REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 55 OF 2010

BETWEEN

JOSHUA KARUTI M'NABEA..…….....….……APPELLANT

AND

REPUBLIC……..……RESPONDENT

JUDGEMENT

The appellant in this matter was convicted by the Principal Magistrate in Maua Principal Magistrate's Court criminal case number 1147 of 2004 and sentenced to twenty (20) years imprisonment. He had been charged of attempted defilement of a girl contrary to **section 145(2) of the Penal Code, Cap 63 Laws of Kenya,** with an alternative charge of indecent assault on female contrary to **section 144(1) of the Penal Code**. The particulars were that the appellant had on 7th April 2004 at [particulars withheld] Location in Meru North District within Eastern Province attempted to have carnal knowledge of J G, a girl aged under the age of fourteen (14) years.The alternative particulars allege that he had unlawfully and indecently assaulted the said girl, a girl aged under the age of fourteen years, by touching her private parts. He was convicted of attempted defilement under **section 145(2) of the Penal Code.**

He was aggrieved by the said conviction and filed the current appeal in person. In the appeal, he listed four(4) principal grounds, namely:

1. That the testimony of the PW1 was not corroborated by any other witness.
2. That although the case was investigated and the investigating officer was not called to testify.
3. That the evidence of the doctor, PW2, was clear that the complainant, PW1, was not raped.
4. That the sentence imposed was too harsh and exorbitant.

At the hearing of the appeal, the appellant was unrepresented. He did not argue his case, but merely invited the court to go through the record and make a determination.

The state, represented by Mr Ongige, opposed the appeal. He stated that the evidence of the complainant was not corroborated. He submitted that the trial court can under section 124 of the Evidence Act, Cap 80 Laws of Kenya, convict on uncorroborated evidence. On the ground that the investigating officer did not testify, he submitted that that was not factual as the officer who investigated the matter did testify according to the court record as PW4. On the question of the medical evidence not establishing rape, he pointed out that the appellant was charged with attempted defilement and not rape. He urged the court not to interfere with the conviction or the sentence.

This being a first appellate court I am bound to follow the guidelines set by the Court of Appeal in ***Kinyanjui vs. Republic*** **(2004) 2 KLR 364**, with respect to criminal appeals. It was said in that matter that

the first appellate court must look at the evidence presented before the trial court afresh and re-evaluate and re-examine the same, and thereafter reach its own conclusions. The first appellate court must bear in mind that it did not have the opportunity to see the witnesses as they testified. The court should also look at the grounds of appeal put forward by the appellant. I also remind myself of the point made in ***Buru vs. Republic*** **(2005) 2 KLR 533** and ***Republic vs. Oyier*** **(1985) KLR 353**, that a first appellate court will not normally interfere with the finding of a lower court on the credibility of witnesses unless it is shown that no reasonable tribunal could make such findings.

I have perused the record of the lower court. The handwritten court record shows that the complainant gave unsworn evidence as PW3. She said she knew the appellant. He told her that she and he should hold each other. He promised to give her money after touching her body. He then touched her body, holding her by her private parts and her body against his body. At the time she told the court this she pointed at her private part and his private part, the subjects of her testimony. The fact that this was happening after he had removed her pants and his left no doubt of the part of their respective bodies that she was referring to. He is said by the minor to have pointed his penis at her private part. At this point her aunt, PW2, called out her name. Her aunt, PW2, testified that she was informed by her daughter that PW3 had been left with the appellant who had promised to buy her sweets. This happened at night, around 8.30 pm. She called out the name of PW3 several times. The child later emerged from farm and told PW2 what had happened. She said that the appellant was in the banana farm. The witness went in that direction and found the appellant putting on his trousers. She hit him and screamed. Help came and the appellant was apprehended and tied up with ropes. He was escorted to the local chief's office and therefrom to the Maua Police Station, and from thence to the Nyambene District Hospital. PW4 was the police officer, who rearrested the appellant when he was presented at the Maua Police Station, booked the report on the incident, facilitated the referral of the child to the hospital, recorded statements from the witnesses and charged the appellant.

The appellant gave an unsworn statement in defence. He said that he normally visited the complainant's guardian, meaning PW2, frequently and used to be given odd jobs by her, and she regularly gave him food. On the material day, he was with PW2 and her husband. They travelled to Maua, where they got drunk, and after that went to her home where PW2 gave them food. He left after that but on the way home he was accosted by PW2 and others who beat him, tied him and took to the police. He was locked up in the cells and he did not know the report made against him.

The appellant was convicted of attempted defilement which is defined in **section 145(2) of the Penal Code**. The offence is committed when a person attempts to have unlawful carnal knowledge of a girl under the age of sixteen. An attempt to commit an offence is punishable although the accused person has not achieved his objective and the *actus reus* of a completed offence is not committed. The offence is defined in section 388 of the Penal Code. A person is said to intend to commit an offence when he begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but he does notsucceed in fulfilling his intention to such extent as to commit the offence. A person would be charged with attempt to commit an offence where the evidence falls short of proving that he committed the *actus reus* of the substantive offence, but he had the *mens rea* for that offence. In *Ismail bin Farah vs. The Queen* (1956) 29 KLR 183, it was held that the necessary ingredients of an attempt as defined in the Penal Code are: an attention to commit an offence, a beginning to put the intention into execution by means adapted to its fulfilment and a manifestation of the intention by some overt act. The intention required for an attempt to be committed will be the same as the intention required for the completed offence.

The issue that arises here is whether the elements of an attempted defilement were proved. Was there an intention to commit defilement? Was there a beginning by the appellant to put that intention into effect and was there a manifestation of the intention by some overt act? What ought to be proved to establish attempted defilement under **section 145(2) of the Penal Code** is that the accused person had an intention to have carnal knowledge of the victim, that the person he intended to unlawfully carnally know was a child, that the accused knew that the victim was a child and that the accused intended to proceed that notwithstanding.

The *mens rea* for the offence is the intention to unlawfully know a minor carnally with the knowledge that she is underage. The evidence recorded in this matter puts the age of the child at between four. Under whatever circumstances a child of such tender years cannot be regarded otherwise. That age is not borderline, it is obvious. No one can possibly assume that such a child has reached the age of consent. There can be no confusion or mistake with such a person. Being found in the circumstances that it is alleged the appellant was found suggests that there was intent to unlawfully know the child carnally. I agree with the conclusion of the trial court. The child and the appellant were both found in a state of undress. PW3 said that it was the appellant who removed her pants, he then removed his and held her body close to his with his penis pointing at her private part. There was an attempt to defile in this case. The intention to defile is, from the record, manifested by the act of the removing of the clothes of both the appellant and the complainant by the appellant and the pointing by the appellant of his penis at the vagina of the complainant. The act was an attempt, not preparation. The bodies of the parties appear from the recorded evidence to have been close, indeed the complainant said that the appellant's penis touched her. The defence evidence puts the appellant at the scene. He visited the homestead of PW2, where the complainant lived, on that material night. He was apprehended that same night and handed over to the police. He said that he was frequent at the home and therefore he must have known the child, and child must have known him.

On the issue of corroboration, the trial court found that the complainant's testimony was corroborated by PW2. Indeed, the complainant's evidence was said to have been firm and consistent. When she testified on 15th September 2004, the court noted, and I hereby set out the remarks verbatim:

> 'Witness very straight forward without showing any fear and has answered the questions as put to her by the trial magistrate. No element of couching (sic) exhibited. Very impressive.'

This would indicate that the trial court would have been satisfied with the evidence even if the same was not corroborated. Furthermore, the Court of Appeal in *Makungu vs.Republic* (2002) 2 EA 482, has declared the corroboration in sexual offences unconstitutional. It was stated that all previous decisions which held that corroboration is essential in sexual offences are no longer good law for being discriminatory. Lack of corroborative evidence is therefore neither here nor there.

There is no merit in the claim that the investigating officer did not testify. The record shows that he did. Even without the testimony of that witness, there would still have been strong evidence against the appellant. There is also no merit in the allegation that the medical evidence did not establish rape. The charge facing the appellant was not rape but attempted defilement. Proof of penetration is not material to a charge of attempted defilement.

The appellant challenges the penalty imposed of twenty years imprisonment, on the grounds that the same was too harsh and exorbitant. The penalty prescribed for the offence of attempted defilement under section 145(2) of the Penal Code, as amended by Act No. 5 of 2003, is imprisonment with hard labour for life. This provision leaves the court with wide discretion. The victim in this case was aged four. The sexual violation of a child of such tender age is something to be abhorred. It is my view that the appellant ought to have been given the maximum penalty available. The minimum penalty for this offence as described in section 9(2) of the Sexual Offences Act is ten years.

The upshot of this is that the appeal herein is unmerited. The conviction of the appellant of attempted defilement is upheld, and the sentence of twenty years imprisonment is confirmed. The appeal is accordingly dismissed..

DATED ,SIGNED AND DELIVERED AT MERU THIS 24TH DAY OF OCTOBER,2013

W MUSYOKA

JUDGE