REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 40 OF 2015

TYSON GEORGE NGOWA …… APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

(From the original Conviction and Sentence in the Criminal Case No. 19 of 2014 of the Chief Magistrate's Court at Malindi – C.M. Nzibe, RM)

JUDGEMENT

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 the appellant, on the 31st April, 2014 at around 1200 hours at [particulars withheld] within Kilifi County, unlawfully and intentionally attempted to cause his penis to penetrate the vagina of H J a child aged 5 years.

The appellant also faced an alternative charge of indecent act contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006. The trial court convicted the appellant on the main count and sentenced him to serve twenty (20) years imprisonment.

The grounds of appeal as per the amended petition of appeal are that: -

i. ***The case was made up due to existing grudge.***
ii. ***The prosecution case was contradictory and unreliable.***
iii. ***Section 169 (3) of the Criminal Procedure Code was not complied with.***
iv. ***The prosecution did not prove its case beyond reasonable doubt.***
v. ***The appellant's defence was not considered.***

The appellant submitted that the complainant's evidence was contradictory and lacked credibility. Whereas the complainant testified that she was defiled, the medical evidence showed that there was no defilement. The complainant's vagina was examined, her hymen was intact and her genitals were normal with no injuries. The complainant was playing with DW2 who testified that she did not see any defilement. DW1 testified that the appellant's house is made up of stones and has a mabati roof. No one can peep inside the house contrary to the prosecution evidence.

It is further submitted that it took some time for the appellant to be arrested yet there is no evidence to suggest that he had escaped. The complainant alledged that she was defiled yet the medical evidence showed that there was no penetration. The complainant alledged that the appellant applied coconut oil on his private part for easy penetration, however, no injuries were detected on the complainant. The P3 form

contains nothing to suggest that there was attempted defilement.

The appellant further submit that section 169 (2) of the Criminal Procedure Act was not complied with. The judgement of the trial court does not indicate the sentence to be suffered as required by that section. The appellant relies on the case of **FUAD DUMILA MOHAMED V REPUBLIC, [2010] eKLR** where the court held that it is really dangerous in sexual offences to convict the accused on the evidence of a woman or girl alone. The complainant's clothes were not produced yet it was indicated in the judgement that the appellant tore her clothes.

Mr. Fedha, prosecuting counsel, opposed the appeal. Counsel submitted that the prosecution proved its case beyond reasonable doubt. The minor testified that the appellant took coconut oil and applied it on her thighs. PW1 knew the appellant. PW1 was cross-examined and she demonstrated what had happened. The medical evidence confirmed that there was attempted defilement.

Being the first court to deal with the appeal, it is required that I evaluate the entire evidence adduced before the trial court and make my own conclusion. The record of the trial court shows that PW1 was the complainant. She gave unsworn evidence. Her evidence is that she was a [particulars withheld] (nursery) student. On the material day she was playing with A, L and E near a tree. The appellant gave her a knife and told her to take it to his house. She went to the appellant's house with him and he told her to sweep the house. She respondent that she did not know how to sweep. The appellant then told her to remove her clothes. She did not. The appellant then removed her clothes, took coconut oil and applied it between her legs. The appellant then defiled her. She cried. She went and informed L that the appellant had defiled her. She also informed her grandmother whom she was living with.

It is the complainant's evidence that she cried and screamed when the appellant was defiling her. No one responded to her distress calls. L and E also reported the incident to her grandmother.

PW2 A H also gave unsworn evidence. She was about five years old when she testified. She testified that on the 31st March, 2014 at about 2.00 pm she was playing with PW1 and L near a tree. The appellant called PW1 and went with her to his house. The appellant told PW1 to take a knife to his house and then asked her to sweep the house. She could hear the appellant talking to PW1. She wanted to help PW1 to sweep the house but the appellant chased them away. The appellant was left with PW1. Herself and L peeped through the appellant's window and she saw the appellant applying coconut oil on PW1's private parts. The appellant also applied the coconut oil on his private part. PW1 later left the appellant's house while crying. She asked her what was wrong and PW1 informed her that the appellant had defiled her. PW1 told her mother what had happened. Her mother went and reported the matter to the police. Her mother had gone to work when the incident occurred.

PW3 T S M is the grandmother to PW1. She testified that PW1 was six years. She produced the clinical card for PW1. It is her evidence that PW1 was born at Malindi hospital. On 31st March, 2014 she left home in the morning and went to a construction site. The children did not go to school that day. She returned at 5.00 pm. PW1 and PW2 together with other children informed her that the appellant had defiled PW1. She knew the appellant who was living with them in the same homestead. PW1 narrated to her what had happened. PW1 also told her that she was feeling pain while urinating. She went and reported the matter to the police. PW1 was taken hospital and a P3 form was filled. She had known the appellant for over ten years. PW1 was first seen at [particulars withheld] and then referred to Malindi district hospital.

PW4 IBRAHIM ABDULAHI is a clinical officer who was based at Malindi district hospital. On 16th April, 2014 he filled the P3 form for PW1 who was aged five years old. On virginal examination, PW1's hymen was intact, her genitals were normal and had no injuries. Her urine had pus cells. He concluded that there was no penetration. PW5 Corporal MARGARET TEROROI was based at Watamu police station. She investigated the case. On the 1st April, 2014 she went to work at 8.00 am and found that the case had been reported the previous day and was assigned to her. She talked to PW1 who narrated to her what had happened. She issued a P3 form to PW1 and referred her to [particulars withheld]. PW5 visited the scene with two of her colleagues. She saw the house had openings on the walls that could enable

someone to see into the house. She searched the house and found an empty container of coconut oil. She later charged the appellant with the offence. It is her evidence that the documentary evidence showed that PW1 was born on 20th February, 2009. She arrested the appellant on 18th April, 2014. It took some time to record witness statements as it was difficult to trace them.

In his sworn defence, the appellant testified that he is a motor cycle operator. On 18th April, 2014 at about 8.00 am police officers went to his home and arrested him. He was taken to the police station and placed in the cells. One of the officers asked him to give Kshs.10,000/= so that the case could not be taken to court. He did not give out the money and he was charged. The complainant recorded her statement after the appellant had been charged in court. He knows PW1 and PW2 who are his neighbours.

DW2 L M C was ten years old and a class four pupil when he testified. She is a cousin to the appellant. On the material day she went to school and later returned home. She was playing with PW1 and PW2 but saw nothing. She left school at 5.00 pm. At 12.00 pm she was in school. It is her evidence that the appellant's house is built of stones with mabati roofing. It is not made of mud. There are no gaps on the walls that can enable someone to see into the house.

DW3 B S was seventeen years old. He is a friend to the appellant. On 18th April, 2014 police officers went to the appellant's house and found him under the bed. The appellant was repairing the bed and was arrested. He went with the appellant to the police station and they were asked by the investigating officer to pay him Kshs.10,000/= to secure the appellant's release. They did not have the money and that is why the appellant was charged in court. On 31st March, 2014 he was with the appellant and they went to eat at a hotel. They then parted their ways at about 4.00 pm.

DW4 W K G is a sister to the appellant. Her evidence is that on 18th April, 2014 police officers arrested the appellant and took him to Watamu police station. After about one hour the police went back to the appellant's home and searched it. They emerged with a coconut oil bottle. She went to the police station and was surprised to be informed that the appellant was alledged to have defiled the child. They were told to pay Kshs.10,000/= for the case to be withdrawn. They managed to raise Kshs.7,000/= but the police refused the money.

The issue for consideration is whether the prosecution proved its case beyond reasonable doubt. As a preliminary issue, it is contended by the appellant that section 169 (3) of the Criminal Procedure Code was not complied with. It is submitted that the judgement did not state the sentence imposed by the court. Section 169 (3) refers to an acquittal. The appellant was convicted. I believe the appellant meant section 169 (2) which indicate that in case of a conviction, the judgement shall specify the sentence of which, or the section of the Penal code or other law under which the accused person is convicted, and the punishment to which he is sentenced. That is the wording of section 169 (2). However, the judgement in practical sense, cannot indicate the sentence. The convicted person is required to mitigate. The court has to know the accused's previous records, whether he is a first offender or not. The previous records and the mitigation will enable the court to determine the extent of the sentence. I do find that, although section 169 (2) calls for the judgement to indicate the punishment, this cannot be included in the judgement.

Turning to the main issue as stated herein above, it is the evidence of PW1 that the appellant asked her to take a knife to his home. That evidence is corroborated by the evidence of PW2. It is further the evidence of PW1 that the appellant told her to sweep his house. PW2 testified that she wanted to help PW1 sweep the house but the appellant chased her away. It is further stated by PW1 that the appellant told her to remove her clothes but she refused. The appellant then removed her clothes. The complainant also testified that the appellant applied coconut oil on her thighs and he then applied it on his penis.

It is the evidence of PW2 that he peeped into the appellant's house and saw him applying coconut oil on PW1's private parts. It is submitted by the appellant that DW2 testified that his house is made of stones and has tinned roof therefore no one can peep into the house. The investigating officer, PW5, testified

that she visited the scene and noted that the appellant's house has openings on the walls that could enable someone to see into the house. The evidence of PW2 is corroborated by that of PW5. According to PW3, the other children were prevented from recording their statements and that the area where she used to stay became hostile to her. DW2 is the appellant's relative. It is established that the appellant's house has gaps that can enable someone to peep inside.

There is the evidence of application of oil on the appellant's and PW1's private parts. PW1 testified that the appellant applied coconut oil between her legs and inserted his stick on her private parts. PW2 informed the court that she saw the appellant applying the coconut oil. The investigating officer, PW5, visited the scene. She searched the appellant's house and recovered an empty container of coconut oil. The container was produced as P. Exhibit 5. It is the evidence of DW4, Wilfrida Karembo, that police officers from Watamu police station searched the appellant's house and emerged with a coconut oil bottle. This proves the evidence of PW1 and PW2 that indeed the appellant applied coconut oil on his private part and between the legs of PW1. The prosecution evidence does prove that the appellant had coconut oil in his house.

The appellant further argue that whereas PW1 testified that she was defiled, the medical evidence shows that her hymen was intact. It should be noted that PW1 was born on 20th February, 2009. By 31st March, 2014 she was five years old. She could not be in a position to differentiate between defilement and attempted defilement. That is why the police decided to charge the appellant with attempted defilement. This cannot be an issue.

The defence evidence is to the effect that the police asked for Kshs.10,000/=. It could be possible that the sum of Kshs.10,000/= was to be a police bond to secure the release of the appellant pending arrangement in court. That is why the police declined the sum of Kshs.7,000/=. This was not a bribe to the police as alledged by the appellant and his witnesses.

According to the appellant, the P3 form does not established that there was any attempted defilement. The Black's Law Dictionary defines the word attempt as follows: -

1. ***The fact or an instance of making an effort to accomplish something, esp. without success.***
2. ***Criminal law. An overt act that is done with the intent to commit a crime but that falls short of completing from the intended crime. Under the Model Penal Code, an attempt includes any act that is a substantial step toward commission of a crime, such as enticing, lying in wait for, or following the intended victim or unlawfully entering a building where a crime is expected to be committed.***

From the above definition it is clear that there is no need for physical evidence such as bruises or laceration on the complainant's private parts or thighs or any part of the body for the offence of attempted defilement to be proved. Section 4 of the Penal Code, Chapter 63, defines an offence to ***"mean an act, attempt or omission punishable by law"***. The appellant was charged with the offence of attempted defilement.

An attempt is what is usually described as an inchoate offence. According to the Black's law dictionary, ***"the common law has given birth to three general offences which are usually termed as inchoate, or preliminary crimes – attempt, conspiracy, and incitement. A principal feature of these crimes is that they are committed even though the substantive offence is not successfully consummated. An attempt fails, a conspiracy comes to nothing, words of incitement are ignored – in all these instances, there may be liability for the inchoate crime."***

The appellant should therefore not expect any signs of defilement in the P3 form. Section 388 of the Penal Code states as follows: -

> ***"388. (1) 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.

(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."

The prosecution evidence does prove that the appellant asked PW1 to go to his house. It is also proved that the appellant asked PW1 to sweep his house. The evidence further establishes that the appellant removed PW1's clothes, applied coconut oil between her legs and on himself and tried to defile PW1. The appellant was not able to defile PW1. PW1 came out of the appellant's house crying. It is therefore established that an attempt to defile PW1 was made by the appellant. The prosecution did prove its case beyond reasonable doubt.

The defence evidence does not raise doubt on the prosecution case. The appellant was alone with the girls when the incident occurred. DW3, B S was not with him. Although DW2 alledged that she was with PW1 and PW2 and did not see anything, the totality of her evidence is displaced by that of PW1, PW2 and the investigating officer. There is no doubt that the appellant took PW1 to his house.

The upshot is that the appeal lacks merit and is hereby disallowed.

Dated and delivered in Malindi this 29th day of August, 2016.

S.J. CHITEMBWE

JUDGE