REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL 175 OF 2013

KIOKO NGUNZI……..……APPELLANT

VERSUS

REPUBLIC…….……..…RESPONDENT

(An appeal arising out of the judgment and sentence of M.K. Mwangi Ag. SPM, delivered on 14th February 2013 in Criminal Case No. 2038 of 2011 at the Chief Magistrate's Court at Machakos)

JUDGMENT

The Appellant has appealed against his conviction and sentence for the offence of attempted defilement, contrary to section 9(1) of the Sexual Offences Act, Act No. 3 of 2006. The particulars of the offence were that on 28th December 2011 in Machakos District within Eastern Province, he intentionally attempted to cause his penis to penetrate the vagina of NK, a girl aged 14 years. The Appellant pleaded not guilty to the offence in the trial court, and after trial was found guilty of the offence and sentenced to 10 years imprisonment.

The Appellant's grounds of appeal as stated in his Petition of Appeal filed in Court on 10th June 2012 are that the learned trial Magistrate erred in law and fact as there was no independent evidence to corroborate, support and sustain the charge. Further, that the prosecution did not prove its case beyond reasonable doubt. The Appellant also submitted during the hearing of the appeal that the complainant was coached on her testimony.

Ms Saoli, the learned counsel for the State submitted that that the prosecution called five witnesses whose evidence was consistent and corroborated, and that the Appellant was known to them. Further, that the trial court rightly convicted the Appellant, and the Defence was not able to shake the prosecution case. The learned counsel asked that the Appellant's appeal be dismissed and his conviction be upheld.

As this is a first appeal, I am required to re-evaluate the evidence given 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**).

The key evidence given at the trial is as follows. PW1 who was the complainant's mother, testified that on 28th November 2011 she sent the complainant (PW2), her daughter aged 14 years, to collect firewood from a thicket near their house. She also sent PW3, her son aged 12 years, to fetch water from the river. However, that PW3 came back home running and told her that the Appellant was defiling PW2. PW1 testified that when she went to check, she found the Appellant who was a neighbor coming out of the thicket with some firewood. Further, that upon inquiring from him if what PW3 had said was the truth, he slapped and kicked her. She then examined PW2 and found semen on her vagina, and she reported the

matter to the chief and police leading to the arrest of the Appellant.

Both PW2 and PW3 gave sworn testimony after a *voire dire* was conducted on both of them by the trial court. PW2 testified that she was 15 years old and that on 28th November 2011 she was sent by her mother to collect firewood, sand he met the Appellant who seized her, removed her panties, wrestled her to the ground and lay on top of her. Further, that she screamed, and PW3 came running and found the Appellant on top of her. Thereupon the Appellant stood up, zipped his trousers and told PW3 not to report him, and then ran away with the bundle of firewood she had collected. She then went home and told her mother what had the Appellant had done, and they went and reported the matter to the chief and the police.

PW3 on his part confirmed that when he was coming from the stream from fetching water he heard the complainant (PW 2) screaming, and he ran and found the Appellant on top of her. He stated that he then ran home and told his mother what he had seen, and he testified that he knew the Appellant who was a neighbor.

PW4 who was the area assistant chief testified that on 28th November 2011 he was at Kaseve market when he was called by his wife and informed that PW1 was at his home complaining that her daughter had been defiled. He then went with a police officer to the complainant's home, and was led by PW1 to the Appellant's house where they arrested him. PW5 was the police officer who confirmed getting a call from PW4 and accompanying PW4 to the complainant's house and arresting the Appellant. He also produced PW2's birth certificate as an exhibit.

After the close of the prosecution case, the Appellant was put on his defence and made an unsworn statement. He stated that on the day of his arrest he was at the bus terminus and the market until 6.45 pm, and that the police and assistant chief then came at 9pm and arrested him for defiling the complainant and he was later charged in court. He denied that he defiled the complainant.

The issue raised in this appeal is whether the Appellant's conviction for the offence of attempted defilement was based on sufficient and satisfactory evidence. Section 9(1) of the Sexual Offences Act refers to an attempted defilement as an attempted 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"**

In **Francis Mutuku Nzangi v Republic, NRB CA Crim. Appeal No. 358 of 2010 [2013]eKLR**, the Court of Appeal explained the meaning of an attempt, as defined by section 388 of the Penal Code (Chapter 63 of the Laws of Kenya) 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**."

From the evidence by PW2 and PW3 it is evident to the Court that the Appellant did put in motion certain acts which were meant to culminate in the act of defilement. PW2 described these acts as follows:

> **"On 28/12/11 about 6pm I was fetching firewood down the bushes in our farm when the accused came and seized me. It was far from our house. There is a path nearby. It is the accused who came and seized me and removed my underpants up to knee level. I was up at that point, then accused wrestled me down. When he did so I screamed. Accused came on top of me and at that point my brother MK who had gone to the stream came running. My**

brother found me lying on the back with the accused on top of me. When the accused saw M, he stood up and zipped his trousers then called M and told him not to report him."

PW3 corroborated these events by his testimony that he found the Appellant on top of the accused, and PW1 by her evidence that she found the Appellant coming out of the wood thicket and that he was hostile after being asked if he had defiled the complainant. The witnesses were consistent in their evidence of what happened on the material day, and as to the intention of the Appellant, and the Defence was not able to throw any doubt as to the said sequence of events.

In addition the Appellant was well known to and recognized by PW1, PW2 and PW3 who all testified that he was a neighbor. The birth certificate of PW2 was also produced in evidence and showed her date of birth to be 12th July 1997, and she was therefore 14 years at the time of the attempted defilement. The other key elements of the offence of attempted defilement of positive identification and the age of the complainant were therefore proved beyond reasonable doubt by the prosecution, and I find that the Appellant's conviction was safe and on the basis of sufficient evidence.

As regards the sentence meted on the Appellant, section 9(2) of the Sexual Offences Act provides as follows:

(2) A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years."

The sentence imposed on the Appellant is the minimum sentence for the offence of attempted defilement and is therefore not only lawful but cannot also be varied by this court.

I accordingly dismiss the Appellants appeal, and uphold and affirm the conviction of the Appellant for the charge of attempted defilement contrary to section 9(1) of the Sexual Offences Act, Act No. 3 of 2006. The sentence for this conviction is found to be legal and is also affirmed.

It is so ordered.

DATED AT MACHAKOS THIS 22ND DAY OF JULY 2015.

P. NYAMWEYA

JUDGE