REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CRIMINAL APPEAL NO. 54 OF 2013

JOSEPH K. TURGUT.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal against the Conviction and Sentence by the Honourable J.Kasam, Senior Resident Magistrate at Sotik in Criminal Case No. 228 of 2011 on 17.10.2013)

J U D G M E N T

1. Joseph K. Turgut, the appellant was charged with the offence of attempted defilement contrary to **Section 9(1)** and **(2)** of the **Sexual Offences Act No. 3 of 2006.**

The particulars stated in the charge sheet were that the appellant on the **8th of March, 2011**, at unknown time in Sotik District of Bomet County, Rift Valley Province, attempted to defile **VC** a child aged five (5) years.

2. He pleaded not guilty to the charge and the case proceeded to full hearing and he was convicted and sentenced to ten(10) years imprisonment. Being aggrieved by the judgment he has appealed against both conviction and sentence raising the following grounds;

a. That the learned magistrate erred in law and in fact in convicting the appellant whereas it was clear that the evidence adduced to prove the charges against him were seriously at variance with the particulars of the offence as stated in the charge sheet.

b. That the learned magistrate erred in law and in fact in that she failed to consider the fact that the appellant pleased not guilty.

c. That the learned magistrate erred in law and in fact in that she shifted the burden of proof in seeking the defence to challenge the prosecution's case in several instances.

d. That the appellant did not have the benefit of a legal counsel.

e. That the learned magistrate erred in law and fact in that she convicted the appellant using evidence of witnesses which was contradictory and therefore incredible thus the charge of attempted defilement was not proved beyond reasonable doubt.

f. That further to the foregoing the learned magistrate erred in law and fact in that he convicted the appellant using evidence of witnesses which was contradictory and full of discrepancies that it should not have been relied on to convict the appellant.

g. That the learned magistrate erred in law when she considered extraneous circumstances in arriving at the decision that he did.

h. That the learned magistrate erred in law and in fact in that she shifted the burden of proof in seeking the defence to challenge the prosecution's case in several instances including the real person who may have committed the offence in question if any.

i. That the appellant was never taken for medical examination to rule out the possibility of any third party being the person who may have committed the offence.

j. That the learned magistrate erred in that she imposed a sentence which is harsh and excessive in all the circumstances of this case.

3. The prosecution called a total of four(4) witnesses. The complainant was a minor aged five(5) years and the court declared her a vulnerable witness and appointed her mother **JL** to be her next of kin. The said mother testified as PW1.

She explained to the court that on **8th March, 2011** at 1pm she went home from the farm but did not find her daughter V.C there. She also missed her at her neighbour's and went to the road as other children from school were around. She was with her neighbour **Christine**.

4. V.C came towards her limping and crying. When asked why she was crying, she kept quiet. PW1 checked her and through the intervention of **Christine,** V.C told her that her teacher had slept with her and threatened her against telling anyone. She said the girl's pant was blood stained. She rushed her to Sotik Health Centre then Kericho District Hospital for treatment. A report was made to Sotik police station the next day. She took the girl's blood stained pant and biker to the station.

5. The Assistant chief, **Lenny Cheruiyot Kirui** (PW2) learnt of the incident and of a reconciliation meeting which had occurred between the victim's and appellant's families and he took the appellant and **V.C** to Sotik police station. They were received by PW3 **No. 88116 P.C Mohamed Abudi**. The appellant and the minor V.C were referred to Sotik Dispensary.

6. PW4 **Paul Ngetich** is the Clinical officer who examined the minor V.C . His findings were as follows:

- *No physical injuries on the body.*

- *No physical injuries, no bleeding, no discharge or any signs of infection in the external genitalia.*

- *The urinalysis proved nothing of significance.*

- *No sign of defilement.*

The appellant was equally examined and he was found to have no physical injuries to his penis. His blood and urine were tested and the tests were negative whatever they were.

7. The appellant in his defence gave an unsworn statement and denied the charge. He called one witness. The witness **Margaret Turgut** (DW2) confirmed that the school committee received a report of the alleged defilement and a meeting was held. It was decided that the girl be referred to hospital as the appellant denied committing the offence. An attempt by the appellant to be given a chance to call a second witness was denied by the trial court.

8. When the appeal came for hearing **Mr. Motanya** for the appellant submitted that the evidence adduced

was at variance with the charge sheet, in that, where as the charge sheet talked of attempted defilement, the evidence adduced was on defilement yet the charge sheet was never amended. He also pointed out contradictions in the judgment and the evidence.

9. M/S Omunyolo the learned state counsel conceded the appeal on the grounds of :

- *Inconsistencies in the evidence.*

- *Failure by the intermediary (PW1) to give evidence on behalf of the minor.*

- *The charge was not proved.*

10. As this is a first appeal, this court has a duty to re-evaluate and reconsider the evidence on record and arrive at its own conclusion. I am also alive to the fact that I did not see nor hear the witnesses testify. See

Okeno V R 1972 EA 32

Ajode V R [2004]2 KLR 81

Simiyu & Anor. V R [2005] 1 KLR 192

11. Ground No. 9 is disallowed as there is evidence on record that the appellant was medically examined by PW4 the clinical officer. He even produced a P3 form (EXB 3) in respect of the appellant. The report shows that no injuries were found on the appellant's genitalia.

12. I will deal with the rest of the grounds together and address several issues that have come up.

Inconsistencies in the evidence

It was the evidence of PW1 that when she examined her daughter (V.C) the latter had blood stains on her pant. She took the pant and biker to the police station. This witness never identified the pant and biker inspite of the promise that she would be recalled for that purpose.

13. The investigating officer (PW3) did produce a yellow biker (EXB2) as the one that had been blood stained. PW1 who took the pant and biker to the station said it was the pant **and not** the biker that was blood stained. The said pant and biker not having been identified by PW1 could not have been produced by PW3 as he was not the one who recovered them.

14. PW1 said the minor was unable to walk because of too much pains, after the defilement. The medical evidence by PW4 does not support the claims of defilement by PW1. It clearly rules out any element of defilement. This is a clear contradiction to the evidence of PW1.

15. The appellant was charged with the offence of attempted defilement. The evidence of PW1 and PW3 was that the minor had been defiled. There was no amendment or attempt to amend the charge sheet, in the face of this evidence. Instead the learned trial magistrate in her judgment at page 3 lines 17-21 states thus:

> ***"PW1 stated that when she approached the child; she was crying and limping and on further examinations; her pants had blood stains. There was corroboration of this evidence that the victim had been sexually assaulted. PW3, the investigating officer produced a yellow biker before court as a listed exhibit 2 which was stained with blood. Therefore the element of attempted defilement has been proved"***

16. If indeed this child had blood stains in her pant or biker and was unable to walk as a result of a sexual assault would the offence be defilement or attempted defilement? And if it was attempted defilement as

found by the trial court what is it that the appellant did which showed that he attempted to defile the child? With all due respect, I find none, in the evidence adduced.

17. PW2 and PW3 relied on some information from villagers to the effect that the family of the victim and that of the appellant had tried to reconcile over the matter. None of the villagers testified and their alleged minutes were never produced as an exhibit in the proceedings. However, the learned trial magistrate refers to this in her judgment as part of the reason for convicting the appellant.

18. Section 31(4) of the **Sexual Offences Act** gives guidelines on how a vulnerable witness is to testify. In this case, the learned trial magistrate declared the minor to be a vulnerable witness and appointed her mother to be the next of kin. She failed to give directions on how this vulnerable witness was to give her evidence. If she meant that she would testify through an intermediary as provided for under **Section 31 (4) (b)** of the **Sexual Offences Act** then this was not achieved because the child's evidence was completely locked out. What her next of kin (PW1) did was to give her own evidence and not the minor's evidence as correctly submitted by **M/S Omunyolo** the learned state counsel.

19. Failure to have the minor's evidence taken did a big blow to the prosecution's case as what the mother (PW1) told the court was so contrary to the medical evidence.

20. I would also wish to comment on the way the appellant's defence was handled by the court. The appellant's bond had been cancelled by the court and he was in custody. His counsel **Mr. Koech** requested for an adjournment to call a witness whose name was given as **Esther Langat** of Kibayit village. The court had earlier on directed that witness summons be issued for her to appear in court, but the witness was not served with summons. **Mr. Koech** applied for an adjournment on this account. The prosecution did not raise an objection to this application but the learned trial magistrate overruled the application and closed the defence case and gave it a date for judgment.

21. There is no reason given for this action by the learned trial magistrate. The appellant was in custody and was not going to run away. As a person in custody he could not get hold of his witness. Why would the court for heaven's sake bar him from presenting his full case before it? This was unprocedural, and unjust.

22. After making an evaluation and analysis of the evidence on record together with the grounds of appeal, I find that the appeal has merit. The State has rightly conceded the appeal. The same is allowed. The conviction is quashed and the sentence set aside. The appellant to be released unless otherwise lawfully held under a separate warrant.

Dated, signed and delivered this 16th day of December, 2014

H.I. ONG'UDI

JUDGE

In the presence of ;

M/S Munyolo for State

Mr. Kiprono for Motanya for Appellant

Lagat – Court Assistant

Appellant

Interpretation – English/Kipsigis