REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CRIMINAL APPEAL NO 25 OF 2017

(From original Conviction and Sentence in Nanyuki

CM Criminal Case No 565 of 2015 – W J Gichimu, PM)

DAVID NG'UNJU KAMAU.........................APPELLANT

VERSUS

REPUBLIC..RESPONDENT

J U D G M E N T

1. The Appellant in this appeal, **DAVID NG'UNJU KAMAU**, was convicted after trial of ***defilement of a child*** contrary to **section 8(1) & (2)** of the ***Sexual Offences Act, No 3 of 2006*** (Count I), and also of ***committing an indecent act with a child*** contrary to **section 11(1)** of the same statute (Count II). On 25/01/2016 he was sentenced to life imprisonment in Count I and to ten (10) years imprisonment in Count II. He has appealed against both conviction and sentence.

2. The particulars of the offence in Count I were that on 15/06/2015 at Katheri area in ***Laikipia County*** the Appellant had intentionally and unlawfully caused his penis to penetrate the vagina of one WN, a girl aged ten (10) years. In Count II it was alleged that on the same date and at the same place, the Appellant intentionally touched the vagina of the same complainant.

3. It is immediately apparent that the offence as charged in Count II must have been committed in the course of committing the offence charged in Count I. It should therefore have been charged as an alternative to Count I, **not** as a substantive count of itself. As charged therefore, Count II was duplex to Count I and should not have been allowed by the trial court to stand, let alone convict upon it as well, having already convicted on Count I. Even if it had been correctly charged as an alternative to Count I, the trial court could not have lawfully convicted upon it, having already convicted the Appellant upon the main charge.

4. The conviction on Count II is therefore bad in law and will not be allowed to stand. Learned prosecution counsel correctly and readily conceded that point of law. The conviction and sentence on Count II are therefore hereby set aside. It is so ordered.

5. The conviction in Count I has been challenged upon the following grounds –

(i) That the prosecution case was "full of contradictions and inconsistencies."

(ii) That the trial court failed to consider the Appellant's defence.

(iii) That the prosecution did not prove the charge beyond reasonable doubt.

6. Learned counsel for the Appellant filed written submissions dated 03/12/2018 which he orally highlighted. Learned prosecution counsel, in oral submissions, supported the conviction. I have considered those submissions.

7. I have also read through the record of the trial court in order to evaluate the evidence placed before it and arrive at my own conclusions regarding the same. This is my duty as the first appellate court. I have borne in mind however, that I did not see and hear the witnesses testify, and I have given due allowance for that fact.

8. There are three main ingredients in the offence charged in Count I. These are-

(i) the age of the complainant;

(ii) Penetration; and

(iii) identity of the perpetrator.

9. The complainant's **age** (10 years at the time of the offence) was proved beyond reasonable doubt by her birth certificate (***Exhibit P2***) which was produced in evidence by her mother (PW1). It says she was born on 29/06/2004. The offence was alleged to have occurred on 15/06/2015; she was thus just shy of 11 years.

10. The **identity** of the alleged perpetrator is also not in serious dispute. The Appellant was well known to the complainant (PW2) by name. She also knew his place of work (he was a day watchman at a secondary school which was next to her own primary school) and she used to see him there.

11. The complainant also knew the Appellant's home, which was not far from her own, and through which she normally had to pass in order to get to her grandmother's home nearby. When the complainant reported the defilement to her mother (PW1) and was asked to take the mother and another person to the home where she was defiled, she took them straight to the Appellant's home. PW1 also knew that home to belong to the Appellant, whom she also knew.

12. The Appellant himself in his cross-examination of prosecution witnesses, and in his unsworn statement, did not once suggest that the complainant did not know him well or at all.

13. The complainant gave unsworn evidence through an intermediary after the trial court satisfied itself that she had a speaking disability and could not directly testify. The court was also satisfied that she did not understand the nature and purpose of the oath. The intermediary was the complainant's teacher who was duly sworn.

14. After her testimony-in-chief the complainant was offered to the Appellant for cross-examination. He stated that he had no questions for her.

15. The complainant's testimony was as follows. On the material date she had come from school and was going to her grandmother's house. It was raining heavily. She met the Appellant at the gate. He greeted her and held her hand. He then took her to his house where he offered her a cup of tea. She declined. The Appellant touched her private parts. He then removed his clothes and also removed her stockings and underpants which were drenched with rain water. She was then lying on a bed facing upwards.

16. The Appellant then blocked her eyes using a piece of paper and tied both her hands and legs with a piece of string. The Appellant then smeared jelly on her private parts. He then inserted *"a big stick"* into her private parts. She felt pain. Once he was through he released her and told her to go away.

17. She then proceeded to her grandmother's house where she found the grandmother and her aunt. She did not tell them what had just happened to her. Her brother came for her and they both went home. Later she informed her mother what had happened.

18. The complainant also stated that she knew the Appellant; and that he worked in a secondary school where she used to see him. She did not see the "stick" that the Appellant inserted into her as he had blocked her eyes.

19. As already observed, the Appellant did not challenge by cross-examination the unsworn evidence of the complainant.

20. PW1 (the complainant's mother) testified that on 15/06/2015 at about 8.00 pm she was working at a bar when her son **SM** called her (apparently by phone) and told her that there was a problem at home, that the complainant had told him something that he could not understand. PW1 then called a neighbour, **Mama F**, and asked her to go and check what the problem might be. Later when PW1 arrived home she found **Mama F** and **Baba F** with the complainant, who was shaking.

21. The complainant then told PW1 that she (complainant) had met a person called **Kamau** on her way to her grandmother's house who had greeted her. He had then led her to his house where he offered her tea but she declined to take it, and that Kamau then removed her clothes, and after smearing some jelly, he inserted a stick into her private parts. PW1 checked the complainant and noted that her private parts were swollen and painful.

22. PW1 then asked the complainant to take PW1 and the others to the house of the person she called Kamau. She took them to the Appellant's house, a neighbour who worked at a secondary school nearby, and whom she had known for about 2 years as **Baba K** or **Kamau**. The Appellant cross-examined PW1. She was not shaken at all in her testimony.

23. PW3 was the doctor who examined the complainant and produced her medical examination report (P3). She testified that upon examination she found the complainant's exterior genitalia to be normal but tender. The hymen was broken. There was no discharge or blood.

24. In cross-examination PW3 stated that the complainant was examined at 08.40 pm on 15/06/2015. She also stated that ***it could not be concluded that the complainant was defiled***, though she had said that an object was inserted into her genitalia.

25. PW4 (last prosecution witness) was the police officer to whom the alleged defilement was first reported at the gender office on 15/06/2015, and also the investigating officer of the case. In her testimony she reported on what PW1 and the complainant had told her. She then referred them to hospital.

26. As already observed, the Appellant gave an unsworn statement in his own defence. He also called 3 witnesses.

27. The Appellant stated that he was a watchman; that on the material day and time he was at his place of work; that it had rained; that he left work at 6:00 pm; that he went to the market; that on the way back he was with his fellow watchman, **Paul Maina (DW3**); that he met PW1 who called him and told him about the alleged offence; that they then proceeded to the AP camp where PW1 reported the matter; and that he was later taken to court.

28. DW2 (Paul Kariuki Wachira) testified that the Appellant was a day watchman at *B Secondary School* where he (DW2) was a lab technician; that in the morning of 14/06/2015 he had found the Appellant at work and saw him around the school compound; and that he had left him at the school at 5:00 pm. In cross-examination he stated that he was not with the Appellant the whole time in the school; that it had started raining in the afternoon; that the Appellant lived in the school compound where he himself lived about one kilometer from the Appellant's house; and that the laboratory where he worked was about 50 meters from the school gate, with classrooms and offices in between.

29. DW3 (PMM) testified that he was a night watchman at *B Secondary School*; that the Appellant was a day watchman at the school; and that the complainant was a daughter of his own cousin. In cross-examination he stated that on 15/06/2015 he found the Appellant at work at 5.00 pm.

30. DW4 (Alice Nyokabi) stated that the Appellant was her husband. She did not testify to anything material to the charge.

31. From the totality of the evidence placed before the trial court it was proved beyond reasonable doubt that on the material date and time the appellant accosted the complainant and took her to his house where he lay her on a bed, undressed himself and her, applied some lubricant to her private parts and then tried to insert a "big stick" (which the complainant could not see as he had blocked her sight with some paper). The "big stick" could have been nothing else but his erect penis in the circumstances of the case. I have used the words, "tried to insert" advisedly because it was the testimony of PW3 (the doctor who examined the complainant) that though the complainant's exterior genitalia was tender and the hymen broken, there was no discharge or blood, and that it could not be concluded that the complainant was defiled. A broken hymen of itself is not necessarily evidence of penetration.

32. In my own assessment of the evidence placed before the trial court, it is clear that there was a spirited attempt to penetrate the complainant's vagina, though penetration was not achieved. ***Attempted defilement*** is an offence under **section 9** of the Sexual Offences Act. It is minor but cognate to the offence of ***defilement*** under **section 8(1) & (2)** of the same Act with which the Appellant was charged.

33. Under **section 179(2)** of the ***Criminal Procedure Code -***

> ***"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."***

And under **section 180** of the same Code,

> ***"When a person is charged with an offence, he may be convicted of having attempted to commit that offence although he was not charged with the attempt."***

34. The testimony of the complainant was cogent and clear. The Appellant never challenged it by cross-examination. The testimony of her mother (PW1) fully corroborated the complainant's testimony in all material particulars; likewise the medical evidence given by the doctor (PW3). Nothing that the Appellant stated in his unsworn statement, or was stated by his witnesses, cast any doubt at all upon the prosecution case. The Appellant's defence was properly and correctly rejected by the trial court.

35. As Already seen elsewhere above, the identity of the perpetrator was never in serious contention. The Appellant was well-known to the complainant, and the offence was committed in day light.

36. In the result the Appellant's appeal is bereft of merit, except that he should have been convicted of ***attempted defilement*** under section 9 of the Sexual Offences Act and not of ***defilement*** under section 8(1) & (2) of the same Act.

37. I will therefore set aside the conviction for defilement under section 8(1) & (2) of the Sexual Offences Act together with the sentence imposed and substitute therefor a conviction for ***attempted defilement*** under **section 9** of the same Act. I will sentence the Appellant to nine (9) years imprisonment. It is so ordered. Sentence to run fro 25/01/2016.

DATED AND SIGNED AT NANYUKI THIS 3RD DAY OF FEBRUARY 2021

H P G WAWERU

JUDGE

DELIVERED AT NANYUKI THIS 4TH DAY OF FEBRUARY 2021