REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 20 OF 2019

MWALIMU ZIRO NGOA.....APPELLANT

VERSUS

REPUBLIC.....APPELLANT

(Being an appeal against the conviction and sentence in Malindi CMCCRC No. 53 of 2017

delivered by Hon. S.R Wewa (PM) on 18th September, 2018)

Coram: Justice Reuben Nyakundi

Mr. Alenga for State

Appellant in person

JUDGEMENT

The appellant was charged with the offence of attempted defilement Contrary to Section 9(1) as read with Sub-section 2 of the Sexual Offences Act No. 3 of 2006. He pleaded not guilty to the said charge. The matter went through a full trial after which the appellant was convicted and sentenced to serve 10 years' imprisonment. The substance of the charge alleged that on the 31st of October, 2017 at around 3:30PM at [Particulars Withheld] Village of Watamu Location within Kilifi County, intentionally attempted to cause his manhood to penetrate the genitalia of the complainant a child aged 6 years.

The appellant was dissatisfied by the findings of the Hon. Magistrate. He therefore protested against both conviction and sentence by way of Amended grounds of appeal encapsulating the following grounds:

> ***1. That the learned trial magistrate erred in law and fact in convicting and sentencing him basing on a theory not canvassed in the evidence.***
>
> ***2. That the mandatory nature of the sentence under section 9(1) of the Sexual Offences Act deprived the trial court the use of judicial discretion to impose an appropriate sentence as required under section 216 and 329 of the CPC.***
>
> ***3. That may this honourable court be pleased to consider that the appellant has the right to equal protection and equal benefit of the law as given under Article 27 of the Constitution. That the time spent in Remand custody be put into account as provided under section 333(1)(2) of the Criminal Procedure Code.***

Evidence

The minor was examined by the trial court prior to tendering her evidence. She gave sworn evidence that the appellant called her as she was playing with her friends, Q and S. He asked her if she was interested in eating potatoes to which she agreed. Her friend Q and her accompanied the appellant to the place they could get the potatoes. The appellant did not buy the potatoes as promised, he instead took the complainant to a bush where he removed his short, knelt and removed her tights. Queen ran away. Upon seeing Q leaving, she told the appellant that her friend was leaving, she hurriedly put her tights back on. She then informed her Auntie R who referred her to one uncle H to whom she made her report.

PW2 was **H** who told the story as per the minor's account. PW3, is the father to PW2. He testified that he received information concerning

the incident from H. He went to scene of the crime in the company of PW1and as they were crossing the road, PW1 identified the appellant as being the perpetrator of the alleged offence. The arrest of the appellant was therefore effected.

PW4 was Queen. She was also examined by the court to determine whether she was competent to testify due to her tender age. The court found her intelligent enough to give sworn evidence. Her testimony corroborated that of PW1to the extent of entering the bush. She claimed that she did not enter the bush hence she did not know what transpired but she heard PW1 scream and later joined her. PW5, the investigating officer in the matter.

The accused was found to have a case to answer, and the court placed him on his defence. He stated that he was court by people he didn't know. He affirmed that they were in company of two small children. He claimed that he didn't know why the children pointed at him. Upon cross examination, he admitted having met the children who asked him for potatoes which he could not buy them since he had no money.

Submissions

The appellant in his submissions argued that the learned magistrate misdirected himself by convicting him basing on a theory not canvassed in the evidence tendered by the prosecution witness. He cited page 20 line 2 of the learned magistrate's magistrate which says, *"He removed his short and knelt, what was his intention".* His argument is that he never alluded to the fact that he knelt and neither did the child tell the court that she screamed. He cited the case of **Oketh Okale & Others v R (1965) EA 555**, in which the Hon. Judge enunciated inter alia that:

> ***"In every criminal trial a conviction can only be based on the weight of the actual evidence adduced and it is dangerous and inadmissible for a trial judge to put forward a theory not canvassed in evidence not in counsel's speech."***

The appellant is therefore asking this court to make similar findings as the one in the above cited legal authority. The appellant has also questioned the legality of the sentence imposed upon him by the honourable magistrate. He contends that the mandatory nature of the sentence encapsulated under section 9(1)(2) of the SOA deprives the trial court of the use of judicial discretion. To support his contention, he cited the case of **Dismas Wafula Kilwake vs Republic, Criminal Appeal No. 129 of 2014**. The appellant has also asked the court to consider the time already spent in remand custody. He explained that he was arrested on 1/11/2017 and he was convicted on the 18/9/2018 which amounted to 10 months in remand. In the spirit of section 333(2) of the criminal procedure code, the appellant is asking the court time already spent in remand. He went further to argue that he has the right to equal protection and equal benefit of the law as conferred by Article 27 of the Constitution. He requested the court to allow his appeal on the basis of the above-mentioned grounds of appeal. There was no response as regards the instant appeal by the prosecution.

As this is a first Appeal, I'm obliged to subject the evidence on record to my own evaluation and assessment and come up with an independent decision on the issues raised before me. I shall also give due regard to the findings and determinations arrived at by the Learned Trial Magistrate who had the added advantage of physically seeing and listening to the witnesses testify before him. **(**See **OKENO v R (1972) EA 32).** I have re-evaluated the evidence on record. The appellant has appealed to this court on several grounds.

Analysis and Determination

The question to ponder in the instant matter is whether the appellant attempted to defile the complainant. The incident is alleged to have occurred in broad day light. The complainant gave a copious detail on how the appellant lured her into the bush and attempted to defile her. Section 9(1) and (2) of the Sexual Offences Act provides:

> ***"9(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 ad child is liable conviction to imprisonment for a term of not less than ten (10) years."***

The issue which arises is in respect of what constitutes an attempt to commit an offence. In a charge of attempted defilement, the prosecution ought to prove all other elements of defilement save for penetration. The said elements are; that the complainant was under the age of 18 years; that the appellant was positively identified as the perpetrator of the alleged offence and the steps taken by the appellant to execute the defilement which did not succeed. Attempted defilement can be simply termed failed defilement.

Under section **388(1) (2)** of the Sexual Offences Act, attempt to commence an act is defined as:

> ***"388(1) when a person intending to commit an offence commits begins to put his intention in execution, by means adopted to its fulfillment and manifest his intention by some overt act, but does not fulfill his intention to such an extent as to commit the offence, he is deemed to have attempted to commit the offence.***
>
> ***(2) It is immaterial except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of his offence or whether the complete fulfillment of his intention is prevented by circumstances independent of his will or whether he desists of his own notion for the further prosecution of his intention.***
>
> ***(3) It is immaterial by reasons of circumstances not know to the offender it is impossible to commit the offence."***

From the foregoing provisions of law, two requisites have to be met; the *mensrea* to commit the offence and the attempt to commit the offence (the *actus rea)*. In **Michael Lokomar v R (2016) eKLR Justice S.N. Riechi** observed as follows:

> ***"In proof of an attempted commission of an offence the prosecution must prove means rea which is the intention and actus reus which is the act which constitutes the overt act which is geared to the execution of the intention. The actus reus must be more than the mere preparation to commit the act as there is a difference between preparations to commit an offence."***

The accused must have reached at least the commencement of the execution of the intended crime. Another key aspect of attempted defilement is the commencement of execution of the intended crime. The appellant ought to have reached far enough towards the accomplishment of the desired result as to amount to a commencement of the consummation. Consummation is what is referred to as "commencement of the execution". In ***Rex* v *Sharpe [1903] TS 868*** the Court describes the same as the beginning of the final series of acts which complete the crime. Thus, the beginning of the acts of the final series depends on the circumstances of each case. It also involves a value judgment by the court.

In the present case, the sequence of events depicts that the appellant lured the complainant into the bush by promising to buy her potatoes, pulled doubt her tights and also his shorts, he then knelt down, the complainant screamed, saw her friend leaving and she got dressed and ran away. In the view of the court, by pulling down his shorts and those of the minor in a bush where no one could see them, he expressed his intention to have sexual intercourse with her. Certainly, the appellant's interest was only on the complainant's private parts. If he had other intentions other than having sex with her, he wouldn't have centered all his efforts to reveal the lower part of the complainant's and his body. The appellant's intention went beyond the preparatory stage to commit the offence but then some other factors caused his attempt to defile the complainant cut short. Had the complainant not screamed and ran away, the appellant could have defiled her.

On sentence, the appellant was handed down 10 years' imprisonment which was a minimum mandatory sentence. The trial court sentenced him after considering his mitigation even though the appellant had maintained his innocence throughout the trial. I therefore find the sentence lawful and the same is merited in light of the circumstances of this case where grown-ups take advantage of young children and defile them.

However, since the appellant was sentenced under the mandatory minimum sentence regime. I am inclined to note that our jurisprudence has since moved from the said regime by dint of the Supreme Court Landmark decision in **Francis Karioko Muruatetu & Another v Republic**, I therefore exercise discretion conferred by the said decision and re-sentence him to serve five (5) years imprisonment to be calculated from the date of his arrest. That includes the time already served in jail in compliance with the dictates of section 333(2) of the Criminal Procedure Code.

To that extent, the appeal on sentence is hereby allowed.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 12TH DAY OF APRIL, 2021.

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R. NYAKUNDI

JUDGE

In the presence of:

Mr. Alenga for the State

The Appellant