Muia v Republic (Criminal Appeal E003 of 2023)
[2024] KEHC 159 (KLR) (18 January 2024) (Judgment)

Neutral citation: [2024] KEHC 159 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E003 OF 2023

MW MUIGAI, J

JANUARY 18, 2024

BETWEEN

DANIEL KIOKO MUIA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment delivered on 26th January,2023 by Hon. M. Opanga Criminal Case No. 25 of 2020 at Kangundo Law courts)

JUDGMENT

1. The Appellant Daniel Kioko Muia was charged with the offence of attempted defilement.
2. The information that led to the arraignment of the Appellant before the trial court was as follows:

   Attempted defilement contrary to Section 9 (1) (2) of the *Sexual Offences Act* No.3 2006

   Particulars of the offence were as follows:

   Daniel Kioko Muia: On the 18th day of June,2020 at Matuu village of Matungulu sub-county within Machakos County, intentionally attempted to cause his penis to penetrate the virgina of MMN a child aged 8 years old.
3. On the alternative count:

   Appellant was charged with offense of committing an indecent act with a child contrary to Section 11(1) of *Sexual Offences Act* No.3 of 2006.

   Particulars of the offences were as follows:

   Daniel Kioko Muia: On the 18th day of June,2020 at Matuu village of Matungulu sub-county within Machakos County, intentionally touched the virgina of MMN a child aged 8 years old with his penis.

4. The Appellant pleaded not guilty to charge and the matter proceeded to full trial.

PROSECUTION CASE AT THE TRIAL COURT

5. Prosecution case was anchored on the evidence of 7 [7] witnesses

6. PW1 was MMN (minor). She testified at the trial court that she knows months of the year. January to December. Testifying on 18/6/2020 she was at home in Wendano and that she with Nicho. He washed clothes then went to fetch water. It was her testimony that in evening and she was left playing with chicks and heard someone knock at the gate. PW1 went to check who it was and found it was a man. He asked for a wheelbarrow and he told him he would not give him because she would be asked. He asked PW1 if she was alone. He asked for water which she gave him, he drunk. He asked another glass of water.

7. PW1 gave him. When she came he banged her head on the wall. He pushed her down and took out her pant and lay on top of her on the kitchen floor. (on being asked what Appellant did to her she remains silent). According PW1 the Appellant got up and promised to bring her a sweet. She got out and found her neighbor Nduku. PW1 told her what happened. PW1 was taken to hospital at Matuu. She was examined. PW1told court that the man was not known to her he is accused in court.

8. In cross-examination, she told trial court that it was the evening the Appellant went and that she did not know where Appellant came from. Appellant came to their house once before. PW1 did not know if Appellant went to do any work; and that Mama Carito knows Appellant as she a neighbor. Mama Carito has three children.

9. PW2 was Pius Mutuku Nzioka. He told trial court that on 18/6/2020 he was at work. According to PW2 while at the site they heard a child crying loudly. They all ran to see what was happening. He was first to reach there. PW2 found a lady he knew walking with a child and that he knows the lady's name is Nduku. PW2 asked what was wrong. Nduku told PW1 that the child told her that a man had defiled her at their house nearby. Testifying that they went to police to report Matuu police Station on a bike. According to PW2, they sent for her mother and were referred for treatment. PW2 followed from behind. They went to Kimiti Level Four Hospital and he was called to record a statement at KBC. PW2 did not who the assailant was he only saw him when he was arrested at KBC police station.

10. In cross-examination, he told the trial court that he did not talk to the child. He only spoke to Nduku and assisted them when Nduku said the child was defiled. PW2 did not find or see Appellant on that day.

11. PW3 was Mary Ndunge. She told trial court that on 18/6/2020 she was at home since morning. At midday, there was a lady who said she goes to plait Catherine. PW3 left her son and daughter at home and went to plait her. After PW3 finished, she was refferred to another neighbor to plait. PW3 went with her. While there, Nduku called the 1st client and the lady spoke on phone. PW3 saw the lady get emotional and followed her outside. According to PW3, she thought something bad had happened and followed them. PW3 found the Chief and went along to where there was a building under construction. PW3 was told her child had been defiled and had been taken to the hospital. They went to the hospital at Matuu/Kimiti where the doctor examined the child and was given medication. They went back home. Nicho had returned; he said the assailant had been cutting firewood nearby and had left the firewood there.

12. PW3 went to the assistant chief and learnt that the man had gone to Nduku to ask for wheelbarrow. That is when he went to Marion. They looked for the man and found him two days later. According to PW3, Marion was born on 10/12/2011 and that she has a birth certificate PMFI-1. Treatment

from Kimiti Level Four PMFI-2 p3 Form PMFI-3. PW3 told court that Marion had told that the man pushed and did bad manners to her and that the man put his penis on top of her private part. PW3 saw the Appellant when he was arrested; he used to do casual jobs around. Appellant was positively identified.

13. In cross-examination, it was her testimony that she had been told by Nchiku that Appellant had gone to ask for the wheelbarrow. That Appellant then went to PW3's house and found Marion whom Appellant asked for a wheelbarrow. PW3 lamented that Appellant is known by his nickname Kasindili and that the Appellant was seen cutting firewood.

14. In re-examination, she testified that her neighbor's daughter told her that the Appellant had gone to ask for the wheelbarrow. She is Nduku's daughter. Appellant should have taken her wheelbarrow for good and leave her child alone.

15. PW4 was Raphael Mutisya Musyoki from Wendano Sub location The Area Assistant Chief. He gave his evidence that on 18/6/2020 while at home, he went to the neighbor where he found three ladies. One received a phone call and he saw her run out in alarm. PW4 thought an accident had happened and they all followed her. They were told Marion had been defiled and taken to Kimiti Level Four Hospital. They all went to the hospital and did not find them; they learnt that they had gone to report. Testifying that after that they went to hospital and they started looking for the suspect. They found his mother and were shown his house. According to PW4, they call him Kasindili and arrested him. Testifying that the suspect was not known to him but found out he was known to the ladies because does casual jobs for them. Appellant was positively identified.

16. In cross-examination, it was PW4's testimony he followed them to the hospital. Major took Marion to hospital and that he did not talk to Major. Testifying that he did not speak with the area Assistant chief. Appellant's mother asked them what the Appellant had done and told her she would know later and took the Appellant where Marion was and she identified Appellant.

17. PW5 was Stella Maris Nduku Nzomo. She testified that on 18/6/2020 at about 2pm she met the child on the road. PW5 had come from getting grass for cattle. PW5 met her neighbor's child Marion crying and asked her what matter was. She said a man had got hold of her and stripped her clothes. The man wanted to sleep with her. She told PW5 that she screamed and the man ran away and that she was all alone.

18. PW5 called her mother Ndunge on phone who then came. Before the mother came, there were some men at the construction site nearby, Major was with them. They came and Marion the Hospital. He took a motor bike and they went. Testifying that Marion's mother came with the chief and followed Marion to the hospital. According to PW5 Marion did not tell her who had tried to sleep with her. Marion told PW5 that she was able to identify the man and that the man had gone to their home to ask for drinking water which she gave him and asked to be added water and further asked if she was alone and followed her inside. The man said he wanted a wheelbarrow. Marion told him that her mother was not at home and when the Appellant was arrested by the chief and father of Marion she said he was the one.

19. PW5 claimed that she had seen the Appellant before as he comes about in the area doing casual jobs. PW5 told trial court further that she has no grudges against the Appellant. Appellant was positively identified. PW5 testified that when she met Marion her clothes were ruffled and dirty due to the struggle. Marion had a knife which PW5 thought she held in defence.

20. In cross-examination, it was her testimony that it was about 2:30pm and that Marion did not Mention the Appellant's name and that Appellant followed her inside after the Appellant for the 2nd Mug

of water. Appellant got inside after confirming Marion was alone. Appellant asked for water and a wheelbarrow.

21. PW6 was Benjamin Ngala Kioko. He gave his sworn evidence that he is a senior Clinical Officer at Kimiti Level Four Hospital Matungulu Sub-county and with him was a P3 Form in respect of MMN. He told court that on 18/6/2020 the P3 Form and the minor was brought from KBC police Station. According to PW6, MMN was 8 years old. Her clothes were dry but soiled skirt, t-shit and under pant. She gave history of assault by a person physically known to her. Assailant went to their home and threatened her with a knife and hit her on the head. She did not lose consciousness.

22. She was in good general condition; she had no injuries on her body but her hair had soil; age of injuries were hours; weapon used was a penile shaft; degree of injury was harm; nature of the offence was sexual assault. Genitalia was normal, slight injuries to labia Majora and labia Minora; slight lacerations; she also had discharge from her vagina, it was yellowish in color. According to PW6, someone tried to defile the girl but there was no penetration. PW6 had seen her on that day. He examined her and filled the P3 form he produced treatment notes exhibit P2 and P3 Form Exhibit P3.

23. In cross-examination, PW6 told Trial court that he examined the minor in the presence of nurse in charge and another nurse and that he did not examine the Appellant as the Appellant was not brought in the Hospital.

24. PW7 was No.10175 PC W. Susan Wausi. She testified that she works at KBC police station and she performs general duties. PW7 recalls on 26/6/2022 she was in her office when a lady, a child and two men went and reported that accused had been arrested on allegation that he had attempted to defile a minor.

25. PW7 took the child in a special room and interrogated her. The minor said on 18/6/2020 she had been left home in the company of her elder brother, after lunch, her brother left home by herself and after a while a man knocked at their gate. She opened the gate and the man asked for drinking water; he asked for another cup of water. The minor told PW7 that the man followed the minor into the kitchen; held her; she tried to scream the Appellant covered her mouth. He removed her skin tight and pant, he placed her down and tried to defile her; that when he heard commotion outside he got up and fled.

26. According to PW7 the child ran out screaming and met a neighbor who asked her what the matter was and took the child to Matuu police post where they were referred to the hospital. The said neighbor called the mother of the minor who took the minor to Kimiti Clinic and were told to go KBC police station from Kimiti and Matuu police post. PW7 testified that she issued P3 form which was filed at Kimiti; the minor was eight years. The copy of the birth certificate was availed. Produced as exhibit 1 earlier marked PMFI-1 and after investigation PW7 preferred the charges. Accused was positively identified. The doctor confirmed that there was an attempt to defile the minor.

27. In cross-examination, PW7 told trial court that the minor said it was the Appellant who attempted to defile her and she knew the Appellant; further that it was only the girl who was taken to hospital. Testifying that the Appellant was not at work at minor's home. That the Appellant went to ask for water at their house after lunch.

28. The prosecution closed its case.

Trial court ruling on a case to answer

29. Vide a trial court's ruling dated 5/9/2022, it was found that the prosecution had established a prima facie case against the Appellant to warrant him being put on his defence.

Defense case at the trial court

30. The defense case was anchored on one [1] witness of the Appellant herein.

31. DW1 was Daniel Kioko Muia. He gave his evidence that he knew the charges he was facing. Testifying that he did not commit the offence; that it was on a Thursday, he was sleeping at home and heard people going home and told his mother they wanted to talk to him. DW1 got out. They were not known to DW1. They alleged that DW1 attempted to defile a minor. DW1 did not go to Matuu that day and that he did not commit the offence. According to DW1, they beat him up and took him to police at Matuu. Testifying that the sub chief and police did not wear uniform. They did not even inform his area sub-chief and chief.

32. In cross-examination, DW1 told the trial court that he had never gone to Matuu and he saw the minor for the first time on date arrest. According to DW1, on 18th he was at Malaa on a casual job at Mama Kathera who is not a witness in this case.

TRIAL COURT JUDGMENT

33. The Trial Court vide its judgment delivered on 26th January,2023 found that the prosecution had proved their case against the Appellant to the required standard of proof that he attempted defile MMN who was is a minor aged eight years and proceeded to convict him accordingly under Section 215 of the Criminal Procedure Code.

THE APPEAL

34. Dissatisfied by the judgment on the conviction and sentence, the Appellant vide Petition of Appeal filed in court on 31st January, 2023, wherein he sought leave to appeal against the conviction and sentence. Which leave to appeal out of time was granted by this court vide an order dated 16/6/2023.

35. The Appellant vide his memorandum of appeal attached to his petition of appeal herein appealed against the conviction and sentence on the following inter alia grounds that:

    1. The Learned Magistrate erred in both fact and law by convicting the Appellant on the evidence that did not meet the minimum threshold to uphold a conviction.

    2. The Learned Magistrate erred both in both fact and law by not considering Appellant's sworn defense

    3. The Learned Trial Magistrate erred in both fact and law by sentencing the Appellant to a non-existent Section of the law.

36. The matter was canvassed by written submissions.

SUBMISSIONS

APPELLANT'S WRITTEN SUBMISSIONS

37. The appellant in his submissions filed in court on 14th July,2023, relied on the grounds of Appeal to factor his submissions.

38. On the evidentiary burden to uphold a conviction, the Appellant submitted that the learned magistrate erred in both fact and law by convicting him on evidence that did not meet the minimum threshold to uphold a conviction. Averring that a matter before trial court was an inchoate offence as defined under Section 388 of the Penal Code an as such the ingredients to be proved were mens rea and actus reus

elements that relate to the intention to commit the act and doing the overt act towards the execution of the intention respectively.

39. It was the Appellant's case that the evidence of a minor is crucial and as such it was important for the court to conduct a voire dire examination for it to satisfy itself that the minor possess enough intelligence and understood the importance of taking an oath and telling the truth. To buttress this position, reliance was placed on the case of Johnson Muiruri vs Republic [1983] KLR 445, which case analyzed the importance of conducting a voire dire examination where a child is of tender years to ascertain whether the child understands the nature of an oath in which even his sworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth.

40. Referring to the trial court's proceedings on page 7 of 22 lines 19-21, it was submitted by the Appellant that from the foregoing the Trial magistrate misdirected herself to convict the Appellant herein and yet the minor remained mute as to what the Appellant exactly did to her. As such the overt act towards the execution of the intended act cannot be said to have been proved beyond reasonable doubt.

41. According to the Appellant the lower court erred in filling the gaps for the prosecution on a case that had collapsed ab-initio. Reliance was placed on the case of Bukenya Vs Uganda, in which court held that:

> " It is not the duties of the court to stage manage the case for the prosecution, nor is it the duty of the court to endeavor to make a case where there is non to an accused person. The duty of the court is to hold the scale to see that justice is done according to the law on evidence before it"

42. It was the Appellant's contention that the trial Magistrate should have warned herself on solely relying on the evidence of the minor pursuant to the Evidence Act. It prejudiced the Appellant's right to a fair trial in that the convicting magistrate tended to believe the testimony of the complainant even without applying Section 124 of the Evidence Act.

43. It was the position of the Appellant that the minor may have been a reliable witness, but was her evidence credible. He averred that the Trial Magistrate should have warned herself on relying on the evidence of a single identifying witness. He placed credence on the case of Cleophas Otieno Wamunga Vs Republic Criminal Appeal No. 2 of 1989 KLR 424, to buttress his point on reliance on a single identifying witness.

44. As to whether the Learned trial Magistrate erred in both fact and law by not considering the appellant's sworn evidence, it was Appellant's submission that the Trial Magistrate negated the Appellant's defense in its entirety as she would have at least been an umpire and see where the Appellant's defense was coming from. According to the Appellant this occasioned prejudice to him as she would have put the defense into consideration as this would have shaken the prosecution's case undoubtedly. Urging the court to allow the appeal on this ground because that omission rendered the whole trial a nullity hence denied the Appellant the right to fair trial as provided in the Constitution under Article 25 [e] and 50 [1]

45. On whether the learned Trial Magistrate erred in both fact and law by sentencing the appellant on a non-existence Section of Law, it was opined that Trial Magistrate by virtue of Section 215 convicted the Appellant herein however she erred in both fact and law by sentencing the Appellant on a non-existent legal principle as depicted on page 8 of 9 in the judgment dated 26th January,2023 where she states "the offence carries a sentence of not less than [15] years imprisonment. I see no reason to exercise my discretion otherwise. I will therefore sentence accused to serve 15 years in imprisonment".

46. According to the Appellant the punishment prescribed by the law under the *Sexual Offences Act* Section 9 [2] for the offence of attempted defilement is a minimum of ten years imprisonment. Averring that the Appellant herein was charged under Section 9 [1] & [2] of the *Sexual Offences Act*. In the circumstances, the trial court erred in fact and in law by sentencing the Appellant on a non-existent Section therefore rendering the sentence an illegality which is manifestly harsh and excessive in the circumstances of the case which the magistrate did not give reasons justifying the imposition of the sais sentence.

47. Appellant implored the court to quash the said conviction and a side the sentence as it has no basis in law.

RESPONDENT'S SUBMISSIONS

48. The Respondent in its submissions dated and filed in court on 24th May,2023, Mr. Mwongera, state counsel opposed the Appeal on the following grounds which he submitted on sequentially:

49. On whether the elements of the offence were proved appropriately, state counsel relied on section 9 [1] [2] of the *Sexual Offences Act* to bring out the elements of the offence. Credence was further placed on the case FOD VS Republic [2014] eKLR, which observed as follows:

> In order to secure a conviction for the offense of defilement under Section 8 [1] of the *Sexual Offences Act*, the Prosecution must prove that the person has committed an act which causes penetration with a child. "penetration" under Section 2 of the Act means, the partial or complete insertion of the genital organs of another person"

50. It was submitted that the testimony of PW1 was beyond a shadow of a doubt, that the appellant attempted to defile her. According to counsel this evidence was corroborated by the testimony of PW6 who testified that the victim's clothes were dry but soiled, the minor was in a good general condition and had no injuries on her body but her hair was soiled. Averring that on examination of her genitalia there was slight laceration on her Labia minora and labia majora.

51. Counsel contended that the age of the minor was proved by the birth which indicated the minor was 8 years old.

52. On whether the trial court failed to consider the Appellant's defense, it was the state counsel's submission that the prosecution relied on evidence that was cogent which the Appellant his defense could not shake the evidence adduced by the prosecution. Opining that the trial court was right in determining that indeed the Appellant was guilty of the offence of attempted defilement. According to the state counsel Appellants defense was simply a narration of the day he was apprehended, hence, the cogent prosecution's case went unchallenged by the Appellant's defense.

53. On proof beyond reasonable doubt, counsel submitted that the Appellant was properly identified by the victim as the perpetrator of the ill-fateful ordeal. PW3 also positively identified the Appellant as a person who does jobs in the area. To buttress this position counsel relied on the case of Peter Musau Mwanzia Vs Republic [2008] eklr.

54. Similarly counsel cited the case of Wamunga Vs Republic [1989] KLR 424 at 426 had this to say:

> " Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favorable and free from possibility of error before it can safely make it the basis of a conviction"

55. Contending that the conviction and 15 years sentence against the Appellant is sufficient and appropriate. Counsel invited the court to uphold the conviction and the sentence imposed by the trial court.

DETERMINATION/ANALYSIS

56. This Court has outlined and considered the Trial Court proceedings, judgment and sentence. The Appellant filed the appeal against the Trial and outcome. Both Appellant and Prosecution have filed written submissions outlined above. The court will consider the appeal as follows;

57. This being the first appellate court, I am therefore required to re-evaluate and subject the evidence before the trial court to afresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. The court also takes note of the fact that it did not have the benefit of seeing or hearing the witnesses testify and therefore has to make an allowance for the same as observed by the EA Court of Appeal in Okeno vs. Republic (1972) EA 32 where the Court of Appeal set out the duties of a first appellate court as follows:

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. 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 finding and conclusion; 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."

58. Also, in M'Riungu vs. Republic [1983] KLR 455 the court held:

> " Where a right of appeal is confined to questions of law, the appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law and it should not interfere with the decisions of the trial or first appellate court unless it is apparent that on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law.."

59. The Appellant submitted that the Trial court to conduct a voire dire examination for it to satisfy itself that the minor possesses enough intelligence and understood the importance of taking an oath and telling the truth.

60. The purpose of voir dire was explained by this court in Johnson Muiruri vs Republic [1983] KLR 445 as follows:

> 1. "Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a voire dire examination, whether the child understands the nature of an oath in which even his sworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him.

2. It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided.

3. When dealing with the taking of an oath by a child of tender years, the inquiry as to the child's ability to understand the solemnity of the oath and the nature of it must be recorded, so that the cause the court took is clearly understood.

4. A child ought only to be sworn and deemed properly sworn if the child understands and appreciates the solemnity of the occasion and the responsibility to tell the truth involved in the oath apart from the ordinary social duty to tell the truth.

5. The judge is under a duty to record the terms in which he was persuaded and satisfied that the child understood the nature of the oath. The failure to do so is fatal to conviction."

61. The Trial Court record indicates the Prosecutor informed the Court the child/witness was 8 years old. The court proceeded with voir dire examination of the witness and recorded as follows;

> My name is MMN. I am 8 years old. I go to school at Prime Preparatory Academy. Iam in Class 3. I know this place.. it is the Court. I reside at Wendano. I go to Church at Rollongs. It is at Wendano. I know the importance of speaking the truth.

63. The Court concluded that the witness may give sworn evidence.

64. From the Trial Court record, I am satisfied that the Trial court conducted a voir dire examination in compliance with the law, and was satisfied the witness was to testify on sworn evidence.

65. The Appellant submitted the Trial Court erred on law and fact by relying on evidence that did not meet the minimum threshold to uphold conviction.

66. At Pg 7-22 lines 19-21 the minor gave testimony and remained silent on being asked what the Appellant did to her. The Trial Court misdirected herself burden Referring to the trial court's proceedings on page 7 of 22 lines 19-21, it was submitted by the Appellant that from the foregoing the Trial Magistrate misdirected herself to convict the Appellant herein and yet the minor remained mute as to what the Appellant exactly did to her. The Appellant took the view the Trial Court filled in gaps for the Prosecution contrary to law as illustrated in the case of Bukenya vs Uganda 1972 E.A. 549. As such the overt act towards the execution of the intended act The Appellant submitted that the execution of the intended act (Intended Penetration) could not be said to have been proved beyond reasonable doubt. The apparent doubt should be to benefit of the Accused person.

67. The Trial Court record on PW1's testimony reads in part as follows;

> ....When I came he banged my head on the wall and took out my pant and lay on top of me on the kitchen floor(on being asked what the Accused did to her she remains silent) Accused got up and promised to bring me a sweet. I got out and found my neighbor Nduku.I told her what happened. I was taken to hospital at Matuu.I was examined. The man was not known to me. He is the Accused in Court.

68. The Appellant was placed in the house of PW1, on the said day in broad daylight and he asked PW1 if PW1 was alone at home and tried to borrow a wheel barrow, asked for water to drink, upon being brought water, he accosted PW1.The Court finds the testimony of PW1 quite telling from the

graphic details outlined above that the Appellant laid PW1 down and removed her pant the logical and reasonable following action was attempted defilement, hence the Accused person was charged with attempted defilement of PW1 not the full offence. The Trial Court did not import any other evidence other than what was stated, in fact the Trial Court recorded what exactly transpired in Court during Trial, exactly what PW1 said and where she remained silent, the Court recorded.

69. On the issue of Identification, the Appellant contested identification in the absence of an identification parade. In R. vs. Turnbull & Others [1973] 3 All ER 549 it was held that:

> "...The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the accused under observation? At what distance: In what light: Was the observation impeded in any way? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?"

70. In the typed proceedings, PW1 met the Appellant in broad daylight, they were in close proximity at first faced each other as the Appellant asked PW1 to borrow the wheelbarrow and also asked for water to drink. Thereafter, the Appellant accosted PW1 by pushing her down and removing her pants. These activities took time and the parties were close for sufficient time without anything impeding contact to prevent identification instead it would aid positive identification.

71. PW5 who came to PW1's aid testified PW1 told her what happened and confirmed she could identify the man who accosted her. When the Appellant was arrested by the Chief and PW1's father, she said she had seen the Appellant before and he came to their area and he did casual jobs. She also positively identified him in Court. This Court is satisfied that the identification was positive in light of the facts as depicted from the Trial Court record.

72. The Appellant raised the issue that the Trial Court failed to warn itself of relying of single witnesses' evidence as envisaged by Section 124 of Evidence Act. The section provides;

Corroboration required in criminal cases

> Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is 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.

73. In the instant case, in compliance with Section 143 of Evidence Act the Prosecution presented evidence of PW1 who testified to attempted defilement which offence the Appellant was charged under in these proceedings. The evidence of PW1 was corroborated by medical evidence by PW6 Clinical Officer from Kimiti Level 4 Hospital Matungulu who examined PW1 same day of the incident 18/6/2020 and observed; her clothes were dry but soiled skirt, t-shirt and under pant. On examination found PW1; genitalia was normal. Slight injuries to labia majora and labia minora. Slight lacerations. She also had

discharge from her vagina. It was yellowish in color. To me, someone tried to defile her but there was no penetration.

74. From the above, this Court finds the evidence sustains the conviction and the Trial Court properly directed itself on the law and evaluation of the facts with regard to proof of the offence by proof of age of the victim, circumstances aiding positive identification and evidence of swift action medical examination and arrest of the Appellant on the same day. I confirm the conviction.

75. The Appellant raised the issue with regard to sentence and submitted that the Trial Court erred in sentencing the Appellant to serve 15 years imprisonment and recorded as follows;

The offence carries a sentence of not less than 15 years in imprisonment. I see no reason to exercise my discretion otherwise. I will therefore sentence the Accused to serve 15 years imprisonment.

76. Section 9 of *Sexual Offences Act* provides for Attempted defilement as follows;

(1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.

(2) A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years.

77. The Appellant's submission on sentencing is that he was charged with a non-existent legal principle/ section thereby rendering the sentence an illegality and was manifestly harsh and excessive as it was/is not the minimum prescribed by law.

The Trial Court's typed proceedings and judgment. The Court finds that the Charge Sheet/ Information shows that the provisions of Section 9(1) & (2) of the *Sexual Offences Act* and alternative charge of Indecent assault contrary to Section 11(1) of *Sexual Offences Act* are detailed in the Charge and Particulars of Offence. On 24/6/2020, these charges and particulars of offences were read to the Appellant and he pleaded NOT GUILTY. Hence the Hearing. There cannot be non- existent charges as confirmed by the Court Record.

78. The anomaly arose in the Trial Court 's judgment, whereas at Pg 6 of the judgment, the Court correctly outlined the provisions of Section 9(1) & (2) of *Sexual Offences Act* with minimum sentence of attempted defilement as 10 years; at the Sentencing part of the Court's judgment by human error, indicated minimum sentence as 15 years instead of 10 years as outlined earlier in the Judgment.

79. The error of sentencing to 15 years as minimum sentence is conceded and hereby rectified to10 years to be computed as from date of sentence as the Appellant was out on bond/bail while on trial.

80. From the above evaluation and analysis of evidence as per the Trial Court record and judgment of the Court, this Court finds the evidence supports the evidence on record and the Appellant was properly identified and the evidence of PW1 corroborated by doctor's evidence PW6, the Appellant committed the offence was properly convicted. With regard to sentence, the Trial Court intended to mete out the minimum sentence instead of 10 years wrote 15 years. The error is corrected and appeal on sentence is upheld and on conviction dismissed.

DISPOSITION

1. The appeal is dismissed on conviction which is upheld.

2. The appeal on sentence succeeds, the sentence is minimum sentence under Section 9 (2) of *Sexual Offences Act* is 10 years which now substitutes the 15 years meted out.

3. The sentence shall run from date of conviction and sentence as the Appellant was out on bond during trial.

JUDGMENT DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 18/1/2024. (VIRTUAL/PHYSICAL CONFERENCE)

M.W.MUIGAI

JUDGE

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