REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 93 OF 2011

HASSAN ETYANG WANYANDE …..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(*Appeal arising from the decision of Hon. M. N. Gicheru CM, in Kitale Chief Magistrate's Court in Criminal Case No. 105 of 2011)*

J U D G M E N T

The appellant was charged with the offence of defilement of a child contrary to Section 8 (1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006. Particulars are that on the 8th day of January 2011 at ***[particulars withheld]*** Village within Trans-Nzoia County, intentionally caused his penis to penetrate into the vagina of M N M, a child aged 17 years.

The appellant was convicted for a lesser offence of attempted defilement and sentenced to 10 years. He preferred an appeal in which he raised the following grounds:-

1. *That essential witnesses in this case were never called to testify.*
2. *That there was nothing connecting him to the offence.*
3. *That the Learned Trial Magistrate erred in law and facts by relying on the evidence of a person who did not testify.*
4. *That there were many contradictions in this case.*
5. *That the charge against him was a framed one.*

The brief facts of the case are that on 7th January 2011, the complainant Pw 1 M N and her sister Pw 2 M O who are Ugandans were in Kenya visiting their relatives. They boarded a matatu and alighted at Kitale. Pw 2 was carrying some Kshs. 350 which they intended to use as fare to Uganda. When they alighted at Kitale, Pw 2 realized that she had lost the Kshs. 350. They went back to the matatu from which they had alighted. As they were looking for the money, the appellant came and asked them what they were looking for. They told the appellant that they had lost Kshs. 350 which was their fare to Uganda. The appellant offered to give them money. They followed the appellant into an estate whereby the appellant opened a house and locked them in and he went away for two days. He left them without food for all those days. He came back after two days accompanied by a friend. The appellant then defiled the complainant as his friend defiled her sister. The appellant's friend went away. The appellant then threw the two out f the house with their bags.

Pw 4 E J W is a Village Elder of ***[particulars witheld]***. On 09/01/2011, he received information that

some girls had been looked in the appellant's house. He was escorted by one Mr. Ouma to the appellant's house where he found Pw 1 and Pw 2 outside the appellant's house with their bags. He knocked on the appellant's house and entered and found the appellant. The appellant told him that he had been with the girls for 2 weeks. The girls themselves told him that they had been in the appellant's house for one week. He then took the appellant and the two girls to Kitale Police Station.

The complainant and her sister were received by Pw 5 PC Mary Umazi of Kitale Police Station. Pw 5 then issued a P3 form and an age assessment form to Pw 4 and asked him to escort the girls to Kitale District Hospital. At Kitale District Hospital, the complainant was examined by Pw 3 Kirwa Labat a Clinical Officer who filled in a P3 form in respect of the complainant. The complainant's age was assessed and she was found to be 17 years old.

The appeal by the appellant was opposed by M/S Limo for the State who argued that the appellant took advantage of the foreign girls to defile the complainant. She contended that the evidence was enough to sustain a conviction and that the Trial Magistrate was correct in convicting the appellant.

The duty of a first appellate Court was clearly set out in the case of **Okeno Vs Republic [1972] EA 32** as follows:-

> ***"An Appellant on first appeal is entitled to expect the evidence as a whole to be submitted to fresh and exhaustive examination [Pandya Vs Republic [1975] EA 366] and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions [Shantilal M. Ruwala Vs Republic [1975] 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 advantage of hearing and seeing the witnesses, (see Peters Vs Sunday Post, [1958] EA 424).***

I have carefully looked at he evidence adduced in the lower Court and I must decide whether the same disclosed the offence for which the appellant was convicted. The complainant testified that, the appellant locked them in his house on a Friday which was 07/01/2011. The appellant went away for two days and came back on the 3rd day, a Sunday when he defiled her. This therefore means that the alleged offence occurred on 09/01/2011. The charge sheet stated that the offence occurred on 8th January 2011. According to the complainant's evidence, the accused was not in the house on that particular day.

The complainant and her sister testified that they tried to seek attention of the neighbours but no one wanted to interfere with affairs in the appellant's house. The complainant stated that for all these days, they went without food.

The person who alerted the Village Elder (Pw 3) about the detained girls was one Ouma. This witness was not called to come and testify. When Pw 3 came to rescue the girls, he found them outside with their bags. The girls told him that they had been with the appellant for one week.

When the complainant was taken to Kitale District Hospital, she was examined by Kirwa Labat who found no evidence of defilement. The Trial Magistrate made a finding that there was no evidence of penetration and as such, he concluded that there was no defilement. He nevertheless invoked the provisions of Section 179 (2) of the Criminal Procedure Code to convict the appellant for attempted defilement.

Section 179 (2) states as follows:-

(2) " When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it"
It is clear from the above section that certain facts must be proved which reduced the offence into a minor

one. In the present case, there were not facts which were proved which would have made the Trial Magistrate to convict the appellant for attempted defilement. The evidence of the complainant was clear that the appellant was away on 08/01/2011. There was no way he would have attempted to defile when he was not present. There was no evidence at all adduced to show that the appellant attempted to defile the complainant. There was therefore no evidence at all upon which the Trial Magistrate would have found that the appellant attempted to defile the complainant.

If the main offence was not proved and there was no any other evidence which would have proved a lesser offence, the Trial Magistrate should have acquitted the appellant. The complainant had only said that she was defiled on 09/01/2011. She did not say how the defilement was done. If there was evidence that the appellant removed her under pant and pinned her down on the bed or on the floor or in any manner tried to penetrate her, then those facts would have sustained a conviction on attempted defilement. It does not automatically follow that if the main charge is not proved, then a lesser offence of attempt can be sustained. There must be some facts tending to prove the lesser offence. In the present case there were no such facts.

The Trial Magistrate accepted the evidence of the complainant and her sister that they had been locked for two days. A critical look at the evidence of the two shows that the two were not speaking the truth. They had said that they tried to seek intervention of the neighbours who seemed not to be interested. It is very doubtful that girls of the age of 17 can be locked in house for two days and neighbour's just ignore them. When Pw 3 came to rescue them, he did not find them in the appellant's house. He found them outside the house with their bags. They told him that they had been with the appellant for one week. This shows that they were not saying the truth.

The complainant herein testified that her mother lives in Uganda and the father lives in Kenya at Cherangani. Her sister Pw 2 on the other hand testified that both parents live in Uganda. Pw 2 said that she was 17 years old. It is not possible that two sisters can be of the same age unless they are twins. Both girls' ages were assessed but the assessment report in respect of Pw 2 was never produced.

For the above reasons, I find that the conviction of the appellant for attempted defilement had no basis. It was not supported by any evidence. I proceed to quash the conviction and set aside the sentence. The appellant should be set free forthwith unless otherwise lawfully held.

Dated, signed and delivered at Kitale on this 11th day of November, 2013.

E. OBAGA

JUDGE

In the presence of:

M/S Limo for State.

Court Clerk: Lobolia

E. OBAGA

JUDGE

11/11/2013