REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO.147 of 2011

EZEKIEL MWITI ……..... APPELLANT

V E R S U S

REPUBLIC ..... RESPONDENT

JUDGMENT

The Appellant Ezekiel Mwiti was charged with the offence of attempted defilement contrary to **Section 9 (1) (2) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that on 18th March 2010, (particulars withheld) he intentionally attempted to cause his penis to penetrate the vagina of **SM** a child aged 3 years 8 months.

The appellant faced a second count of assault causing actual bodily harm. The particulars of the offence were that on 18th March 2010 at (particulars withheld) he unlawfully assaulted SM thereby occasioning her actual bodily harm.

At the end of the trial, the appellant was convicted of the two offences and sentenced to ten years and twelve months respectively with an order that the sentences do run concurrently. The Appellant was aggrieved by the convictions and sentence and filed this appeal on 13th May 2011. The appellant later filed amended grounds of appeal setting out the following grounds of appeal:

1. **That the trial magistrate failed to comply with section 48 (1) of the Evidence Act;**

2. **That the learned trial magistrate failed to comply with section 50 (2) (m) of the Kenya constitution;**

3. **That the learned trial magistrate failed to resolve material contradictions in the case in his favour;**

4. **That the charge was defective;**

5. **That the appellant's defence was not considered;**

6. **That the prosecution did not prove their case to the standard required by law.**

The appellant therefore prays that the appeal be allowed, the conviction be quashed, the sentence be set aside and he be set at liberty.

The appellant appeared in person and relied on the written submissions that he had filed. The respondent was represented by Mr. Mulochi.

When the appeal came up for hearing on 27th October 2015, Mr. Mulochi, Learned Counsel for the State contended inter alia that PW1 who is the mother of the complainant found the appellant attempting to defile the complainant who was only 3 years 8 months; that she screamed thus attracting PW2 J K and 3 D T to the scene by which time the appellant had run off. He further contended that PW4 who examined the complainant found lacerations on her genitalia and he assessed the degree of injury as harm. On sentence, the Learned State Counsel contended that with respect to the 1st count, the appellant was handed the minimum sentence which was lenient; that with regard to the 2nd count he was handed 12 months imprisonment whereas the maximum sentence for the offence was 5 years. Consequently, he urged that the sentences were lenient and the court should dismiss the appeal.

Guided by the decision in ***Okeno v Rep (1972) KLR 32***, this court , as the first appellate court, is required to examine and analyse the evidence adduced in the trial court and draw its own conclusions but bearing in mind that the court did not have the benefit of seeing the witnesses to assess the credibility.

Briefly, the prosecution's case was as follows; **PW1 M K**, the mother of the complainant, had on 18th March 2010, gone to the *shamba*. At noon, she went home to prepare lunch. On her way she looked ahead at her house, she saw the appellant lying on top of her child. It was her evidence that the appellant had removed his trousers and that he had pulled the child's pants. PW1 then screamed and the appellant then ran away and entered into a thicket. It was her evidence that she was in the company of another young man from the canteen. They later took the child to hospital and she was given a P3 form which was duly filled.

PW2 J K testified that on 18th March 2010 he was in his shamba when he heard screams from his neighbor. He went there and found K (PW1) screaming and she informed him that Mwiti (the appellant) had slept with her child. Some other neighbours came and they found the child still lying on her back with her clothes lifted. They then sighted the appellant in the shamba and gave chase but he fled into the forest and they got scared of entering there. A report was then made to the police and the child was later taken to hospital.

PW3 D T testified that on 18th March 2010, at about 12 noon he heard screams coming from PW1's house. He went to the scene and PW1 told him that Mwiti (the appellant) wanted to kill her child. It was his evidence that he was in the company of PW2 and that he saw the appellant about 20 meters away. They then chased the appellant who escaped into a thicket. They then advised PW1 to report the incident to the police and take the child to hospital.

PW4 Ntongai M' Imathiu testified that on 22nd March 2010, the complainant was brought to hospital complaining of defilement on 18th March 2010. On examination, there were some bruises and lacerations on the genitals but the hymen was intact. The approximate age of the injuries was 4 days and the degree of injury was assessed to be harm.

PW5 Corporal Dorcas Muthee from Kiutine police post testified that on 18th March 2010, she was in the office when PW1 accompanied by the complainant reported that the complainant had been defiled. She booked the report in the OB and went aside with the complainant for observations and noticed bruises on her thighs. She then took the child to hospital whereupon she was examined by the doctor who confirmed that indeed the child had been defiled. She later visited the scene and after about 3-4 days the appellant was arrested by members of the public. She further testified that the child indentified Ezekiel Mwiti (the appellant) as her assailant.

After the close of the prosecution's case the appellant was found to have a case to answer and he elected to make unsworn statement and called one witness. The appellant raised an alibi defence that on the material date, he was attending a harambee in Tigania where he was just arrested and framed, taken to Kiutine police post; that the case was a frame up because he had a land dispute with PW1.

I have considered the submissions by the parties and the grounds of appeal. In addition, I have reevaluated the evidence on record. The complainant in this case is a child aged about 3 years 8 months. She was observed by the court but was found to be unable to comprehend the proceedings and hat is why she did not testify.

It was contended that the trial magistrate failed to comply with ***Section 50 (2) (m) of the Kenyan Constitution****. I believe the appellant meant 'Article' as opposed to section. The said Article provides as follows:*

> ***"50 (2) every accused person has the right to a fair trial, which includes the right-***
>
> ***(M) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial."***

In the instant case, it is evident from the proceedings of 23/3/2010 when plea was taken that the charge was read over to the appellant in 'Kimeru' language. With regard to prosecution witnesses it was indicated that the language was English/Kiswahili and Kimeru. It was therefore not possible to ascertain the language that the prosecution witnesses used when testifying. The record however, clearly shows that there was a court clerk present at the hearing and court clerks are ordinarily the interpreters. There was no evidence that the appellant intimated to the court that he did not understand the proceedings. He cross examined the witnesses with relative ease and gave his unsworn defence. I am satisfied that the appellant fully understood and comprehended the proceedings at his trial and he was not prejudiced by the omission to clearly indicate the language that was used. I believe that once the plea was taken in Kimeru, that is the language that the appellant had informed the court that he understood and that was the language used in the proceedings.

In saying so, I am guided by the decision of the Court of Appeal in ***George Mbugua Thiongo v Republic, Criminal Appeal 302 of 2007.*** In that case the Court stated that:-

> ***"For the court to nullify proceedings on account of lack of language used during the trial, it should be clear from the record that the accused did not at all understand what went on during his trial. That is not the case here. The appellant cross-examined all three witnesses with no difficulty. He had no difficulty in conducting his defence. It is clear that the appellant clearly understood the proceedings. We do not therefore consider that the omission by the learned trial magistrate to record the language occasioned a miscarriage of justice."***

I find no merit in this ground.

The appellant contended that the trial magistrate failed to comply with **Section 48 (1) of the Evidence Act CAP 80 of the Laws of Kenya**. The said section provides as follows:

> ***"Opinions of experts When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity, or genuineness of handwriting or fingerprint or other impressions.***

PW4 who allegedly examined the complainant did not state who he was i.e. clinical officer or medical doctor, neither did he state his qualifications. From the evidence however, it is clear that he was working at the hospital and he has signed the P3 form as a medical officer/practitioner. The appellant was not in any way prejudiced by this evidence because he had the opportunity to cross examine PW4 on his qualifications but did not do so. Similarly no evidence was tendered to show that PW4 did not have the requisite minimum qualifications and neither did the appellant oppose the production of the medical reports and the P3 form by PW4. Inany event, there is no longer requirement that medical evidence be adduced in a sexual offence **(Section 124 of the Evidence Act).** Apart from his evidence, there was evidence from the Hospital where the child was first treated PEx 2, the treatment notes.

In the case of ***Geoffrey Kioji v Republic*, *Nyeri Criminal. App. No. 270 of 2010 (Nyeri)*** it was stated that:

> *"**Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person.***

In my considered view, the omission by PW4 to state exactly who he was did not prejudice the defence.

By the testimony of PW1, this incident happened about noon. PW2 and 3 who were attracted by PW1's screams confirmed that it was about noon. It was in broad daylight. PW1 is the only identifying witness. She knew the appellant as a neighbor and I have no doubts that she was able to identify him. PW2 and 3 corroborated PW1's evidence that they responded to PW1's distress call whereupon PW1 informed them that the appellant had tried to defile her child. They then spotted the appellant and pursued him but he disappeared into a bush.

PW1' evidence remained unshaken and consistent. In cross examination she insisted that she found the appellant on top of her child. She denied that there was a land dispute between her and the appellant. Similarly PW2 denied having a land dispute with the appellant. The appellant never alluded to the kind of land dispute he had with PW1 and 2. PW1 and 2 are just neighbours, not related – as he is their neighbour. The allegation of there being a land dispute between him and PW1 and 2 is unbelievable. I find that the appellant was caught read handed in the act. **Section 388** of the **Penal Code (Chapter 63 of the Laws of Kenya)** defines an attempt 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.***

In ***Francis Mutuku Nzangi v Republic Nairobi Criminal Appeal No. 358 of 2010 [2013] eKLR***, the Court of Appeal stated 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.***

Before attempting to understand what an offence of attempted defilement under **Section 9 (1) of the Sexual Offences Act** is, I think it is necessary to understand what the offence of defilement is.

> ***"8 (1). A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."***

Penetration is defined under Section 2 to mean

> ***"the partial or complete insertion of the genital organ of a person into the genital organ of another person."***

PW1 told the court that her child's clothes had been lifted up and the appellant had partially removed his trouser. Upon observing the child's genitalia, PW1 and 3 noticed something watery like seminal fluid; PW2, said he saw blood. Medical treatment notes were produced as PEx. No. 2 which indicated that the child had genital lacerations and bruises though the hymen was still intact. The presence of lacerations and bruises to the child's genitalia is itself evidence of penetration considering the position PW1 found the appellant. He had partially removed his trouser. In my considered view, the appellant did not just attempt to defile but was already in the process of defiling the minor because there was evidence of penetration. He need not have completed the act. Since the hymen was intact, there was partial penetration. It was wrong for the police to charge the appellant for only an attempt and the trial magistrate should also have noted this anomaly. The appellant was lucky to be charged with a lesser offence of attempted defilement which I am satisfied has been proved to the required standard.

With regard to the allegation that the trial court failed to give consideration to the appellant's defence, the learned trial magistrate in rejecting the appellants defence remarked as follows:

> "***The accused's defence struck me as a mere afterthought as he never raised the issue of a land dispute during the entire trial process."***

Contrary to the trial magistrate's remarks, the appellant did raise the issue of land dispute with both PW1 and 2 who denied in cross examination that there was any land dispute between them and the appellant. Even if the appellant was to be believed that there was a dispute between him and PW1, and 2 then and that he was framed as a result, one would wonder why PW3 would want to frame him since there was no dispute between them. The appellant's defence that he was just arrested at a harambee and framed and taken to Kiutine police post is not tenable. In any event PW5 in her evidence stated that the complainant who was only 3 years and 8 months indentified her assailant as Ezekiel Mwiti (the appellant herein) a fact which was never disputed by the appellant. Consequently I reject this ground of appeal as well.

Lastly, the appellant contended that the prosecution case was riddled with contradictions that should have been resolved in his favour. PW1 and 3 in their evidence stated that there was watery fluids around the private parts of the complainant. PW2 on the other hand stated that the complainant was bleeding from her vagina. PW4 who examined the child as well as PW4 found the child's genitalia bruised and it is possible there may have been both seminal fluids and blood. In my opinion this contradictions were minor and the appellant was in no way prejudiced by this contradictions. Consequently nothing turns on this ground.

In the end result I find that the evidence tendered by the prosecution witnesses especially PW1,who caught the appellant red handed in the act, and PW2 and 3 who pursued the appellant after PW1 raised alarm was sufficient, credible, overwhelming and reliable to found a conviction. I am satisfied that the offence was proved beyond reasonable doubt and the appellant was properly convicted. As was rightly observed by the trial court, the appellant was caught in the act by PW1 and had it not been for the interruption by PW1 he would have gone all the way.

With regard to the second count of assault causing actual bodily harm contrary to **Section 251 of Penal Code**, it is my considered view that it amounted to duplication of charges, the same having arisen during the same transaction as the offence of attempted defilement. The appellant ought to have been charged with an alternative charge of committing an indecent act with a child contrary to **Section 11 of the Sexual Offences Act**. The charge was irregular and the conviction must be quashed, the sentence is set aside and he is acquitted of Count II.

The appellant was sentenced to 10 years imprisonment on Count 1 which is the minimum sentence for the offence of attempted defilement. Having found that infact the appellant got away easy when he should

have been charged with the offence of defilement, the 10 years imprisonment was too lenient. I will set aside the sentence of 10 years imprisonment and enhance it to 15 years imprisonment.

In the end, the appeal succeeds on Count II but on Count 1 the appeal is dismissed and the appellant is sentenced to serve 15 years imprisonment and the sentence will commence on the date he was sentenced by the trial court, i.e. on 28/4/2011.

It is so ordered. Right of Appeal 14 days.

DATED, SIGNED AND DELIVERED THIS 30TH DAY OF NOVEMBER, 2015.

R.P.V. WENDOH

JUDGE

30/11/2015

PRESENT

Mr. Mulochi for State

In Person for Appellant

Ibrahim/Peninah, Court Assistants