ROBERT KIBET WANYONYI :: APPELLANT.

VERSUS

REPUBLIC :: RESPONDENT.

(*Being an original conviction and sentence of M.N. Gicheru – CM. in Criminal Case No. 1955 of 2010 delivered on 26th May, 2011 at Kitale.)*

J U D G M E N T.

Robert Kibet Wanyonyi, (herein, the appellant) and another appeared before the Chief Magistrate at Kitale charged with gang defilement contrary to section 10 of the Sexual Offences Act, in that, on 15th July, 2010 in Kwanza District having a common intention to penetrate the vagina of **D.M,** a child 13 years, the appellant caused his penis to penetrate the vagina of the said **D.M**.

Alternatively, the appellant was charged with committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act, in that, on the 15th July, 2010 in Kwanza District he intentionally touched with his penis the vagina of **D.M**, a child aged 13 years. The appellant pleaded not guilty to both counts and was tried accordingly. After trial, he was convicted on the lesser offence of attempted defilement and sentenced to serve ten (10) years imprisonment.

In convicting the appellant and acquitting the co-accused, the learned trial magistrate considered the facts and evidence which formed the prosecution case against the appellant. Briefly, the facts are that on the material date, **S.W.W (PW1),** father to the child complainant, **D.M (PW3),** was heading to a river with two others when he heard the cries of the complainant from inside a nearby house.

S rushed to the said house and found the appellant's co-accused at the door. He made enquiries and the co-accused told him that he had just arrived from a burial. Stephen entered the house and on drawing a curtain, saw the complainant on a bed with the appellant covering her mouth. S whipped the appellant, screamed and with the assistance of others attempted to apprehend the appellant but he escaped.

The appellant's co-accused was apprehended while the appellant was pursued upto his brother's house where he was also apprehended and handed over to the police firstly at the AP camp N Farm and secondly at the E Police station. The complainant was taken to the hospital for necessary examination by her mother, **J.N (PW2),** who was attracted to the scene of the offence by noises and was informed on arrival that the complainant had been defiled.

W.S (PW4), arrived at the scene together with the complainant's father and found the appellant in bed with the complainant who was covered with a blanket. He (PW4) took part in the apprehension of the appellant and his co-accused who were then handed over to **APC Bernard K'Odhiambo Otieno (PW5)** who in turn handed them over to the police at E police station.

Linus Ligare (PW6), a clinical officer at Kitale District Hospital examined the complainant and

compiled the necessary report on a P3 form. He formed the opinion that the complainant had been defiled.

P.C. Esther Bitok (PW7) of E Police station investigated the case and preferred the appropriate charges against the appellant and his co-accused.

In his defence, the appellant denied the offences and contended that the charges were a frame up after he informed the complainant that he had no money she had asked for. Her father appeared at the scene and beat him up. He was with the co-accused who was apprehended at the scene. He later learnt that there were allegations of defilement against him.

The learned trial magistrate considered all the evidence placed before him and arrived at the conclusion that the appellant was guilty of attempted defilement rather than gang defilement. Consequently, the appellant was sentenced to ten (10) years imprisonment. The appellant's co-accused was found not guilty and acquitted accordingly.

Being dissatisfied with the conviction and sentence, the appellant preferred this appeal on the basis of the grounds filed herein on 9th June, 2011. At the hearing of the appeal, the appellant relied on his written submissions.

The learned prosecution counsel, **M/s. Bartoo**, opposed the appeal on behalf of the respondent and contended that the prosecution case was proved beyond reasonable doubt through PW1, PW3 and PW4.

The learned prosecution counsel submitted that the appellant was found in the act at the scene of the offence and that the evidence against him was sufficient in establishing attempted defilement since the medical examination did not disclose penetration.

The learned prosecution counsel further submitted that the appellant's defence was duly considered by the trial court and acted upon.

It was the contention of the learned prosecution counsel that the complainant's evidence was duly corroborated even though section 124 of the Evidence Act does not require corroboration in Sexual Offences. With regard to the appellant's submission that there was contradiction in the prosecution case, the learned prosecution counsel contended that the said contradictions were insignificant as they did not go to the core of the prosecution case.

Having considered the grounds of appeal and the rival submissions by the appellant and the respondent and also after having re-considered the evidence as is the duty of a first appellate court bearing in mind that the trial court had the advantage of seeing and hearing the witnesses, this court's view is that there was sufficient evidence by the prosecution showing that a sexual offence was committed against the complainant.

The evidence showed that there was an attempt to defile the complainant rather than a gang defilement which was the preferred charge.

Attempted defilement is a lesser offence. It was therefore proper and lawful for the learned trial magistrate to apply the provisions of section 179 of the Criminal Procedure Code in the circumstances.

The clinical officer (PW6) formed the opinion that the complainant was defiled on the material date. However, his findings recorded in the P3 form left doubt as to whether penetration occurred on the material date considering that the hymen was not freshly torn as indicated in the clinical officer's testimony. The complainant was medically examined a day or two after the offence. If she had been defiled on the material date her hymen would have been freshly torn.

The doubt created with regard to the alleged penetration on the material doubt was correctly resolved by the learned trial magistrate in favour of the appellant and since he was found in bed with the complainant covering her mouth to prevent her from screaming further, it was apparent that his intention was to defile

the complainant but for the intervention of her father and others.

Being a person very well known to the complainant and her family and having been caught “red-handed” in bed with the complainant, the appellant could not be heard to deny having sexually molested the complainant. His defence was clearly dislodged by the prosecution evidence which was found to be cogent and credible. Consequently, this appeal is unmerited on both conviction and sentence. The sentence imposed by the trial court is in accordance with section 9 (2) of the Sexual Offences Act.

In sum, the appeal is dismissed in its entirety.

[Delivered and signed this 24th day of May, 2012.]

J.R. KARANJA.
JUDGE.