REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

H.C. CRIMINAL APPEAL NO.156 OF 2011

(An Appeal arising out of the conviction & sentence of R. OIGARA –SRM delivered on 5th September 2011 in Kimilili SRMC.CR.C. No.732 of 2008)

ENOCK SOET NDIWA……..APPELLANT

VERSUS

REPUBLIC…….……..…….....RESPONDENT

J U D G M E N T

The Appellant, Enock Soet Ndiwa, was charged with the offence of **attempted defilement** contrary to **Section 9(1) & (2)** of the **Sexual Offences Act**. The particulars of the offence were that on 24th September 2008 at ***[particulars withheld]*** Village in Kimobo Location of Mt. Elgon District, the Appellant unlawfully attempted to commit an act which could cause penetration against B C, a girl aged three (3) years. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, the Appellant was convicted as charged and sentenced to serve ten (10) years imprisonment. The Appellant was aggrieved by his conviction and sentence. He has filed this appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of the evidence that did not support the charge. He accused the trial magistrate of being biased and convicting him on a basis of a defective charge. He faulted the trial magistrate for considering extraneous factors in convicting him and in further failing to analyze the evidence on record which was in fact contradictory. He was aggrieved that he had been tried and convicted in a language that he did not understand. He was finally aggrieved that he had been sentenced to serve a custodial sentence that was harsh and excessive in the circumstances. In the premises therefore, the Appellant urged the court to allow his appeal, quash his conviction and set aside the sentence that was imposed upon him.

During the hearing of the appeal, the Appellant presented to the court written submission in support of his appeal. He urged the court to allow the appeal. On his part, Mr. Ogoti for the State opposed the appeal. He made oral submission urging the court to find that the prosecution had established its case on the charge of attempted defilement to the required standard of the law. This court will address the issue raised by the parties to this appeal after briefly setting out the facts of this case.

The complainant in this case, B C was a girl aged about four (4) years at the time of the alleged complaint. The birth certificate produced in evidence showed that the complainant was born on 22nd December 2004. According to PW3, C C, the mother of the complainant, on 24th September 2008 at about 2.30 p.m., she was at her home at ***[particulars withheld]*** Village undertaking some domestic chores. She realized that the complainant was nowhere to be seen. She started looking for the complainant within the neighbourhood. As she was walking past a maize plantation, she heard a child crying. She went to investigate. She found the Appellant having removed his trousers. He was with the child. The complainant's pants had also been removed. She recalled that when the Appellant saw her, he rose from the ground and used a piece of sugarcane to hit her. PW3 raised alarm. People who were in the neighbourhood answered her screams. They apprehended the Appellant. PW3 examined the complainant. She saw that the complainant had spermatozoa on her thighs. The complainant was taken to Kapsokwony

District Hospital on 25th September 2008 at 6.30 p.m. She was examined by PW1, Simon Kwami, a Clinical Officer based at the said hospital. On examining the genitalia of the complainant, he noted no signs of injury or defilement. The complainant did not have any injury. The P3 form was produced as an exhibit during the hearing. PW1 also examined the Appellant. He noted that the Appellant was wearing bloodstained clothes. He had an injury on his head. In his assessment, the injury was caused by a blunt object. The Appellant told him that he had been beaten by members of the public at the scene where it was alleged that he had defiled the complainant.

The complainant testified before court. In the assessment of this court, the complainant was not sufficiently intelligent to testify. She was not possessed of knowledge to know what transpired on the material day. Her testimony was not completed until after a period of two (2) years. In two instances, she could not testify because she was unable to talk. When she finally testified, it was apparent that her testimony was couched. PW4, AP Cpl Nahashon Karani testified that on 24th September 2008 at about 4.30 p.m. he was at the D.O's office Kimobo when complainant's mother arrived at the office with a child. She told him that she suspected that the complainant had been defiled by the Appellant. PW3 arrested the Appellant and took him to Kapsokwony Police Station. He advised the mother of the complainant to take the child to hospital. PW5, Moding Kipkuni, was the investigating officer in this case. He told the court how upon the arrest of the Appellant, he commenced investigations and later reached the conclusion that the offence for which the Appellant was charged had been disclosed. After the conclusion of the investigations, he made the decision to charge the Appellant. When the Appellant was put on his defence, he denied committing the offence.

This being a first appeal, it is the duty of this court to reconsider and to reevaluate the evidence adduced before the trial court so as to reach its independent determination whether or not to uphold the conviction of the Appellant. In reaching its decision, this court is required to always put in mind the fact that it neither saw nor heard the witnesses as they testified and therefore is required to give due allowance in that respect (see **Okeno –Vs- Republic [1972] EA 32**). The issue for determination by this court is whether the prosecution established its case on charge of attempted defilement that faced the Appellant to required standard of proof beyond any reasonable doubt.

This court has reevaluated the facts of this case. The first issue to be determined is whether the charge that the Appellant was charged with is defective. The Appellant argued that the charge brought against him was defective. In his submission, he stated that the particulars of the charge were incomplete because the particulars read *"(the Appellant) unlawfully attempted to commit an act which could cause penetration against B C, a girl aged three years"*. In the Appellant's understanding, the particulars were incomplete because it did not define what constituted penetration. **Section 2(1)** of the **Sexual Offences Act** defines **"penetration"** to mean *"the partial or complete insertion of the genital organ of a person into the genital organ of another person"*. In its submission, the State was emphatic that the charge brought against the Appellant was proper. Having considered the rival arguments in this regard, this court is of the considered view that the charge was indeed not defective. The Appellant was charged with the offence of attempted defilement. The act of defilement was not complete. The Appellant did not defile the complainant but it was alleged that the Appellant attempted to defile the complainant. The particulars of the charge were therefore complete. This is because it stated that the Appellant attempted to commit an act that would cause penetration against the complainant. That ground of appeal has no merit and is disallowed.

The second issue for determination is whether the prosecution adduced evidence which established the guilt of the Appellant on the charge of attempted defilement to the required standard of proof beyond any reasonable doubt. The complainant, a girl aged three (3) years, was put on the stand to testify the case. The trial magistrate did not conduct *voire dire* to establish whether the child was of sufficient intelligence to testify in the case. From the proceedings, it was clear that the complainant was not in a position to testify because she lacked sufficient intelligence to testify in the case. This court doubts that the child understood the import of the evidence that she was testifying. In **Mohammed –Vs- Republic (2008)1KLR (G&F) 1175**, the Court of Appeal held that the purpose of conducting *voire dire* is to establish two matters, firstly, whether the child understands the nature of the oath. If the court comes to that conclusion, then it proceeds straight away to swear or affirm the child and to record the evidence.

Secondly, if the court is not satisfied on the first test, it should express its opinion, not only that the child is possessed of sufficient intelligence to justify reception of the evidence, but also understands the duty of telling the truth, before proceeding to record the child's evidence. In this appeal, the failure by the trial magistrate to conduct *voire dire* rendered the evidence of the child of little or no probative value because this court is unable to assess whether the child was possessed of sufficient intelligence to testify in the case. In any event, common sense dictates that a child of three (3) years cannot possibly be possessed of sufficient intelligence to be able to testify in a criminal case. The possibility that the child could be made to parrot someone else's directions cannot be excluded.

Having excluded the child's evidence, is the other evidence on record sufficient to sustain the conviction of the Appellant? The only other evidence is that of complainant's mother, PW3, C C. She told the court that on the material day she heard the complainant cry inside a maize plantation. When she went to investigate she found the Appellant having removed his trousers. The child's pants had also been removed. She raised alarm. Members of the public came to her aid. She told the court that on inspecting the child, she saw that the child had spermatozoa on her thighs. The child was taken to be examined by the clinical officer, PW1, a day after the incident. It was therefore not possible for this court to verify the claim by the complainant's mother that indeed she found spermatozoa on the thighs of the child. The clinical officer testified that the complainant had no injury at all and was not defiled. No other witness testified as to what transpired on the material day. It was claimed that members of the public came to assist the complainant's mother when she raised alarm. No such member of the public was called as a prosecution witness to testify in the case. This court would have found the testimony of PW3 credible if the same was corroborated. It was not corroborated by any other evidence. In fact, the crucial evidence that spermatozoa of the Appellant were found in the thighs of the complainant was not corroborated by other evidence, including medical evidence. This court therefore finds that the prosecution did not adduce sufficient evidence to establish the guilt of the Appellant on the charge of attempted defilement to the required standard of proof beyond any reasonable doubt. The defence of the Appellant to the effect that he did not commit the offence may well be true.

In the premises therefore, this court holds that the prosecution did not adduce sufficient evidence to establish the charge of **attempted defilement** contrary to **Section 9(1)** as read with **Section 9(2)** of the **Sexual Offences Act**. The appeal is allowed. The conviction of the Appellant is quashed. The sentence of ten (10) years imprisonment that was imposed upon the Appellant is hereby set aside. The Appellant is acquitted. He is ordered set at liberty forthwith unless otherwise lawfully held. It is so ordered.

L. KIMARU

JUDGE

DATED, COUNTERSIGNED AND DELIVERED AT BUNGOMA THIS 22ND DAY OF JULY 2013.

F. GIKONYO

JUDGE