REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL APPEAL NO. 92 OF 2015

(FORMERLY NAKURU CRIMINAL APPEAL NO. 241 OF 2014)

(Being an appeal against conviction and sentence in Narok Criminal Case No. 827/2012 – Z. ABDUL RM)

PAUL MUTAI……..…….APPELLANT

VERSUS

REPUBLIC…….RESPONDENT

J U D G M E N T

1. The Appellant was charged before the Chief Magistrate's court at Narok with the offence of Defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act. The particulars state that on the 15th day of July 2012 within Rift Valley Province, intentionally caused his penis to penetrate the vagina of **T C** a child aged 11 years.

2. In the Alternative charge, he was charged with Committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. The particulars are that on the 15th day of July 2012 within Rift Valley Province, intentionally rubbed his penis against the vagina of **T C** a child aged 11 years. Following a full trial, the Appellant was convicted on the alternative charge and sentenced to 12 years imprisonment.

3. He has raised five amended grounds of appeal against conviction and sentence as follows:

   "1. The trial magistrate erred in both law and fact in failing to note that the charge sheet was defective (against the Sexual Offences Act) and insufficient in its particulars.

2. **The trial magistrate erred in law and facts in relying on contradicting and conflicting evidence that was inconsistent.**

3. **The learned trial magistrate erred in both law and fact in failing to note PW2 framed him out of a grudge from a land dispute. The respondent allegations were not supported by the P3 form.**

4. **The pundit trial magistrate erred in both law and fact in relying on the weakness of defense to convict rather than in the strength of the prosecution case which was in the erroneous approach in a criminal trial.**

5. **The learned trial magistrate erred in law and fact in dismissing the appeal and mitigation and imposes an inconsistent sentence." (sic)**

4. In his written submissions, he argues on the first ground that the alternative charge upon which he was convicted was defective as it did not include the element of unlawfulness. Further that the particular unlawful act, namely the rubbing of his genitalia against the victim's genitalia was not established. On the same ground, he has submitted on the extraneous matter regarding his delayed arraignment in court, which has no significance in this appeal **(See Julius Mbugua -Vs- Republic [2010] eKLR).**

5. Regarding the 2nd and 3rd grounds, the Appellant contends that the evidence of the Complainant and her brother was inconsistent and that the same was fabricated due to a land dispute between the family of the Complainant and his own. He particularly highlighted the evidence of the victim and her brother regarding the material incident and the point at which the latter came on the scene, asserting that there were contradictions therein. Further, he challenges the identification evidence of the two witnesses emphasizing that the incident occurred at 7.30pm in the night.

6. I was not able to follow completely some of the submissions on the 3rd and 4th grounds but in summary, the Appellant appeared to contrast the evidence of the Complainant, confirming penetration, against the medical evidence showing the contrary, thus asserting that the Complainant gave false testimony. In his view, the indecent act was not established either as the description of the act by the complainant did not support such finding.

7. In support of the 5th ground, the Appellant submits that his mitigation was not considered nor the fact that no negative antecedents were proved against him. He thus invites the court to interfere with the sentence.

8. The appeal was opposed by the DPP reiterating the prosecution evidence. The duty of the first appellate court was clearly stated in **Okeno -Vs- Republic 1972 EA 322** as follows:

"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya –Vs- R [1957] EA 336) and to the Appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala –Vs- R [1957] EA 570. It is not the function of the first appellate court merely to scrutinize the evidence to see there was some evidence to support the lower court's findings and conclusions; 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] EA 424.

9. Briefly, the prosecution evidence was that **T A (PW1)** was a girl aged 11 years on the date of the offence. She resided Kutete/Kilande, Mulot with her mother **A C (PW3).** An older brother **A R (PW2)** lived close by with his own family. The Appellant was a neighbor. On 15th July, 2012 at about 7.30pm, **PW3** dispatched **PW1** to go to the home of her brother (**PW2)** to shut the chicken coop. Apparently, **PW2**'s wife was away at the time.

10. On the way there, **PW1** was intercepted by the Appellant, who forcefully cupped her mouth and took her to a bushy area and after undressing inserted his genitalia into hers. **PW1** raised an alarm notwithstanding. **PW2** who was heading towards his home was drawn to the scene by noises behind a kei-apple fence. He observed a struggling couple on the ground as he drew close. On sighting him, the Appellant took to his heels but **PW2** caught up with him and after a struggle, subdued the Appellant.

11. With the assistance of members of public, he escorted the Appellant and the Complainant to Mulot Police Station where a report was made. Police referred **PW1** to the hospital where a

clinician **Korir Stanley (PW5)** examined and treated her. Afterwards, the P3 form was completed and the Appellant was charged.

12. Upon being placed on his defence, the Appellant elected to give an unsworn statement to the effect that on the material date, he went to **PW1's** home and took alcohol during which he argued with **PW2** and left the home. But **PW2** pursued him and assaulted him claiming that he had defiled a child. He stated that his family and the Complainant's had a standing land dispute.

13. There is no dispute that the Appellant was well known to **PW1, 2** and **3** and that he visited the home of the Complainant on the material date. His defence confirms that he was in the scene of the offence on the material time, save that he disputes committing the offence.

14. **PW1** gave sworn evidence pursuant to a *voire dire* examination. She stated that the Appellant intercepted her and forced her into a bushy area where he proceeded to do "*tabia mbaya*" to her. She elaborated by stating that the Appellant undressed and also removed her under pant before inserting his genitalia into her. That he fled thereafter.

15. According to her, she started to walk back home and was met by **PW2** who pursued the escaping Appellant. **PW2** said he was drawn by noises to the scene and heard a "voice across the Kei apple fence." On checking, he saw "people struggling with each other on the ground" and at that point the Appellant escaped. He said the area was illuminated by moonlight and he chased and caught up with the Appellant.

16. It would appear from his evidence that **PW2** only confirmed the identity of the Appellant on catching him. The fact that **PW1** and **PW2** did not give exactly similar evidence regarding the point at which **PW2** came on the scene is of no moment. **PW1** did not know why her assailant fled nor had she observed her brother approach the scene, most probably because she was on the ground and in turmoil. However, as she hurried from the scene, she met **PW2** as he pursued the assailant.

17. The evidence of **PW 1** and **2** and as indeed somewhat confirmed by the defence is that **PW2** is the one who got hold of the Appellant some distance away from the scene. There is no evidence that **PW2** lost sight of the fleeing man, whether in the obtaining light he could clearly tell his identity in the cause of his chase. Nor was there any suggestion that any other man was chased at the scene at the material time.

18. The question of a land dispute between the family of the Complainant and the Appellant was not canvassed with **PW1**, **PW2** and **PW3** during cross-examination but was first raised during the Appellant's defence. Nor the allegation that the Appellant had been visiting the Complainant's home on the material evening and disagreed with **PW2** after taking alcohol.

19. Regarding penetration, **PW1** told the court that:

"**He (Appellant) removed his private parts and put (it) in mine. I had clothes on except the panty and he also removed his trousers…when accused finished he ran away."**

20. The clinical officer **PW5** did not find any evidence of injuries to the Complainant's genitalia, even though that is not necessary to prove defilement. The Court of Appeal has stated that the slightest insertion of the genitalia of the offender into that of the victim amounts to penetration, in keeping with definition of penetration in Section 2 of the Sexual Offences Act which states:

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

21. Nor is ejaculation necessary to prove defilement as the Appellant purports in his submissions. The fact that there was no evidence of injury to the Complainant does not mean that she gave a

false account. Her statement that the assailant fled when he "finished" does not suggest that there was ejaculation or a complete penetration of her genitalia.

22. Being a minor, it is possible that PW1 believed that a complete sexual act had taken place hence the use of the word "finished" in reference to the Appellant's actions. No doubt the trial court was persuaded by the findings in the P3 form in arriving at the conclusion that the alternative charge rather than defilement had been proved.

23. In my considered opinion, there was credible evidence to establish at the very least a case of attempted defilement. The evidence by **PW1** as corroborated by **PW2** and **PW3** leaves no doubt that had **PW2** not intervened, the Appellant's intention was to carry through with the defilement of the minor. The fact that the Appellant intercepted the minor, forced her to a secluded place, threw her on the ground, undressed her and also exposed his genitalia and inserted it in her genitalia is clear proof of that intention. In his guilt, he fled when **PW2** came to the scene and fought him in a bid to escape the consequences of his actions.

24. The definition of an attempt is found in section 388 of the Penal code which states:

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

25. Commenting on the provision in the case of **Francis Mutuku Nzangi v Republic [2013]eKLR**, the Court of Appeal observed that:

"**Our understanding of this provision 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 the 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."**

26. In the circumstances of this case, the trial magistrate, not satisfied that defilement proved, was entitled to invoke the provisions of Section 180 and 186 of Criminal Procedure Code and to record a conviction for the minor and cognate offence of attempted defilement rather than indecent act. See the Court of Appeal decision in **Bwana Kombo Muhati -Vs- Republic [2000] eKLR.**

27. Section 186 of the Criminal Procedure Code states:

"**When a person is charged with the defilement of a girl under the age of fourteen years and the court is of the opinion that he is not guilty of that offence but that he is guilty of an offence under the Sexual Offences Act, he may be convicted of that offence although he was not charged with it."**

The trial court's decision to enter a conviction for the charge now attacked by the Appellant as being defective resulted from failure to invoke the above provisions. Grounds 1, 3 and 4 therefore have some merit as regards the appropriateness of the offence for which conviction was recorded. I find no merit in ground 2.

28. In the result, the appeal on conviction has partially succeeded and this court quashes the conviction for the offence of indecent act contrary to Section 11(1) of the Sexual Offences Act and substitutes therefore a conviction for the offence of attempted defilement contrary to Section 9(2) of the Sexual Offences Act.

29. The minimum sentence for this offence is ten years imprisonment. The record does not contain any notes by the trial court before sentencing as required. This is an important aspect of the sentencing process as it indicates the reasons for the sentence awarded. Be that as it may, the offence of attempted defilement carries a minimum penalty of 10 years imprisonment.

30. No previous convictions were proved against the Appellant nor aggravating factors regarding the offence. The appeal on sentence will be allowed to the extent that the sentence is reduced to ten years imprisonment from the date of sentencing.

Delivered and signed on this **23rd** day of **June**, **2016**.

In the presence of:-

For the DPP : Mr. Koima

Appellant : present

Court clerk : Barasa

C. MEOLI

JUDGE