IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL NO. 53 OF 2014

(FORMERLY KISII HCCRA NO. 71 OF 2012)

BETWEEN

ELIJAH ODHIAMBO ODUOGI …….…. APPELLANT

AND

REPUBLIC ……...……... RESPONDENT

(Appeal from the original conviction and sentence in Criminal Case No. 126 of 2011 at the Senior Resident Magistrates Court at Ndhiwa, Hon. B.O. Omwansa, RM, dated 27th October 2011)

JUDGMENT

1. The appellant, **ELIJAH ODHIAMBO ODUOGI** faced a charge of attempted defilement contrary to **section 9(1)(2)** of the ***Sexual Offences Act, 2006***. The particulars of the charge were that on 23rd June 2011 at [Particulars Withheld] in Ndhiwa District he attempted to cause his penis to penetrate the vagina of NA, a child aged 14 years. He faced an alternative charge of committing an indecent act with a child contrary to **section 11(1)** of the ***Sexual Offences Act***.

2. He was convicted on the principal charge and sentenced to 10 years imprisonment. He now appeals against the conviction and sentence on the grounds set out in the petition of appeal which may be summarized as follows; that the learned magistrate erred by basing the conviction on the sole of evidence of PW 1, that the evidence of PW 1, PW 2 and PW 3 did not corroborate that of PW 1 and that the learned magistrate failed to consider his defence. The appellant relied on written submissions and supplementary grounds which mirrored the grounds of appeal.

3. The State through its learned counsel, Mr Oluoch, opposed the appeal on the ground that the evidence supported the conviction and that the prosecution proved the offence. He submitted that the appellant's defence was an afterthought.

4. The grounds of appeal and arguments proffered call upon this court to review and re-appraise the evidence and reach its own conclusion bearing in mind that it neither saw nor heard the witnesses. This is consistent with the duty of the first appellate court elucidated in ***Ngui v Republic*** **[1984] KLR 729 and** ***Okeno v Republic*** **[1972] EA 32**).

5. PW 1, NA, testified that she was aged 14 years and was in standard 6. She produced her child

health card. She recalled that on 23rd June 2011 at midday she was sent home to collect school fees. On the way she met the appellant armed with a stick and panga. He tried to seduce her but she refused and ran into the home of PW 3. PW 3 testified that she was home when pW 1 came running and breathing heavily. PW 1 told her that the appellant was chasing her and in a short while the appellant appeared armed with a stick and panga. He threatened PW 3 and left. PW 3 then left her home for a while to collect maize from the farm

6. When PW 3 was away, the appellant came back looking for PW 1. PW 1 testified that he found her in the bedroom, pulled her by the sweater and dragged her to the maize plantation, removed her skirt and pant as she struggled. She raised alarm whereupon he fled.

7. PW 3 testified that she met PW 1 while coming from the maize farm who narrated to her ordeal. She decided that to take PW 1 back to school where she informed one of the teachers to take up the matter.

8. PW 4, the father of PW 1, testified that his wife called him in the evening of 23rd June 2011 and told him about the incident. He reported to the police and was issued with a P3 form. He took the PW 1 to Ndhiwa District Hospital where she was examined by PW 2. PW 2, a clinical officer, saw PW1 on 24th June 2011. He examined the genitalia and noted no injuries or discharge. The HIV, Syphilis and pregnancy test were all negative. He confirmed that there was no penetration. He filled the P3 form 2 days later.

9. PW 5, a neighbour to PW 3, testified that on 23rd June 2011 she was at house when she heard commotion from the gate. When she went out she saw PW 1 and PW 3. PW 3 called her to go and see what happened. She went to the nearby maize farm and found leaves lying low as if a person had been rolling on them. She was told that the appellant tried to molest PW 1 but she did not see him.

10. The last witness, PW 6, a police officer confirmed that she received the complaint on 24th June 2011 at about 3pm and was asked to investigate. She accordingly recorded statements and issued the P3 form. She noted that PW 2 confirmed there was no penetration. She stated that the appellant came and presented himself at the station and was arrested.

11. When he was placed on his defence, the appellant gave an unsworn statement. He denied knowledge of the allegations against him. He stated that on the material day, he left duty at about 6.30 pm after working the whole day at Ruma National Park. He stated that he was arrested on 6th July 2011 at the police station when he went to report the loss of his identity card which was eventually found.

12. Did the prosecution prove that the appellant was the person who attempted to defile PW 1? **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 fulfilment, and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.*
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> *(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.*
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> *(3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence.*

13. In ***Francis Mutuku Nzangi v Republic*** **NRB CA Crim. Appeal No. 358 of 2010 [2013]eKLR**, the Court of Appeal recapitulated the provisions 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.*

14. The testimony of PW 1 was clear, consistent and convincing regarding the events of the material day. She testified how she was threatened by the appellant who was hell bent on sexually assaulting her. He followed her twice to the home of PW 3 and the use of force in the maize plantation manifested his clear intention to defile her. PW 1's testimony was unshaken on cross-examination and in my view it was sufficient to found a conviction under the proviso to **section 124** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** which provides as follows;

> *[P]rovided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person.*

15. Even absent the requirement for corroboration, the PW 1's testimony was corroborated by the production of the torn pullover which was seen by PW 2. PW 3 testified that she saw where the attempt to place in the maize farm. The testimony of PW 2 confirmed that of PW 1 and lent it credibility and consistency. It was not therefore necessary to call a teacher from the school who would only confirm the PW 2's complaint. Moreover, PW 2 testified that she left a teacher to deal with case and PW6 confirms that a complaint was made to the police which led to the arrest of the appellant.

16. The case of mistaken identity does not arise as the events took place at daytime. PW 1 had contact with the appellant twice on that day and he was also seen by PW3 in the area where the offence took place.

17. The appellant's defence was an alibi. In the case of ***Wangombe v Republic*** **[1976-80] 1 KLR 1683**, the Court of Appeal addressed itself to the treatment of defence of alibi by a court trying a case and held that even where the accused does not call witnesses, it is the duty of the court to weigh the evidence adduced in totality and make a finding on the culpability or otherwise of the accused.

18. The appellant's defence, in light of the prosecution evidence was but an afterthought as the evidence against him was overwhelming. PW 6, when asked about any report about the appellant's identity card, denied that such a report was made.

19. The evidence against the appellant was overwhelming.The sentence imposed was the statutory minimum under the **section 9(2)** of the ***Sexual Offence Act***.

20. I affirm the conviction and sentence. The appeal is dismissed.

DATED and DELIVERED at HOMA BAY this 24th day of November 2014

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Oluoch, Senior Deputy Director of Public Prosecutions, for the respondent.