REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL 29 OF 2013

LEONARD NDAVI KYENZE ……APPELLANT

VERSUS

REPUBLIC……..…….RESPONDENT

(An appeal arising out of the conviction and sentence of Hon. L. Simiyu Ag. SRM delivered on 15th March 2013 in Criminal Case No. 2579 of 2010 in the Chief Magistrate's Court at Machakos)

JUDGMENT

The Appellant was convicted and sentenced to serve 15 years imprisonment for the offence of attempted defilement, contrary to section 9(1) and (2) of the Sexual Offences Act. The particulars of the offence were that on 24th December 2010 in Athi River District within Eastern Province, the Appellant intentionally attempted to cause his penis to penetrate the vagina of D K J a child aged 10 years.

The Appellant was also charged with an alternative offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No 3 of 2016. The particulars of the offence were that on 24th December 2010 in Athi River District within Eastern Province, the Appellant intentionally touched the vagina of the vagina of D K J a child aged 10 years with his penis.

The Appellant was first arraigned in the trial court on 28th December 2010 when he pleaded guilty to the main charge. Before the facts could be read to the Court, the Accused indicated he wanted to change his plea on 30th December 2010, when he pleaded not guilty to both the main and alternative charges. The hearing commenced before Hon J. Omange on 13th September 2011 who heard 3 prosecution witnesses before the prosecution made an application to amend the charge on 17th November 2011. The Accused then applied to recall the witnesses.

Later on the same date, directions were given that the case proceeds afresh, which did happen on 15th December 2011 when the hearing started *de novo*. During the ensuing trial five prosecution witnesses gave evidence, and the Appellant made a sworn statement after he was put on his defence. The Appellant was consequently convicted of the main charge and sentenced to serve 15 years imprisonment.

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 Amended Grounds of Appeal dated 6th June 2016, which he availed to this Court together with the submissions thereon.

In summary, the Appellant alleges that the matter in the trial Court was prosecuted by an unqualified prosecutor who was neither gazetted nor above the rank of Assistant Inspector of Police, and that while

the said prosecutor was gazetted vide legal notice of 7th December 2012, he had been prosecuting the instant matter since 15th December 2011 for 11 months without being lawfully empowered to do so.

Secondly, the Appellant alleged that he was not supplied with copies of the witness statements in contravention of Article 50(2)(j) of the Constitution, despite his repeated applications. The Appellant referred the Court to various pages of the proceedings in this regard. The third ground raised by the Appellant was that vital and crucial witnesses' evidence was not submitted, thus rendering the investigations that underpinned the prosecutions' claims suspect.

Reliance was placed on section 150 of the Criminal Procedure Code, section 147 of the Evidence Act, and the decision in **Bukenya vs Uganda (1972) E.A. 549** for the position that the prosecution should make available all the witnesses necessary to establish the truth and for the fair dispensation of justice. The potential witnesses who the Appellant alleges were not called to testify were the complainant's father, the complainant's playmate and other police officers at the scene of his arrest.

The last ground of appeal was that the Appellant ought to have been accorded legal advice and/or representation in light of his legal naivety and legal illiteracy, and the gravity of the charges against him. He claimed that pitting him against a skilled prosecutor rendered the trial an unequal contest.

Ms Rita Rono, the learned prosecution counsel, opposed the appeal in written submissions filed on 6th July 2016 that were dated 30th June 2016. It was urged therein that the prosecution had proved its case to the required standards. It was further submitted that the prosecutor one PC Gatimu was duly gazetted, and a copy of the gazette notice being Legal Notice No 105 of 2011 was provided. It was also contended that the times when the Appellant asked for witness statements the court ordered that he be supplied with the same, and that he did not raise the issue later during the trial. On the arguments about some witnesses not being called, the prosecution submitted that the testimony of a complainant is enough to convict without corroboration in sexual offences. Lastly, it was submitted that the Appellant was not facing a capital offence and could therefore not be assigned legal representation by the state.

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**).

In this regard after going through the grounds of appeal, the arguments made and evidence of the five prosecution witnesses and that of the Defence, I note that the issue being raised by the Appellant as to the qualification of the prosecutor was not raised in the trial court, and cannot be raised at appeal as this entails the introduction of new evidence, which cannot be subject to the process of examination at this stage. Therefore, the outstanding issues are whether the Appellant's right to a fair trial was violated, and if the Appellant was convicted for the offence of attempted defilement on the basis of sufficient and satisfactory evidence.

On the first issue, the Appellant claimed that his right to a fair trial as enshrined in the Constitution were violated, as he was not availed the witness statements the prosecution was relying on. I have perused the record of the trial court, and note that the Appellant did request for witness statements before the initial trial, and the court ordered that he be supplied with the statements. Upon the trial starting *de novo* on 15th December 2011, the Appellant stated that he was ready to proceed, and did not ask for statements, until 15th February 2012 when the prosecution after calling 4 witnesses, applied for an adjournment to call two more witnesses. The Appellant then stated that he did not have the statements of these two witnesses This indicates that he did have the statements of the witnesses who had been called previously. The only prosecution witness who was thereafter called was the doctor (PW5) who produced a medical report and P3 form.

Article 50(2)(j) of the Constitution provides that the right to a fair trial includes the right of an accused person to be informed in advance of the evidence the prosecution intends to rely on, and to have

reasonable access to that evidence. This right was explained in ***Dennis Edmond Apaa and Others v Ethics and Anti-Corruption Commission,*** **Nairobi Petition No. 317 of 2012 [2012] eKLR** as follows:

> ***"The words of Article 50(2)(j) that guarantee the right "to be informed in advance" cannot be read restrictively to mean in advance of the trial. The duty imposed on the court is to ensure a fair trial for the accused and this right of disclosure is protected by the accused being informed of the evidence before it is produced and the accused having reasonable access to it. This right is to be read together with the other rights that constitute the right to a fair trial. Article 50(2)(c)guarantees the accused the right, "to have adequate facilities to prepare a defence.***
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> ***This means the duty is cast on the prosecution to disclose all the evidence, material and witnesses to the defence during the pre-trial stage and throughout the trial. Whenever a disclosure is made during the trial the accused must be given adequate facilities to prepare his or her defence ….. The obligation to disclose was a continuing one and was to be updated when additional information was received."***

In the present appeal, I note that the Appellant had been consistent and persistent in requesting for the witness statements before the trial commenced, and the trial Court did order that he be provided with the said statements. At the start of the trial *de novo* the Appellant did not raise this issue, and indicated that he was ready to proceed. Further, the Appellant did not allege that the medical report and P3 form which were the basis for the doctor's evidence were not availed to him, and he did not raise this issue when the doctor was called to testify.

The record therefore shows that the Appellant did ask for witness statements and was given the said statements, and he did not indicate at the material time before the start of the trial that he was still lacking the statements. The Appellant cannot therefore be heard to state that his right to a fair trial was infringed on this account.

As regards the ground raised as to the Appellant's right to legal representation, Article 50 (2) (h) of the Constitution provides that an advocate ought to be assigned to an accused person at State expense if substantial injustice would otherwise result. This article was the subject of the Court of Appeal's decision in the case of **David Macharia Njoroge vs Republic [2011] eKLR** . The court after reviewing the past and current law stated that as follows:-

> *"**Art 50 of the Constitution sets out a right to a fair hearing, which includes the right of an accused person to have an advocate if it is in the interests of ensuring justice. This varies with the repealed law by ensuring that any accused person, regardless of the gravity of their crime may receive a court appointed lawyer if the situation requires it. Such cases may be those involving complex issues of fact or law; where the accused is unable to effectively conduct his or her own defence owing to disabilities or language difficulties or simply where the public interest requires that some form of legal aid be given to the accused because of the nature of the offence...We are of the considered view that in addition to situations where "substantial injustice would otherwise result", persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense."***

In the present appeal, the charges the Appellant was facing did not carry a penalty of loss of life, and the Appellant did not suffer from any of disability that prevented him from understanding the proceedings. The Appellant alleges that the legal issues were too complex for him, however the record of the trial Court does not show any such disclosure and application for legal advice or assistance made by the Appellant, who on the contrary indicated he was ready to proceed with the trial. His allegation that his right to a fair trial was infringed on account of lack of legal representation can only therfore be construed as an afterthought.

The second issue was that of the sufficiency of the evidence used to convict the Appellant. Section 9 of the Sexual Offences Act refers to an attempted defilement as an act which would cause penetration. It states as follows:

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

The word "*penetration"* is the operative word in the above definition which is defined in Section 2 of the Sexual Offences Act to mean:-

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

The Court of Appeal elucidated the meaning of an attempt in **Francis Mutuku Nzangi v Republic [2013] eKLR**, as defined by section 388 of the Penal Code 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.”

What was the evidence adduced to support the charge of attempted defilement? The evidence of PW1 who was C G M and the complainant’s mother, was largely an account of what she had been told about the attempted defilement of the complainant. The evidence of the complainant, D K J (PW2) was key, and she testified after a *voire dire* examination that on 23rd December 2010, she was with her friend called R when the Appellant came, carried her to a place with a lot of grass, removed her dress and underpants, removed his clothes and put his penis into her vagina. PW2 then screamed and was rescued by the police who took away the Appellant.

PC Mathews Masibo (PW3) who was on patrol on that day is the one who rescued PW2 and arrested the Appellant after hearing the scream, and finding the Appellant lying down half naked with PW2, who had no clothing on her lower half of the body. Pauline Katunga (PW4), was stationed at the Crime office in Athi River Police station and received the complaint about the attempted defilement.

The last prosecution witness who was Dr. Nelly Kamwele Ongetho (PW5), produced a medical report and P3 form that showed that the complainant had a urinary tract infection and sexually transmitted infection, even though her hymen was intact. She also produced as evidence an age assessment report showing that the complainant was aged 13 years.

The evidence by PW2 as regards the attempt at penetration was in this regard clear. The evidence adduced by the other witnesses was also sufficient to corroborate the account by PW2 about the attempted defilement, particularly as the Appellant was found by PW3 in a position and state that could only lead to the conclusion that his intention was to defile PW2, and as he was also arrested at the scene of the crime. There was therefore no need for any additional witnesses as argued by the Appellant, and the prosecution proved all the elements of the offence of attempted defilement. I accordingly find that the Appellant’s conviction was safe and on the basis of sufficient evidence.

As regards the sentence, I note that under section 9(2) of the Sexual Offences Act, the minimum sentence for attempted defilement is imprisonment for ten years. I note that the Appellant was found to be a first offender and he did plead for leniency. Therefore while the sentence of 15 years imprisonment was legal it was harsh in the circumstances. I therefore reduce the sentence to ten years’ imprisonment.

I accordingly uphold and affirm the conviction of the Appellant for the charge of attempted defilement contrary to section 9(1) and (2) of the Sexual Offences Act, Act No. 3 of 2006, and only partially allow the appeal by substituting the sentence of 15 years imprisonment with a sentence of 10 years imprisonment which shall run from the date of the Appellant’s conviction by the trial Court.

It is so ordered.

DATED AT MACHAKOS THIS 27th DAY OF SEPTEMBER 2016.

P. NYAMWEYA

JUDGE