REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KAKAMEGA.

CRIMINAL APPEAL NO. 10 OF 2015.

DOMINIC CHESAINA :: APPELLANT

VERSUS

REPUBLIC :: RESPONDENT

(*An appeal from the conviction and sentence of Hon. S.N. Abuya – SRM in Butali Senior Resident Magistrate's Court Criminal Case No. 805 of 2010 delivered on 20th May, 2011.)*

J U D G M E N T

1. The appellant was charged with the offence of attempted defilement contrary to section 9 (1) (2) of the Sexual Offences Act No. 3 of 2006. He was found guilty and convicted of the said offence. He was sentenced to serve 10 years imprisonment.

2. The appellant filed his petition of appeal raising the following grounds:-

i. ***THAT the learned trial magistrate erred in both law and facts by not discovering that the appellant was not examined by any medical officer so as to prove him guilty;***
ii. ***THAT the pundit magistrate misdirected himself by convicting him and sentencing (sic) him without collaboration evidence since prosecution witnesses produced hearsay (sic) before the court of law;***
iii. ***THAT the learned trial magistrate failed himself (sic) to discover in law and fact that this case was not investigated in anymore (sic) thus, there was no investigating officer;***
iv. ***THAT the learned trial magistrate did not take into account that the key prosecution witness absconded after he discovered that they framed the offence and planted on him (sic) the appellant;***
v. ***THAT the learned trial magistrate erred in law and fact by not discovering that the prosecution side failed to produce the complainant's birth certificate to prove the (sic) age;***
vi. ***THAT the pundit magistrate failed to discover in law and fact that the prosecution side failed to avail the clan elders who arrested the appellant;***
vii. ***THAT the learned trial magistrate erred in both law and facts by charging the appellant with (sic) defective charge sheet.***

Appellant's submissions.

3. At the hearing of the appeal, the appellant relied on his written submissions which he expounded on as follows:-

i. ***The trial court did not comply with article 50 (2) (h) of the Constitution in that it failed to observe that he was not given witness statements in accordance with article 50 (2) (j) of the***

Constitution;

ii. ***In the judgment, the learned trial magistrate stated that the complainant was 15 years old in the year 2010 whereas the charges were framed in July, 2010 when the complainant was 16 years old;***

iii. ***PW1, the complainant, contradicted herself when she said that she was not given a letter and later on in her evidence she said that she left the doctor's letter at home;***

iv. ***The village that PW2 lives in is not clear;***

v. ***At page 4 of the proceedings, the prosecutor mentioned some documents that he would rely on in court, the said documents were never produced;***

vi. ***That PW3 who framed the case against him was together with Dennis according to PW2;***

vii. ***PW2 did not clearly state where the funeral that he attended was;***

viii. ***Police officers were not called to give evidence which shows that no investigations were carried out;***

ix. ***The learned trial magistrate did not consider the appellant's defence;***

x. ***The charge sheet shows that the offence occurred at Mangorilo village whereas PW1 lives at Nguvuli village;***

xi. ***PW3's evidence is silent on whom he was with when they locked the appellant inside the house.***

In concluding his submissions, the appellant informed the court that he was reformed and prayed that his appeal be allowed.

Respondent's submission

4. Mr. Oroni, learned prosecution counsel opposed the appeal. He submitted that PW1 testified that she struggled with the appellant who removed her clothes. This prompted her to run away screaming.

   Mr. Oroni further submitted that PW2 met PW1 running away from the appellant and PW3 confronted him. By then, PW1 was half naked after having been unclothed by the appellant.

   It was submitted by the prosecution that for the offence of attempted defilement, no documentation was required in evidence. Mr. Oroni urged this court to dismiss the appeal.

Analysis of the Evidence

5. This being the 1st appellate court, it is obligated as was held in the case of **Mark Oiruri Mose vs. R. (2013) eKLR**, **to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter, but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that.**

6. The complainant gave evidence as PW1. She testified that she was 16 years old when she testified on 1/12/2010. She gave sworn evidence. No voire dire examination was carried out. She stated that on 10/7/2010 at 11.00 a.m. she was basking outside their house when the appellant passed by their home, took jerricans and started fetching water in a well at PW1's home. Suddenly, the appellant moved to where PW1 was and started removing her clothes, he tore her skirt and pant. PW1 started struggling with him, got out of his grasp and started screaming as she ran. The appellant followed her.

7. PW3 found PW1 crying. PW3 held the appellant and took him to PW1's parents' house where he locked him up. PW1 narrated to PW3 what had transpired and gave him her father's cell phone number. PW3 called PW1's father who went home. The appellant was arrested. PW1 was treated on her leg where she was injured. She testified that the appellant tried to defile her but he did not manage to do so.

8. On cross examination, PW1 remained unshaken in her evidence and confirmed her narration that

the appellant tried to defile her.

9. PW3 adduced evidence that on 10/7/2010, he left his home at Manguliro for Nguvuli and on passing a river, he saw PW1 crying. He asked her what was wrong and she said that the appellant wanted to "**fall on her"** (sic). PW3 saw that PW1's petticoat was torn and her knees were dirty. On seeing the appellant, PW3 asked him what was wrong but the appellant asked PW3 in what capacity he was asking him that question. The appellant started following PW1 again and PW3 arrested him and called PW1's father on the phone. The appellant was locked in a house until PW2 went to the scene.

10. On cross examination, PW3 said that he never saw Dennis but only saw the appellant following the girl "**wanting to fall on her**" (sic) to continue with his work. PW3 said that he was a passerby when he witnessed the incident.

11. PW2, the father of PW1 went home from a funeral after being called on the phone by PW3 who told him that the appellant was chasing PW1 with the intention of wanting to defile her. PW3 had arrested the appellant who was locked in a house with the assistance of Dennis. PW2 reported the incident to the sub chief who gave him two Administration Police Officers to assist him. The appellant was arrested. The sub-chief gave PW2 a letter to take to the police station. PW1 was treated. PW1 produced the letter from the Assistant chief.

12. On being cross examined, PW2 said that he does not know where Dennis had gone to by the time he reached home.

13. The appellant denied having committed the offence and informed the court that PW3 and another boy called Dennis wanted to cut him with a panga and he gave Dennis money. That PW3 told Dennis to arrest him and lock him inside a house. It was then that Dennis called PW2 on the phone and told him that the appellant wanted to defile PW1. He was arrested and charged. He informed the trial court that PW1did not bring the Doctor's letter when she went to court to testify.

Determination of the appeal

14. This court cannot establish from the face of the lower court record that the appellant was denied copies of witness' statements and that he requested for the same but they were not availed. If that is the position, the appellant did not bring it to the attention of the court as the same is not recorded in the lower court record. His submission therefore that the provisions of article 50 (2) (j) were contravened is without basis.

15. PW1stated on oath on 1/12/2010 that she was 16 years of age. This court does not doubt that the complainant was a minor as at the time the offence was committed.

16. The proceedings of the lower court indicate that it was PW2 who was given a letter by the sub-chief to take to the police station after the offence of attempted defilement. PW2 produced the said letter as evidence in court. The evidence of PW1 was to the effect that she was not given a letter. She later on in her evidence said she left the Doctor's letter at home. This court notes that from the manner in which the evidence was recorded it is difficult to discern if the letter that the appellant was referring at the first instance was a letter that originated from the police station or from hospital. All that is discernible from the record is that PW1 stated that the first time she went to court she left the Doctor's letter at home. The appellant ought to have clearly brought out in cross-examination the letter he was referring to.

This court finds that the inconsistency on the existence of the said letter does not go to the substance of the case.

17. Failure by the police officers to include the police occurrence book No. in the charge sheet does not render the charge defective. No prejudice was occasioned to the appellant by that omission.

The police case No. was indicated as 973/320/10. That information was sufficient to show that the case was formally reported to the police station and a police file opened.

18. The appellant submitted that it was not clear where PW2 resides. The evidence of PW2 was very clear that he resides at Nguvuli village.

19. It is clear that Dennis was not an eye witness to the incident. The evidence of PW1 was to the effect that Dennis went to the scene after the incident was over.

20. The appellant brought up the issue of where PW2 had gone to attend a funeral as PW2 mentioned two places namely Nambacha and Bungusa. This court notes that PW2 was away from home attending a funeral when the incident occurred. This court cannot determine at appeal stage if Nambacha is at the same place as Bungusa. Cross-examination of that aspect would have shed more light at the trial court.

21. The appellant submitted that the documents which were to be produced in court by the prosecution were not produced. This court bears in mind that the offence that the appellant was charged with was one of attempted defilement. It is not mandatory for the prosecution to produce documentary evidence to support the said charge. All that the prosecution is required to prove is that there was an attempt to defile. The actions executed by the appellant in this case were sufficient to indicate that he was not after a brotherly hug from PW1. His actions of stripping PW1 of some of her clothes was indicative of his intentions to defile her.

22. The learned trial magistrate considered the appellant's defence and dismissed it for being unbelievable. I am of a similar opinion as the learned trial magistrate that the appellant's defence was farfetched rendering it to be unbelievable. PW3 and one Dennis could not have gone to the extent of convincing PW1 to make up a case of attempted defilement as a cover up that PW3 and the said Dennis robbed the appellant of his money.

23. On the failure by the prosecution to call the investigating officer to adduce evidence in court, I am guided by the provisions of Section 143 of the Evidence Act which states as follows:-

> ***"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of a fact"***

24. In the case of **Harward Shikanga and Another vs. Republic [2008] eKLR, the Court of Appeal held that failure to call an investigating officer cannot automatically result in an acquittal. Each case has to be considered in its own circumstances."** Similary, in the case of **Cliff Bikeri Mokua and Another Vs. Republic [2014] eKLR**, the Court of Appeal stated that the duty of the prosecution is to present before the trial court such witnesses as it thinks will establish its case beyond reasonable doubt. Further in the case of **Kiriungu Vs. Republic [2009] KLR 638**, the court said:-

> ***"..... the effect of failure to call police officers involved***
>
> ***in a criminal trial, including the investigating officer, is not fatal to the prosecution unless the circumstances of each particular case so demonstrate. We have examined the circumstances of this case and we are satisfied that the evidence of the investigating officer and the arresting officer would not have been prejudicial to the prosecution case as it was established beyond reasonable doubt that the appellant was involved in the crime with which he was charged."***

In the instant case, the evidence on record reveals that failure to call the investigating officer did not prejudice the appellant herein.

25. The appellant in his written submissions indicated that the trial court admitted the evidence of a

minor, PW1, unprocedurally as a preliminary examination was not conducted to establish her intelligence before being sworn in to give evidence.

In the case of **Kibangeny vs. Republic [1959] EA 92 at 94**, the law regarding children of tender years was succintly stated by Windham JA. The judge stated thus:-

> ***"There is no definition in the Oaths and Statutory Declarations Ordinance of the expression "child of tender years." For the purpose of section 19. But we take it to mean, in the absence of special circumstances, any child of an age, or apparent age, of under 14 years", although as was stated by Lord Goddard CJ in R. Vs. Campbell (1) (1956) 2 ALL ER 272 –***
>
> ***"Whether a child is of tender years is a matter of the good sense of the court ..... where there is no statutory definition."***

26. It then follows that in this case, the magistrate did not consider PW1 who was 16 years of age to be a child of tender years so as to require her to go through a voir dire examination. I do not fault the learned trial magistrate in so doing as the said magistrate is the one who saw the said witness and exercised his discretion in accepting PW1's evidence without conducting a voir dire examination. PW1 therefore did not fall within the test laid down by Windham JA nor can she be said to have been a child of tender years as the test laid by Lord Goddard – CJ in the Case of **R. Vs. Campbell (supra)** was applied by the trial magistrate.

27. It is my finding that the prosecution proved its case beyond reasonable doubt. The sentence imposed on the appellant is the minimum sentence provided by law for the offence of attempted defilement.

28. I therefore find the appeal devoid of merit and I hereby dismiss it in its entirety.

DELIVERED, DATED and **SIGNED** at **KAKAMEGA** on this 10TH day of **DECEMBER**, 2015.

NJOKI MWANGI.

JUDGE.

In the presence of:-

..... for the Appellant.

..... for the Respondent.

..... Court Assistant.