REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARSEN

CRIMINAL APPEAL NO. 29 OF 2019

SIMON MUIRURI WAMBOI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence of the

Principal Magistrate Court at Mpeketoni by Hon P. E. Nabwana

(RM) delivered on 22nd July, 2019 in MCSO Case No. 19 of 2018)

Coram: Hon. Justice R. Nyakundi

Appellant in person

Mr. Mwangi for the state

J U D G M E N T

This appeal is against a conviction and sentence of fifteen (15) years imprisonment for the offence of attempted defilement contrary to Section 9 of the Sexual Offences Act. The appellant was initially charged with defilement contrary to Section 8 (1) as read with (8) (2) of the Act but was substituted at the final decision with that of attempted defilement as clearly captured in the impugned Judgment. The appellant aggrieved with the entire Judgment filed an appeal based on several grounds namely:

(1). I pleaded not guilty to the charge.

(2). That I was sentence to fifteen (15) years imprisonment for the offence of Attempted defilement contrary to Section 9 of the Sexual Offences Act No. 3 of 2006 in Criminal Case No. 19/2018 on 30.7.2019 before Principal Magistrates Court Mpeketoni.

(3). That your honor I was arrested on 1.11.2018 and conducted this case while in custody the prosecution side produced eight (8) witnesses while I was the only defence witness though two of my witnesses from the defensive were not summoned to appear for the same. The Magistrate dictated me in unlawful manner by ignoring everything from my defensive side.

(4). That Your Honor, the Learned trial Magistrate erred in Law and facts by relying most on the prosecution side and also he failed to distinguish the truth from falsehood raised from the complainant side because it ironical for the Learned trial Magistrate to rebut the defilement charges in the fact that it is not the minor's first sexual encounter and the Court finds that the there was no evidence of defilement but he changed his mind and hence convicting the accused with attempted defilement.

(5). That Your Honor, if there were no proof of defilement then how can the Magistrate conclude that the accused did attempt because the complainant was covered in dirt on her back, neck, thighs, and buttocks?

(6). That Your Honor, since the prosecution did not prove its case of defilement against reasonable doubt then this case could have been terminated for acquittal by awarding the accused benefit of doubt.

(7). I humbly beg your honorable court to receive my grounds in honor for the sake of justice and review my case and if possible quash the sentence am serving at present.

(8). I will be glad if my appeal is going to be considered and approved since it will help me a lot for my future life.

In the written submission relied upon by the appellant its claimed that the charge sheet is incurably defective and in contravention of Section 134 and 214 of the Criminal Procedure Code. Secondly, the medical evidence failed to conclusively state whether the complainant was defiled as alleged in her testimony on oath in Court. Further, the appellant contended that the P3 Form did not indicate the probable weapon used to commit the act of defilement. Thirdly, the critical ingredients of the offence remained unproven by the prosecution to warrant a finding of guilty and conviction reached by the trial Court. Fourth, the appellant argued and contends that the prosecution having failed to amend the charge, left no room for the Learned trial Magistrate to substitute the charge with that of attempted defilement.

The respondent's submissions covered analysis of both the prosecution and defence case. From that analysis, Learned counsel for the state submitted that all the necessary ingredients were proved beyond reasonable doubt. On the whole Learned counsel argued and submitted that the final findings on attempted defilement by the trial Court were all within the bounds of the statute and no evidence of misdirection has been demonstrated by the appellant.

Determination

In this appeal whichever angle out looks at the case, appellant is telling this Court the charge against him was never proved beyond reasonable doubt to warrant a conviction of attempted defilement. So what was the prosecution required to proof at that trial:

(a). The act of penetration into the genitals of the complainant.

(b). The age of the complainant being below eighteen (18) years.

(c). That the appellant was positively identified as one responsible for the crime.

In order to satisfy any of the above ingredients, the relevant provisions applicable are those defined under Section 107 (1) and 108 of the Evidence Act. The general rule is that the burden of proving any particular fact lies on the person who wishes the Court to believe existence or non-existence of a fact to obtain Judgment in his or her favor. Further it should be remembered as affirmed by **Lord Sankey** in **Woolmington v DPP {1935} AC 462** the prosecution bears the burden of proof on every issue in a criminal matter against a defendant beyond reasonable doubt.

The legal burden as allocated by the canons of the Constitution that an accused person is presumed innocent until the contrary is proven thrives on the noble principle that it is better to make an error in the sense of wrongly acquitting a hundred guilty men than err by convicting and sending to an undeserved punishment one innocent soul. **(See Malawian Case of Chavya v R CR Appeal No. 9 of 2007).**

The import of this appeal is for this Court to re-examine, and re-evaluate the evidence against the backdrop of the record and ingredients of the offence. Doing this, I bear in mind that the prosecution is the one with the duty to prove the guilt of the appellant as there exist no corresponding burden laid upon the shoulders of the appellant. For the Court to reverse the impugned Judgment, the relevant ingredients have to be re-considered a fresh.

In the matter at hand, the element of penetration under Section 8 (1) of the Sexual Offence ought to have been determined conclusively. A case in point in this regard is evidence which is in compliance with Section 2 of the Sexual Offences Act on partial or complete insertion of the appellant penis into the genitals of the complainant.

In terms of the prosecution case, the trial Court had the evidence of **(PW1) SM.,** she stated on oath that on 1.11.2018 the appellant defiled her while aged on or about fifteen (15) years. According to the chronology of events **(PW1)** told the Court that she had gone to the fields to pick fruits from Baobab tree in company of **(PW2) (LN.), (PW3) (LA).** It happened that when accompanied with the rest to the picking of fruits they headed home leaving behind **(PW1)** walking respectively at slow pace. In addition, **(PW1)** testified that she came into contact with the appellant who pulled her aside of the path, strangling her to make it difficult for any screams to be made. For this reason, **(PW1)** informed the Court that the appellant undressed her, simultaneously unzipped his trouser, for easier access of his penis to penetrate her vagina. The overall struggle continued until she was able to bite appellants palm to free herself from the sexual assault.

Further, the complainant testified that being in such a distressful condition, she met one **'Wamboi'** whom she explained her ordeal. This was followed with a complaint being made to Mpeketoni Police Station with a view to investigate the appellant.

In similar version, **(PW2)** confirmed being in the company of **(PW1)** prior to the occurrence of the incident. **(PW2)** asserted that on their way home, she left **(PW1)** behind to burst the Baobab pods. As they walked home, **(PW2)** told the Court that she saw the appellant with two jerricans outside their home. It did not take long **(PW1)** later arrived home crying that she had been defiled by the same person. From the testimony of **(PW3),** it was clear that he had been in the field with **(PW1)** and **(PW3)** to pick the Baobab fruits. According to **(PW3)** on exiting the scene they left **(PW1)** behind but it turned out that she had been defiled by the appellant.

The other circumstantial evidence came from **(PW1), (PW4), (PW5)** and **(PW6)** their evidence was on the aftermath of the incident and a report made to them by the complainant **(PW1)** with regard to the commission of the crime. The complainant was later to be referred to Mpeketoni County Hospital. In that hospital the clinical officer **(PW7)** testified that on examination of **(PW1)** she had suffered injuries on her neck; and the hymen was broken. However, **(PW7)** further stated that there were no lacerations or bruises on her private parts, save that the clothes had dust and grass remnants on them. The P3 and treatment notes were both admitted in evidence.

The last witness happened to be a police officer testifying as **(PW8)** who happened to have investigated the incident. According to **(PW8),** the investigations revealed an act of defilement had been committed against the complainant by the appellant. **(PW8),** added that in the course of investigations there was recovery of exhibits which comprised of a green shirt, white skirt, blouse and a birth certificate duly marked, identified and presented as exhibits in support of the charge.

Again the Court had an occasion to hear the defence offered by the appellant. A perusal of it indicates that the appellant denied the offence. It was his defence that when the matter came to his attention he was also shocked and surprised as much. He asserted that the complainant was never at the said scene. He attributed the whole saga to a land dispute between **(PW6)** and their family.

In this first ingredient, the phrase penetration has been defined under Section 2 of the Act. The concept of proof beyond reasonable doubt when applied to the evidence of **(PW1)** certainly shows that as a matter of fact, the appellant made attempts to defile her. In this case, as stated by **(PW1)** an act of self-defence and use of force against the appellant resulted in an opportunity to escape from the scene before the partial or complete entry of his penis into her genitalia. The trial Court in dealing with this ground had to bear in mind the surrounding circumstances as stated by the complainant **(PW1).** As what constitutes the required elements of attempted defilement, for purposes of the said provision, it all depended upon the numerical count of such acts, on the continuous course of such conduct which go by the intensity, gravity and stigmatic impact against the complainant. There is therefore consistence in the evidence of **(PW1)** with that of the clinical officer **(PW7)** who testified on the positive findings instructive of the medical examination.

Every act of attempted defilement must be judged in relation to its attendant circumstances, the physical condition, or susceptibilities of the innocent complainant. The intention of the offending appellant can be deduced from the evidence of **(PW1)** asserting strangulation, undressing her clothes and the bravery of unzipping his trouser to release his penis as an instrument to *"inflict harm."* The assertion of the appellant grounded on a land dispute is a matter not capable of a rebuttal of the evidence by **(PW1)**. The witness alleged to have engineered the arrest of the appellant happened not to be the complainant at that trial before the Court below.

For my part I am quite satisfied that the prosecution discharged the burden of proof that the appellant attempted sexual intercourse with the complainant. There has been no new evidence to entitle the appellant a reversal of that finding by the trial Court. In this appeal, the appellant failed to draw a distinction on the terms of Section 134 and 214 of the Criminal Procedure Code. On amendments and the jurisdiction exercised by the trial Court to convict on a lesser offence dependent on the nature of the evidence and amenable offence proved.

In the instant case, that finding did not occasion prejudice or a failure of justice on the part of the appellant. I therefore find probative weight in the evidence of **(PW1)** and that of **(PW3)** on the issue of attempted penetration.

Secondly, on the ingredient as to the age of the complainant, the same remains unchallenged by the appellant. It is clear that **(PW1)** evidence was corroborated practically based on the birth certificate admitted as **Exhibit 5**.

Finally, there other crucial element set to be proved stood to be that of identification. As correctly pointed out by the complainant, this instant case involved recognition evidence. The circumstances upon which the appellant came to be identified are clearly set out in the testimony of the complainant **(PW1)**. In essence, the general rule is that the evidence of one witness is enough to prove any fact in issue including that of identification. From that stand point alone, the evidence by **(PW1)** competently sums the effect of the threshold required in so far as the principles espoused in **Anjononi v R {1976-80} 1KLR 1566** and **Wamunga v R {1989} KLR 424** are concerned on the issue of identification of the appellant. Based on the foregoing, I find that the evidence of recognition was never controverted by the appellant.

Having determined that the evidence of **(PW1)** was correctly admitted and evaluated, there is no question as to the culpability and participation of the appellant in this attempted defilement of the complainant. I do understand completely the trial Court's reasoning in this regard, and the appellant grounds of appeal remain to be mere conjectures and as assertions that remain echoes to constitute a benefit of doubt to presume him innocent of the offence.

This appeal would remain incomplete without a discussion on the appropriateness of the fifteen (15) years sentence imposed by the trial Court. The fight for the protection of victims of defilement and rape in our country remain to be a mirage. There are societal barriers to this like patriarchal norms, the values and social-cultural biases embedded in our multi-ethnic society rendering the perpetrators to escape liability. Therefore, sentencing convicted offender is a hallmark of ensuring access to justice for victims of sexual offences. In spite of the legislative scheme to provide for mandatory minimum sentences sexual abuse of girls under the age of eighteen (18) years continues is known to constitute a considerable problem in the administration of the criminal justice system. One contentious issue I see that emerges is one arising out of this aspect on sentencing is the important enactment of Article 2 (4) of our Constitution which expressly states that Customary Law is part of the Kenyan Law so long as it's not inconsistent with any of the provisions of the same Constitution. That means Customary Law shall continue to have effect as part of the Law of the Republic. Our compassionate Constitution, the fountain Head of all Laws, is gender sensitive and the makers of it incorporated equality status under Article 27 to every man and woman. The Courts therefore are bound to administer Customary Law in so far as it is not in conflict with written Law and not contrary to justice, morality and good order.

The moot question is whether a sentencing Court can take into account any of the compensation or reparation made by the perpetrator/or his family due under specific customs in addition to any other sentence prescribed by Law. It is important to note that a sentence of full time custody of the youth offenders and adolescents have inevitably imposed significant hardship on their lives and other members of the family. Given the position of the Law at the moment I dare say that in assessing the fair and appropriate sentence nothing like contentious customary Law factors should impair the Judgment of the trial Court. I hold the view that as much as Customary Law is part of our legal system, in sentencing hearings, trial Courts ought to reject the bread-winner or family circumstances of the perpetrator upon conviction for an offence under the Sexual Offences Act. These factors should have less weight in sexual assault cases, in comparison with the other related serious crimes. As a result of this crime children of tender years and those under eighteen (18) years have had their dignity lost and shunned by the public or other members of the family. Some of the victims experience sexual intercourse for the first time through an act of defilement and they suffer loss of virginity. As a consequence, the consideration of customary reconciliation in the context of mitigatory factor for sexual offences against girls to me amounts to a form of discrimination against women and girls. This is mostly compounded when the victim of the sexual assault is young to comprehend the parameters of customary compensation and reconciliation. In this context the judiciary response to gender – based sexual violence against girls below the age of eighteen (18) years is to interpret the Law through the lens of the Constitution and the Sexual Offences Act to effectively pass sentences to protect that vulnerable members of our society by holding the perpetrators accountable.

Giving effect to the provisions of Section 382 of the Criminal Procedure Code and considering the seriousness of the offence, the appellant's culpability in committing the offence there are no compelling or extenuating circumstances for this Court to apply in order to interfere with

the sentence of the trial Court. At the time of evaluating the appellant's appeal, it came to light that the illustrative grounds of appeal were meant to justify a reasonable possibility that will go to assist the appellant for his benefit. However, in this case despite the overload matters of fact are peculiar and only happens when one raises a rebuttable presumption of fact from the circumstances of the case. Unfortunately, for the appellant that evidential burden was never discharged at his trial Court before the session Magistrate.

In my view, the sentence being above the minimum prescribed cannot be made the ground for treating the sentence as punitive and excessive for the offence. The upshot of the foregoing is that the appellant's appeal has no merit. Accordingly, the appeal on both conviction and sentence is dismissed.

DATED, SIGNED ON 15TH DAY OF SEPT 2021 AND DISPATCHED VIA EMAIL ON 15TH DAY OF SEPTEMBER 2021

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R. NYAKUNDI

JUDGE

In the presence of:

1. The appellant

2. Mr. Mwangi for the DPP