REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 7 OF 2013

GEORGE KETER alias BOI……..……..APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 773 of 2012 Republic vs George Keter alias Boi in the Principal Magistrates' Court at Kapsabet by B. Mosiria, Principal Magistrate dated 31st December 2012)

JUDGMENT

1. The appellant was convicted on a charge of attempted defilement contrary to section 9 (2) of the Sexual Offences Act, No. 3 of 2006. He was sentenced to ten years imprisonment.

2. The particulars of the charge were that on 4th April 2012 in Nandi County he unlawfully and intentionally attempted to cause his penis to penetrate the vagina of *D I*, a child aged three years.

3. The appellant has preferred an appeal. The petition of appeal was filed on 11th January 2013 and raises twelve grounds. They can be condensed into ten. First, that the conviction was against the weight of the evidence; secondly, that the trial court misapprehended the medical evidence; thirdly, that the learned trial magistrate failed to take into account relevant factors and instead took into account extraneous factors; fourthly, that the evidence of prosecution witnesses was contradictory; fifthly, that the trial court disregarded the evidence tendered by the defence; sixthly, that the charges were defective; seventh, that the ingredients of the offence were not proved; eighth, that the learned trial magistrate shifted the burden of proof to the appellant; ninth, that the trial court erred by relying on the demeanor of witnesses; and, tenth, that the learned trial magistrate did not properly evaluate the evidence.

4. Learned counsel for the appellant submitted that the medical evidence was unreliable. He emphasized that the complainant's genitalia were intact. He punched holes into the timelines to show that the appellant could not have been at the *locus in quo*. He referred the court to the evidence of DW3 who claimed to have been with the appellant between 4:00 p.m. and 6:00 p.m. on the material day. He said that no independent witness or neighbor saw the appellant commit the offence. He also attacked the judgment at page 17 of the record. He said that the first four sentences clearly shifted the burden of proof to the appellant. In a synopsis, the appellant's case is that the conviction was unsafe.

5. The appeal is contested by the State. The learned State Counsel submitted that the charge was proved beyond reasonable doubt. She submitted that the appellant was positively identified. The case for the State is that PW1 knew the appellant; that she clearly identified the appellant as the person who touched her vagina and put in something he had removed from his trousers. It was submitted that the trial court

was entitled, under section 125 of the Evidence Act, to believe the complainant. Learned State Counsel submitted that DW3 was not in the company of the appellant throughout the material time. In a synopsis, the case for the State is that the evidence established the appellant's guilt. I was implored to dismiss the appeal.

6. This is a first appeal to the High Court. I have re-evaluated all the evidence on record and drawn my own conclusions. In doing so, I have been careful because I neither saw nor heard the witnesses. See *Pandya v Republic* [1957] E.A 336, *Ruwalla v Republic* [1957] E.A 570, *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] EA 32, *Kariuki Karanja v Republic* [1986] KLR 190, *Felix Kanda v Republic* Eldoret, High Court Criminal Appeal 177 of 2011 (unreported), *Paul Ekwam Oreng v Republic* Eldoret High Court Criminal appeal 36 of 2011 (unreported), *David Khisa v Republic* Eldoret High Court Criminal appeal 142 of 2011 (unreported).

7. The complainant was aged *three* or thereabouts. She was attending nursery school. Her evidence was straight forward. She testified as follows-

> *"I know I am in court. I know my mother she is called M. I can also see a police officer in court. I know accused he is called Boi. He does stay near where I stay. We did go to school and came back and Boi took me to our home. He did carry me to his place. We did get in to house and put me on the seat. I was wearing a trouser, he did remove my trouser. He then touched my private part with something from his clothe. And he also touched me with his hand. I felt pain when he touched me. I did cry. He didn't tell me anything but just left me and I went home. He stays near home. I later [told]my mother what happened".*

8. Her mother, PW2, said that on the material day, she found the complainant and her elder sister at home. She prepared supper for them. The complainant refused to go to sleep and started crying. When she asked her what the problem was, she said she was feeling pain in her private parts. PW2 examined her vagina and found some dry substance. They seemed like sperms. The complainant then told her what Boi had done to her. Boi was their neighbour and landlord. She reported the matter to Nandi Hills Police Station.

9. PW3 was the complainant's grandmother. She said she did not know if PW2 had an affair with the appellant. She denied that the appellant had ever married PW2 or any of her daughters. Upon cross-examination she testified that the appellant's wife was not staying with him. She conceded that whenever the appellant travelled, PW2 would take care of his house. She denied coercing the appellant to marry her daughter.

10. PW4 was a clinical officer. He examined the complainant. He testified as follows-

> *"I did find the hymen to be intact. All the other parts were normal. There was no discharge in sub section (b). I did lab investigation. HIV test was negative. High vaginal swap findings were normal no infection was detected. PW3 was filled on 11/4/12. I want to produce it as an exhibit".*

11. When cross-examined by the appellant, he said the child had changed clothes; and, he did not find any bloodstains in her private parts. He confirmed that the appellant was not taken to hospital for examination.

12. The appellant denied committing the offence. He called witnesses to confirm that he was not at the scene of the crime. DW3 said that on 4th April 2012 he was with the appellant from 4:00 p.m. to 6:30 p.m. After that, the appellant said he was going "to town for milk". He was shocked to hear the following day that the appellant had been arrested.

13. DW4 testified that on 4th April 2012 he had left his mobile phone charging at the appellant's place. He did not get the appellant in his house. He then went to visit DW3 and found the appellant there. It was between 6:00 and 6:30 p.m.

14. A number of issues arise from that evidence. The minor gave unsworn evidence. The trial court formed the opinion that she did not understand the nature of an oath. However, no *voire dire* examination was conducted. The true purpose of a *voire dire* examination is to establish whether a child of tender years understands two things: the nature of an oath and the need to tell the truth. See *Republic v Peter Kiriga Kiune* Criminal appeal 77 of 1982 (unreported), *Johnson Muiruri v Republic* [1983] KLR 445. The Children Act defines a child of tender years to be one of ten years or below. The complainant was *three* years old. I am *not* satisfied that the court complied fully with the procedure of taking evidence of the minor.

15. Although the minor spoke confidently, she was not clear about what the appellant did to her. She said he touched her vagina and put in something he removed from his trousers. I am alive that that a child of that age could not describe sexual acts in a graphic manner. The appellant was facing a charge of attempted defilement. The complainant was the key witness. PW4, the clinical officer, did not find any significant evidence. Despite the gaps, the learned trial magistrate concluded as follows-

> *"There is a possibility the doctor couldn't find anything significant and the doctor could also have chosen not to comment even on appearance of genital organ of child now that previous day she complained of the same. I do find the doctor failing to describe how genitalia was [to be] deliberate. However, I don't expect much from doctor now that this is a case of attempted defilement. The minor struck me [as] a child who was telling the truth. I choose to believe her as provided under section 125 Evidence Act because she was clear, consistent and could ably answer questions put to her without contradiction. I will rely on her evidence. The evidence of PW1 is corroborated by PW2 who told the court what child said she underwent".*

16. I am not satisfied that the evidence of PW2 corroborated PW1. I am alive that under section 124 of the Evidence Act, it is *not* mandatory for the evidence of the victim of a sexual offence to be corroborated. But a court convicting on such evidence must be very *careful*. In this case, the charge related to an *attempt*. The burden to prove the offence never shifted to the appellant.

17. I have then examined the following passage in the judgment-

> *"The accused although denying offence did not ably challenge the evidence of child and PW2. The accused didn't ask questions to minor to show her evidence should be doubted. His witnesses didn't help in defence either since no witness was with him all through to rule out possibility of him not having committed offence. The accused hasn't challenged evidence of witnesses how they arrested him on the claims of young child. The accused didn't say he has any grudge with minor so that she can frame her in court. Equally no grudge was demonstrated to exist with PW2, PW3 and PW5 so that they could also testify against accused. Claims by accused to say PW2 wanted him to marry her were refuted by PW2 and PW3 and the accused never pursued that in anyway."*

18. I think with respect, the trial court shifted the burden of proof to the appellant. Subject to section 111 of the Evidence Act, the legal burden of proof rests with the prosecution. See also *Woolmington v DPP* [1935] AC 462, *Bhatt v Republic* [1957] E.A. 332 at 334, *Abdalla Bin Wendo & another v Republic* (1953) EACA 166, *Kaingu Kasomo v Republic*, Court of Appeal at Malindi, Criminal Appeal 504 of 2010 (unreported).

19. The appellant was setting up an *alibi*. When *alibi* evidence is proffered, the prosecution is obligated to investigate it. The appellant had not given any notice that he would raise it. It was being set up well after the close of the prosecution's case. It was thus open to the trial court to weigh it against the evidence already tendered. See *Wang'ombe v Republic* [1976-80] KLR 1683, *Karanja v Republic* [1983] KLR 501. The *alibi* in this case was supported by DW2 and DW3. No one else besides the complainant had placed the appellant at the *locus in quo*. From the cross–examination of PW2 and PW3, elements of a grudge were evident. All these matters created some doubts whether the appellant was the person who attempted to defile the complainant between 4:00 and 6:00 p.m. on 4th April 2012. That doubt should have been interpreted in favour of the appellant.

20. For all those reasons it was *unsafe* to convict the appellant. In all the circumstances of this case, I cannot say that all the ingredients of the offence were proved beyond reasonable doubt.

21. The upshot is that I allow the appeal. I quash the conviction and sentence. The appellant shall be set free forthwith unless held for some other lawful cause.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 18th day of June 2015.

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of

The appellant(in person)

Ms. R. N. Karanja for the State.

Mr. Kemboi, Court Clerk.