Police station but previously the Deputy OCS, Emali police station. She testified that on 24/11/2013, an Administration Police officer went to the station in the company of two minors and their mothers. She was informed by one of the officers, Inspector Makanga, that he had received information from members of the public about a man who had been seen at corner bar with two girls asking for a room. Inspector Makanga sent Sergent Ochieng' and another officer to the bar where the appellant was found with the two girls. They were escorted to Matiliku AP camp and later to Matiliku hospital for medical checkup.

15. She recorded PW1's statement who alleged that on 22/11 2013 during the school closing day, the appellant called her and told her that he would send her to her grandmother. He asked to meet her in Matiliku market on 24/11/2013. On the agreed date, the accused arrived and met with PW1. They went to Corner bar where the appellant pleaded to have a love affair with her since he had helped her pass the maths exam.

16. PW9 visited corner bar where she found PW3 who narrated what had transpired on that day. That a man had found her sweeping and asked for a room. PW3 told him to wait as he attended another customer. On returning, she found the appellant with two young girls. She was suspicious of him and decided to alert the officers. The appellant was found with PW1 as PW2 had left. PW1 was then taken to Makindu District Hospital for treatment and filling of P3 form. On cross examination, she said that the arresting officer found the appellant in the bar premises.

17. The appellant gave a sworn statement. In his defence, the appellant stated that he is a teacher by profession. On 24/11/2013, he was headed to Emali in a bus called Mutongoi. While on the way, he received a call from an unknown number. He told the caller that he could not hear her because the bus had loud noise. He asked who the caller was and she said that she was a teacher at xxxx Primary School. She failed to give her name and he disconnected the call.

18. He received the call again and the caller asked how far he was and whether he had arrived at Matiliku. He said he would be there in 5 minutes. The caller requested to meet him at a shop near corner bar. When he got to Matiliku, he alighted, went to the shop but did not see her.

19. PW1 and PW2, his students at xxxxx Primary School found him there. He asked what they were doing at the marked and they said they were from the Church. They asked him whether they had passed to go to class 8 and he told them that they could not discuss that there.

20. Two police officers found them there and informed him that they had received a report from 2 ladies about an adult who was taking advantage of children at corner bar. The officers had been informed that the appellant had sex with one of them and she was screaming. They had therefore been instructed to go and save the 2nd one.

21. The appellant told the officers to enquire from the children whether such a thing had happened but they replied that they had been sent by their boss.

22. The officers asked the appellant and the children to accompany them for examination. The appellant was locked up at Matiliku AP camp while the children were taken to a separate place for interrogation. A crowd gathered at the camp and wanted to kill him. The inspector then told the appellant that the children had been examined and found to be alright.

23. Later, the children's parents arrived. PW1's father asked for half a million. He was then taken to Emali police station and then to Makindu hospital. PW1 was taken in for examination. The appellant asked to be examined but was told it was not necessary. He was then charged in Court.

24. The trial Magistrate evaluated the prosecution evidence and convicted the appellant for the offence of attempted defilement and sentenced him to ten (10) years imprisonment on each count. The sentences on count 1 and 2 were to run concurrently.

25. In convicting the appellant, the trial Court opined that the prosecution's case had been consistent and sufficiently corroborated.

THE APPEAL

26. Aggrieved by the decision of the trial Court, the appellant filed the instant appeal and raised the following amended grounds of appeal:-

> ***i. That the particulars of the main charge giving rise to the conviction is defective because it does not tally with the evidence adduced in support.***
>
> ***ii. That section 214 of the Criminal Procedure Code was not adhered to even after the prosecution had realized that the charge sheet was defective.***
>
> ***iii. That the medical report that was tendered as evidence did not give any support to the prosecution case hence had no connection to the offence charged of attempted defilement.***
>
> ***iv. That the corroboration of evidence as was held by the trial Court was not met due to the fact that none of the prosecution witnesses opined as to have witnessed the attempt to defile.***
>
> ***v. That the prosecution case was riddled with lots of malice, contradictions and inconsistencies which could have been looked upon before arriving at the decision to convict.***
>
> ***vi. That the trial Court further faulted the points of Law when rejecting my defence of alibi without giving concrete reason for so doing hence breaching the rule of law under section 169(1) of the CPC.***

27. The appellant filed elaborate submissions which he relied on during the hearing of the appeal. It was his submission that the charge sheet was defective because the minor's age indicated therein was not supported by evidence (birth certificate). Further, he contended that the evidence of the prosecution witnesses was contradictory and was therefore not sufficient to sustain a conviction. He particularly faulted the evidence of PW1 (the complainant). According to him, she was not a straightforward witness. The appellant further submitted that the trial Court had erred by failing to consider his alibi defense. He urged the Court to allow the appeal.

28. The learned prosecution Counsel, Mr. Kihara in opposing the appeal stated that there was sufficient evidence to sustain a conviction. He basically reproduced what the prosecution witnesses had said in the trial Court. It was his contention that their testimonies were corroborative and that the case had been proved beyond reasonable doubt.

DUTY OF COURT

29. The duty of a first appellate Court was set out in the celebrated case of **OKENO V. REPUBLIC**

(1972) E.A. 32 in the following terms;

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to afresh and exhaustive examination (Pandya Vs. Republic (1957) EA. (3365) and the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) E.A. 570). It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses, see Peters Vs. Sunday Post [1958] E.A. 424."***

ISSUES, ANALYSIS AND DETERMINATION

30. In my considered view, before delving into analysis of the evidence, there were two issues raised by the appellant which this Court should address albeit briefly;

> **i. Whether the charge sheet was defective?**
>
> **ii. Whether the appellant raised an *alibi* defence?**
>
> **iii. Whether the prosecution proved its case beyond reasonable doubt?**

WAS THE CHARGE SHEET DEFECTIVE?

31. The charge sheet indicated the minor's age to be 13 years. At the close of the prosecution case, the prosecutor discovered that the charge sheet was defective as regards the age of the minor and sought to amend it. In disallowing the prosecutions' request, the learned trial magistrate opined that it was too late in the case to amend the charge sheet.

32. The minor's birth certificate was produced as exhibit No. 1. It indicated that she was born on 07/01/1998. When the appellant was arraigned in Court on 25/11/2013, the complainant was approximately **15 years and 10 months**.

33. According to section 9(1) of the Sexual Offences Act, No. 3 of 2006 (the Act);

> ***"A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement."***

34. According to the Act, **"child"** has the meaning assigned thereto in the Children Act (Cap. 141).

35. The children's Act defines a child as ***"any human being under the age of eighteen years."***

36. Section **134 CPC** 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."***

37. The charge as drawn contains a statement of a specific offence, namely attempted defilement, and such particulars as may be necessary for giving reasonable information as to the nature of the offence charged. The only error is the complainant's age. Having found that she was approximately 15years and 10 months at the time of taking plea, I am of the considered opinion that the disparity in age did not change the fact that she was a minor.

38. I have also examined the evidence and noted that the appellant participated in the trial in a manner suggesting that he understood the charge he was facing. In my opinion therefore, there is no miscarriage of justice or prejudice on his part due to the disparity in the complainant's age. Besides, the appellant did not raise any objection during trial and only became aware of the defect after the prosecution's application to amend.

39. Section **382 CPC** states that;

> ***"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:***
>
> ***Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceeding."***

40. The trial magistrate should have invoked the provisions of this section to find that the defect was curable. Be that as it may, I have already opined that no prejudice was occasioned to the appellant and as such, that ground of appeal should fail.

<u>DID THE APPELLANT RAISE AN ALIBI DEFENCE?</u>

41. In **Karanja v Republic [1983] eKLR**, the Court of Appeal expressed itself as follows;

> ***"The word "alibi" is a Latin adverb, meaning "elsewhere" or "at another place". Thus if an accused person alleged that he was not present at a place at the time an offence was committed, and that he was at another place so far distant from that at which it was committed, that he could not have been guilty, he is said to have set up an alibi."***

42. It is trite that an alibi defence should be raised at the earliest instance so that the prosecution can have an opportunity to dislodge it.

43. In the instant case, I have examined the evidence carefully and did not find anything suggesting that the appellant recorded a statement at the police station. Assuming he did, the same was not brought to the attention of the trial Court. This Court is therefore not able to tell whether the appellant raised an alibi defence at the first instance.

44. Be that as it may, the alibi defence did not feature anywhere in the course of proceedings. During cross examination of the various witnesses, the appellant did not mention it anywhere. Infact, it was clear that the appellant was with the complainant at the time it was alleged that he had attempted to defile her.

45. In his defence, the appellant stated as follows;

> ***"I got to Matiliku and alighted and went to the said shop and I did not see her.***
>
> ***While there, two children who are my students came, they are N.M and M.M….while standing there, two police officers came and told me that 2 ladies had rushed to the station which is about 10 metres from where we were standing and had reported that there was an adult taking advantage of children at Corner bar."***

46. From the above sentiments it is clear that the appellant was in close proximity to the place where the attempted defilement is said to have occurred. This ground of appeal is in my opinion, misplaced.

WHETHER THE PROSECUTION PROVED ITS CASE BEYOND REASONABLE DOUBT?

47. A crucial issue for determination by this Court is whether PW1 and PW4 were credible witnesses.

48. According to PW1, the appellant took them to a place where they sat on a bed. He then asked PW2 to leave after which he told PW1 to remove her shoes. PW3 on the other hand stated categorically that the appellant and the minors were seated outside as he was yet to allocate a room to him. PW7, the arresting officer was very economical with his statement.

49. His evidence was that he found the appellant within the premises of corner bar. The questions which beg are; where exactly was the appellant at the time of arrest? On which bed was he sitting on yet a room had not been allocated to him? The prosecution did not lead any evidence to suggest that there were other beds in Corner bar apart from the ones in the rooms. Further, if indeed the appellant was in the room, the arresting officer should have stated as much regard being paid to the fact that he was present at the scene of the alleged offence.

50. I have serious doubts with regard to credibility of PW1. These doubts are reinforced by how she behaved towards PW2. She told PW2 that she wanted to meet her aunt after church. However, from her statement to PW9, the investigating officer, it is clear that there was a pre-arranged meeting between her and the appellant. PW1 went as far as borrowing a phone in order to talk to the appellant yet all this time PW2 thought that PW1 was communicating with her aunt.

51. It is clear from the evidence that PW1 and the appellant had some familiarity outside the school environment. Perhaps that is why she did not have any problem meeting him on a Sunday. It is noteworthy that she even had his phone number. However, if their meeting was just about being sent to her grandmother, isn't it intriguing that she decided to take her friend (PW2) round in circles with regard to such a straightforward matter.

52. PW4, the pastor from faith ministries testified that when he got to corner bar, he found an officer shaking the door of one of the rooms. They got out a man and a girl. The man had no shoes. In my opinion, this testimony collapsed the minute the arresting officer took the stand and testified that he had not broken any door. Infact; PW3 had already stated that she had not allocated a room to the appellant.

53. As earlier stated, the trial magistrate concluded that the prosecution's case had been consistent and corroborative. In my opinion, this conclusion was without basis. Had she properly evaluated the evidence, she would not have missed the glaring and damning inconsistencies.

54. The persuasive decision of Makau J in **DAVID OCHIENG AKETCH VS REPUBLIC [2015] EKLR, SIAYA HIGH COURT CRIMINAL APPEAL NO. 30 OF 2015,** is relevant in this case. The Court expressed itself as follows;

> ***"What is attempted defilement? It can safely be stated to be the unsuccessful defilement. For a successful prosecution of an offence of attempted defilement the prosecution must adduce sufficient evidence to the required standard to prove an attempted penetration. This may in my view include bruises or lacerations from complainant's vagina and/or bruises or lacerations of culprits genital organ and finding male discharge such as semen or spermatozoa outside the complainant's vagina or innerwear without there being penetration. There was absence of penetration or evidence linking the culprit with the offence of attempted defilement."***

55. PW1 unequivocally stated that the appellant did not touch her. In the words of PW8,

> ***"There was no visible bruising of the labia majora and minora. The hymen was broken but the injury was an old tear. There was presence of discharge"***

56. The inference to be drawn from this is that PW1 was sexually active. It is trite that wet genitalia are not *prima facie* indicator of sexual activity.

57. Be that as it may, the medical evidence on record does not remotely point to the offence of attempted defilement.

CONCLUSION

58. The conviction was against the weight of the evidence. It was unsafe. The prosecution's case was doubtful and as it has been held in numerous judicial pronouncements, any doubt in a criminal trial should be exercised in favour of the accused. The court there fore makes the following orders;

> **i. The conviction is quashed, sentence set aside and appellant set at liberty unless otherwise lawfully held.**

SIGNED, DATED AND DELIVERED THIS 18TH DAY OF DECEMBER, 2017.

C. KARIUKI

JUDGE

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