REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO. 51 OF 2018

ANTHONY GATHUKU KIONGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Appeal from the decision of V. Ochanda, Resident Magistrate, in S.O. No. 13 of 2014 at Murang'a dated 23rd August 2018]

JUDGMENT

1. The appellant was convicted for *attempted defilement* contrary to section 9 (1) as read with section 9 (2) of the **Sexual Offences Act**. He was imprisoned for eleven years.

2. The particulars were that on 5th June 2014 at *[particulars withheld]* within Murang'a County, he attempted to cause his penis to penetrate the vagina of MMN *[particulars withheld]* a child aged *five years*.

3. The appellant first lodged his petition of appeal in person on 5th September 2018 raising four grounds. On 13th November 2018 the firm of *Rachier Advocates* filed a fresh petition of appeal raising sixteen grounds but *without* leave of the court. In light of section 350 of the **Criminal Procedure Code**, the latter petition is obviously a *nullity*.

4. The original grounds of appeal were: Firstly, that the medical report did not support the charge; secondly that the charge was trumped up owing to a grudge between the appellant and the complainant's grandmother; thirdly, that the appellant was not granted a fair opportunity to defend himself; and, lastly, that his defence was completely disregarded. In a nut shell, the appellant contends that the key elements of the charge were not proved beyond reasonable doubt.

5. The appeal is opposed by the Republic.

6. Learned counsel for the appellant, *Mr. Ongoro,* filed written submissions on 28th October 2020 with a list of authorities. On 5th May 2021, I heard brief arguments from counsel for the appellant and that for the Republic.

7. This is a first appeal to the High Court. I have re-evaluated the evidence and drawn independent conclusions. I am alive that I neither saw nor heard the witnesses. ***Njoroge v Republic*** [1987] KLR 19, ***Okeno v Republic*** [1972] E. A. 32.

8. From the birth certificate (exhibit 2) the complainant was born on 26th April 2009. I am thus satisfied that at the time of the offence, she was about 5 years old. The submission by the appellant that age was not proved collapses.

9. The trial court conducted a second *voir dire* examination on 25th May 2015. The learned trial magistrate formed the opinion that the minor was intelligent and understood the nature of an oath. She thus gave sworn evidence and was cross-examined. I am satisfied that the trial court complied with the procedure of taking the evidence of the minor. ***Johnson Muiruri v Republic*** [1983] KLR 445.

10. I am also satisfied that the complainant knew the appellant. In his defence, the appellant confirmed that he used to work as a farmhand for the complainant's grandmother. This was evidence of *recognition*; far more reliable than simple identification. ***Wamunga v Republic*** [1989] KLR 424, ***Maitanyi v Republic*** [1986] KLR 198 at 201.

11. When the complainant first took to the stand on 29th January 2015, she broke down. Her teacher (PW2) testified that on 6th June 2014 she questioned the complainant. But before she could answer, her classmates said that the appellant had inserted his fingers into the complainant's private parts. When PW2 took the complainant to the staffroom, she told her that the appellant carried her into the thicket and

inserted fingers in her vagina. PW2 informed the complainant's grandmother (PW3) about the matter.

12. It is instructive that none of the complainant's classmates testified. When the complainant resumed testimony on 25th May 2015, she said-

> *Gathuku would carry me to his house, remove my clothes, then he would remove his clothes, then he would put his thing between my legs, the thing he uses to urinate. He put inside my thing for urinating. I felt pain and started crying. Then he removed his thing….and took me to my house.*

13. Dr. Raphael Gachiri (PW5) examined the minor on 9th June 2014. That was three days after the incident. He testified that there was no vaginal penetration and that the hymen was intact. He did not find any blood or spermatozoa. However, there were pus cells and blood cells. That fact coupled with the complainant's testimony led the trial magistrate to conclude that there was an attempt to defile the complainant.

14. Counsel for the appellant submitted that there was no corroboration. But I am alive that under the proviso to section 124 of the **Evidence Act** the sole evidence of the victim of a sexual offence can prove the charge. Furthermore, under section 143 of the Act, no particular number of witnesses is required to prove any particular fact.

15. It is *not* true that the appellant was not afforded a fair opportunity to defend himself. The record shows that he gave sworn evidence and was cross-examined on it. Like the trial magistrate, I find his claims of a grudge or vendetta to be a red herring. The complainant gave clear testimony that was unshaken by the cross-examination. I see no reason why the five-year-old would frame up the appellant.

16. That said, the evidence of the complainant and PW2 presents a number of problems. If the complainant's evidence is completely accurate, the appellant should have been charged for defilement as he partially penetrated the minor. The evidence of PW2 on the other hand pointed to a sexual assault or an indecent act.

17. But the appellant was charged for an *attempted* defilement. As rightly held by Majanja J, in ***John Mokua Atandi v Republic***, High Court, Kisii, Criminal Appeal 27 of 2018 [2018] eKLR, an attempted defilement *"is a failed defilement and that is why the intention to penetrate is a key ingredient of the offence"*.

18. A combination of the complainant's evidence and that of the doctor established that the appellant caused his fingers or penis to touch the complainant's vagina. The *mens rea* is clear from three sets of facts: firstly, by isolating the complainant from her young friends and carrying her to a secluded location; secondly by removing his and her clothes; and, lastly by making contact with her genitalia using his penis or his fingers. Save that the pain became unbearable for the child, he might as well have succeeded.

19. I thus find that the conviction for attempted defilement was *safe*. The appeal against conviction is accordingly *dismissed*.

20. The sentence provided is not *less* than ten years. Following the landmark decision of the supreme Court in ***Francis Karioko Muruatetu & another v Republic***, Consolidated Petitions Nos. 15 & 16 of 2015 [2017] eKLR, the courts now frown upon *minimum* or *mandatory* sentences. Specifically, the Court of Appeal has given fresh guidance on *minimum sentences* under the **Sexual Offences Act** in ***Jared Koita Injiri v Republic*** [2019] Kisumu Criminal Appeal 93 of 2014 [2019] eKLR.

21. I have considered that the appellant is a first offender and his mitigation. I set aside the sentence. The appellant shall now serve a term of *3 years* imprisonment. For the avoidance of doubt, the new sentence shall run from 23rd August 2018, the date of his original conviction.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 1ST DAY OF JULY 2021.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

Mr. W. Ongoro for the appellant instructed by Rachier & Amollo Advocates.

Mr. S. Mutinda for the Republic instructed by the Office of the Director of Public Prosecutions.

Ms. Dorcas Waichuhi & Ms. Susan Waiganjo, Court Assistants.