REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO.130 of 2010

BARAKO AJAA…….APPELLANT

VERSUS

REPUBLIC……...RESPONDENT

(Being an appeal against both conviction and sentence in Criminal Case No.106/09 in MARSABIT Law Courts- before K.A. BIDALI)

J U D G M E N T

The Appellant BARAKO AJAA, was charged with an offence of attempted defilement contrary to Section 9(1), (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on 13th day of May,2009 at Mataarba sub-location, in Marsabit District within Eastern Province the appellant intentionally and unlawfully attempted to defile E M F, as girl aged 10 years. The appellant faced alternative count of indecent Act with a Child, contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence are that on 13th day of May, 2009 at Mataarba sub-location in Marsabit District, within Eastern Province, the appellant unlawfully and indecently assaulted E M F by touching her private parts.

The Appellant faced count II, of grievous harm contrary to Section 234 of the Penal Code. The particulars are that on 13th day of May, 2009 at Mataarba sub-location in Marsabit District within Eastern Province, unlawfully assaulted GOYO NURA thereby occasioning him actual bodily harm.

The appellant was further facing Count III of Assault causing actual bodily harm contrary to Section 251 of the Penal code.

The particulars are the 13th day of May, 2009 at Mataarba sub-location in Marsabit District within Eastern Province, unlawfully assaulted SALE GUYO thereby occasioning her actual bodily harm.

The Appellant was convicted of attempted defilement and sentenced to 10 years imprisonment. He was also convicted of Count II and III and sentenced on Count II to serve 3 years imprisonment and on count III, 1 year imprisonment, all to run concurrently.

Being aggrieved by the conviction and sentence he filed this appeal setting out the following grounds:

1. ***I wish to appeal against my conviction granted by the Marsabit Law Courts***

2. That I pleaded not guilty at the trial

3. That I was beaten by three complainants in my plots who are relatives

4. That the complainants tried to stole my logs from inside the Compound.

5. That they entered my compound at around 7.00 p.m, I opened the door after hearing the dog barking immediately they saw me they started fighting me. They were four in numbers, three relatives and another person.

6. That I have witnesses who were with me on that day.

7. That my witnesses attended the court but were not allowed to testifying in the court.

8. That I am an old man of 66 years unable to see well and walk properly

9. That your lordship, I pray for consideration and leniency from within your chambers

This is the first appeal and being first appellate court I have the duty and obligation to re-evaluate and re-analyse the evidence that was adduced at the lower court to enable me reach my conclusion. When doing so I have to bear in mind that I never had the opportunity to observe or hear the witnesses give evidence and observe the manner and demeanor of the witnesses. Those basic principles were set down in the case of **OKENO –V – REPUBLIC(1973) EA 32** where Court of Appeal set out the duty of the first appellate court in the following terms:

> "**An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [Pandya vs. Republic (1957) EA 336] and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)"**

The Appellant appeared in person in support of his appeal. The Appellant made the following oral submissions: That his appeal is against both the conviction and the sentence, that he did not commit the offence and that he is 66 years old. He further submitted that he is grandfather to the complainant. He submitted he is unable to sexually do anything to female including his wife. He urged that people who damaged his property went to his plot and injured him. He concluded by submitting that the case against him is a frame up.

Miss Mwangi, learned State counsel, apposed this appeal. Miss Mwangi submitted that PW 1, the complainant identified the appellant who had held her and who wanted to sleep with her. She submitted that struggle ensued and PW 1 hurt her knees. That a torn dress was produced as exhibit. That PW2 saw

the Appellant hit PW 1 at the knee. Miss Mwangi submitted that evidence of PW 1 was corroborated by PW 2. That PW 5, a doctor classified injuries of PW 1 as harm, of PW 4's, as grievous harm. On sentence Miss Mwangi submitted, an offence of attempted defilement, attracts sentence of not less than 10 years and of grievous harm upon conviction, the accused is liable to imprisonment to life. She submitted the sentence was within the Provisions of the law and urged the appeal be dismissed.

The facts of the prosecution case is that on 13th May, 2009, PW 1, was send by her Auntie PW 3, to go and untie a donkey. This was at 7.00 p.m. That as PW 1 was untying the donkey, the Appellant Barako Ajaa, her neighbor went to where PW1 was, held her by hand, telling her he wanted them to sleep together. The Appellant looked drunk. The two struggled. The Appellant felled PW 1, and she injured her knee. PW 1 was screaming at that moment. PW 3 and PW 4 answered her call and the Appellant on seeing them took a stone and hit PW 4 on the mouth and the arm. He also hit PW 3 and took off.

PW 4 and PW 3 were injured. PW 4 sustained fracture of 1/3 ulna bone and as per P3 Form his injuries were classified as grievous harm, as per exhibit P. Exhibit 1. PW 3 sustained injuries to her hand and the injuries classified as grievous harm as per exhibit P Exhibit 3. PW 1 had bruises on her knees and her injuries were classified as harm as per P3 Form exhibit P. Exh. 1.

The matter was reported to police. P3 form issued and after treatment the Appellant was charged with the offences indicated in the charge Sheet.

The Appellant in his defence denied having committed the offence. He stated that he found the complainant at his shamba with other young children and he chased them away. That their parents went and beat him as he ran away raising alarm. That his radio fell and people came and found them in a scuffle. He testified he was referred to hospital and produced treatment card as defence exhibit 1 (a), (b) and (c).

The conviction was based on evidence of PW 1, PW 2 and PW 3. It is when dealing with evidence of a minor in a Sexual Offence to look at whether in absence of corroboration whether the conviction can be sustained. Under Section 124 of the Evidence Act it is provided:-

"124. Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

Provided 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 if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

In the instant case the offence is a sexual offence. The direct evidence is that of PW1, the alleged victim of the offence. There was a medical report on PW 1, Exhibit P. Exhibit 1. The part dealing with Sexual Offence in the P3 form otherwise, referred to as Section "C" to be completed in alleged Sexual Offences of the after completion of Sections "A" and "B" as well as No. 4 (b), 5 and 6 of the P3 Form is blank. The medical doctor did not complete the same. The evidence of PW 1 was not corroborated by PW 5, doctor Richard Guyo. The doctor did not note any injuries to genitalia of the complainant, nor were there any bruises. The injuries to the knee of PW 1 is not related in any way with the offences of attempted defilement.

PW 1 in her evidence did not say that the Appellant lay on top of her contrary to what the trial court stated in its judgment. PW 1 simply stated the appellant felled her and she was injured on her knee. She further went on to say that the appellant did not lay on her. She stated that that he further held her and tore her dress.

The trial magistrate further in his judgment stated that PW 4 evidence was that he saw the accused holding PW 1 to the ground trying to remove her undergarments.PW1's evidence contradicts that of PW 4. She did not mention the Appellant pinning her to the ground and trying to remove her undergarments.

In view of the contradictory evidence of PW 1 and PW 4 and in absence of medical report showing any injuries on the complainant's genitalia or evidence to show that the Appellant touched the complainants private parts such as buttocks or breast or virgina. I am not satisfied that the prosecution did prove to the required standards the charge of attempted defilement. There is no evidence of the Appellant attempting to commit an act which would cause penetration with the complainant. There is even no evidence of the Appellant unzipping his trouser or lying on top of the complainant.

I am therefore, convinced that the evidence of PW 1 needed corroboration so as to meet the threshold under Section 124 of the Evidence Act. In addition I am not convinced that the complainant told the truth as all the appellant did was to fell her and tore her dress. The complainant never gave any details to establish an attempt of defilement on her. She never mentioned what the Appellant did, other than telling her, if he wanted to sleep with her. What the court has, is her words against the words of the Appellant. This is a criminal case and should be proved beyond reasonable doubt. The mere words unaccompanied by any action, that would tend to show intention to commit any offence cannot sustain a conviction in a criminal case.

On the issue of Count II and III, PW 2 and PW 4 evidence clearly indicate that the two sustained injuries. The evidence of PW 5 and the medical Report support the nature of injuries sustained by the PW 2 and PW 4. PW 1, PW 2, and PW 3 were at the scene and clearly saw the appellant hit PW 2 and PW 4 with stones.

The trial court considered the appellant's defence to be unmaintainable after it had considered the defence. The Appellant was at the scene. There is no reason why PW 2 and PW 4 who were injured could frame the Appellant. The Appellant was known to the complainants and, they did see him pick stone and injure them. The evidence of PW 1, PW 2 and PW 4 is consistent and corroborated each other as to how they were injured by the Appellant.

I find the Appellant's defence to have been evaluated and reject in view of the evidence by the prosecution witnesses.

I observe in views of the circumstances of the events, that occurred between the Appellant and the complainant, PW 1, the Appellant should have been charged with malicious damage to property and assault but not attempted defilement.

In view of the foregoing, I according allow the appeal against attempted defilement. I set aside the conviction and sentence that was imposed upon the Appellant and acquit him of the charge of attempted defilement.

I dismiss the appeal against count II and III since the appeal has no merits. I hereby, uphold the conviction and confirm the sentence that was imposed by the learned trial magistrate. That the appellant has now served the full sentence under Count II and III, the appellant may be released forthwith unless otherwise lawfully held.

Dated at Meru this 19th November, 2013

J.A. MAKAU

JUDGE

Delivered in open court in the presence of

Miss Mwangi for State

Appellant in person.

J.A. MAKAU

JUDGE

J. A. MAKAU

JUDGE