REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 97 OF 2019

CYPRIAN MWENDA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence in Maua

SOA No. 10 of 2018 by Hon. A. G. Munene SRM made on 31/5/2019)

J U D G M E N T

1. **Cyprian Mwenda ("the appellant")**, was charged with the offence of attempted defilement contrary to ***Section 9 (1) (2) of the Sexual Offences Act No. 3 of 2006***. It was alleged that on 15/1/2018 at Mukululu Location, Igembe Central Sub – County within Meru County, the appellant intentionally attempted to cause his penis to penetrate the vagina of EK a child aged 16 years.

2. He also faced a second count of committing an indecent Act with a child contrary to ***section 11 (1) of the Sexual Offences Act No. 3 of 2006.*** The particulars thereof were that on 15/1/2018 at Mukululu Location Igembe Central Sub – County within Meru County, the appellant intentionally touched the vagina of EK a child ages 16 years with his penis.

3. The appellant was convicted of the first count and was sentenced to serve ten (10) years imprisonment. Aggrieved by his conviction and sentence, the appellant has now preferred this appeal and set out eight (8) grounds which may be collapsed into two: ***that the trial Court erred in convicting the appellant on evidence that was inconsistent and contradictory*** and ***the prosecution case was not proved beyond reasonable doubt.***

4. This being the first appellate court, it is incumbent upon it revisit and re-evaluate the evidence before the trial court afresh, assess the same and make its own independent findings and conclusions bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See **Okeno vs. R [1972] EALR 32.**

5. The prosecution called four (4) witnesses to support its case. **PW1 E. K** stated that she was 16 years of age. That on the material day at about 2.00 am, she was at home sleeping with her sisters W and N. They were in the same room but separate beds. That the appellant who she knew dug a hole in the ground and entered their house. She identified him because she used to see him on the road and he had a torch with him with which she was able to see him. He came to where she was sleeping got hold of her neck and ordered her to remove her clothes. She did as ordered whereby the accused touched her between her legs.

6. That the appellant then removed his trouser and slept on her as she was lying on her back. She screamed which caused her mother and other neighbours to come. Their mother asked them while at the door why they were screaming. She instructed them to open the door for her but the accused escaped through the window. They went and reported the matter at the police station and she was taken to Mutuati Clinic.

7. **PW2 MK,** the mother to **PW1** recalled that on the material day and time she heard the screams from her daughter, and rushed to their room. **PW1** told her that the appellant was in the room but he escaped through the window. She was able to see him as there was moon light. In the morning, she reported the matter at Kangeta Police Post and took the jacket and cap that the accused had left behind. She then took **PW1** to hospital.

8. **PW3 Gerald Mutuma** a registered clinical officer working at Pembe Medicare produced the P3 form which he had filled and signed on 8/2/2018 together with the treatment notes. On examining **PW1's** clothing, they were torn, soiled and blood stained. Her genitalia was normal on external, her hymen was missing but the cervix was intact. There was whitish discharge on the vaginal opening and no blood stains or lacerations. He examined the accused but there was nothing of importance.

9. **PW4 No. 104759 Lina Cherotich** investigated the case. She stated that on 15/01/2018, **PW1** came to the station accompanied with her mother **PW2.** She reported that the appellant while in the company of one Michael had gone to the house where **PW1** was sleeping with

other children, they broke the door and entered the room. The children screamed which caused the parents, who were in the adjacent room about 20 meters away to respond.

10. She further testified that **PW1** identified the appellant who had left behind his jacket and cap which she produced as **PExh.6. PW1** was taken to the nearest clinic, **Pemba Medicare** where the P3 form was filled by a medical officer working at Maua General Hospital but who was operating the said clinic. The appellant was arrested on 7/2/2018 by members of the public and charged. The other suspect was still at large

11. **DW1 Cyprian Mwenda** gave a sworn statement. He denied committing the offence. That he was framed because one of his cows had entered her farm on the material day and because he had sprayed herbicide thereat and it died. That it is then that **PW2** framed him with the offence.

12. ***Section 9 (1) (2) of the Sexual Offences Act*** provides:-

"(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".

13. In **Michael Lokomar v Republic [2017] eKLR,** the Court held that :-

"The prosecution in an offence of attempted defilement must prove the other ingredients of the offence of defilement except penetration; it must prove the age, of the complainant, positive identification of the accused, and then prove steps taken by the accused to execute the defilement which did not succeed. Attempted defilement is as if were a failed defilement, failed because there was no penetration. Attempt to commence an act is defined as;

388(1) where a person intending to commit an offence begins to put his intentions into execution by means adopted to its fulfillment, and manifests his intention by some avert act but does not fulfill his intention to such an extent as to commit the offence, he is deemed to attempt 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 the offence or whether the complete is prevented by circumstances independent of his will or whether he desists of his own motion from further prosecution of his intention"

14. In this regard, the ingredients that need to be proven by the prosecution beyond reasonable doubt are; the age of the complainant, positive identification of assailant and the steps taken by the accused to execute the defilement which did not succeed.

15. In the present case, **PW1** stated that she was 16 years old. **PW3** testified and produced a P3 Form which showed the complainant's age as 16 years. This evidence was never challenged. In **Nickline Odhiambo Otieno v Republic [2018] eKLR,** the Court held:-

"***Having taken the foregoing in mind, it is our considered view that the minor's apparent age was proved by the P3 form. The court ended up concluding that, "where actual age of a minor is not known, proof of his/her apparent age is sufficient under the Sexual Offences Act-*** *Jackton Mwanzia Musembi –vs- Republic Criminal Appeal No. 42 of 2016.*

In Uganda, the Court of Appeal opened the brackets on means of establishing the age wider, where in the case of *Francis Omuroni –vs- Uganda, Criminal Appeal No. 2 of 2000* ***the court held:-***

"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense".

16. In this regard, I hold the view that the trial Court did not err when it made a finding that the complainant was below eighteen (18) years.

17. The second ingredient is identification of the assailant as the appellant. In **Kariuki Njiru & 7 Others Cr. Appeal No. 116 of 2005,** the Court held:-

"The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinized, and should only be accepted and acted upon if the Court is satisfied that the identification is positive and free from the possibility of error".

18. In **Donald Atemia Sipendi v.Republic [2019] eKLR,** Mativo J held:-

"To determine whether identification is truthful, that is, not deliberately false, the Court must evaluate the believability of the witness who made an identification. In doing so, the court may consider the various factors for evaluating the believability of a witness's testimony. Regarding whether the identification is accurate, that is, not a honest mistake, the court must evaluate the

witness's intelligence, and capacity for observation, reasoning and memory, and be satisfied that the witness is a reliable witness who had the ability to observe and remember the person in question. Further, the accuracy of a witness's testimony identifying a person also depends on the opportunity the witness had to observe and remember that person, and whether the victim knew the accused before".

19. Finally, in **Toroke v. Republic [1987] KLR, 204,** the Court of Appeal held:-

"It is possible for a witness to believe quite genuinely that he had been attacked by someone he knows, yet be mistaken. So the error or mistake is still there whether it be a case of recognition or identification".

20. In the present case, the incident occurred at night. **PW1** stated that the appellant dug a hole under the door to their room and entered. He had a torch which helped her identify the appellant as the assailant. **PW2** stated that when she heard the screams, she went to the children's room where she saw the appellant jump through the window as there was moon light.

21. **PW4** testified that the matter was reported by **PW1** who told her that the appellant together with a person called Michael came to their home, broke the door and entered the room where the victim and other children were sleeping in. When they screamed the parents responded to the scream. She stated that the complainant stated that appellant had gone into their home severally and could not remember the date of the offence. That she did not report the initial incident.

22. The evidence of **PW1** and **PW2** contradicted that of **PW4**. The way the incident is said to have occurred is entirely different. According to **PW1** and **PW2,** it is the accused who dug a hole on the ground which he used to access the room. **PW1** stated that her father was away at the time of the incident and that her mother and neighbours came when they screamed. **PW2** stated that her husband, presumably the father of **PW1**, was present when the incident happened.

23. The evidence of **PW4,** who is the first person in authority who received the report from **PW1 and PW2,** could not corroborate the evidence of **PW1** and **PW2** as to how the incident occurred. Secondly, **PW4** went to scene but could not confirm the assertion by **PW1** that the appellant accessed entry to the house by digging a hole under the door. She stated that there were no immediate neighbors. That the neighbors who got to know of the incident were scared to talk. This contradicted the claims of **PW1** and **PW2** that neighbors came to the scene when **PW1** and the other children screamed.

24. According to the appellant, the case is about **PW2's** intention to fix him as a result of the death of her cow that went to his farm and ate crops which had been sprayed with herbicide and later died.

25. This being a criminal case, the burden of proof is usually on the prosecution to prove its case beyond reasonable doubt that the person arraigned in court is the one who committed the offence. In this case, there are so many material inconsistencies in the prosecution's case which were left unexplained. The inconsistencies tend to raise more doubt than provide answers. That doubt is to be resolved in favour of the appellant.

26. As a result, I hold the view that the prosecution failed to prove its case beyond reasonable doubt and discharge its burden.

27. I find that there was no prove that the perpetrator was the appellant and that he had taken the necessary steps to execute defilement on the complainant but did not succeed.

28. Accordingly, I find the appeal to have merit and I allow the same. The conviction is hereby quashed and the sentence set aside. The appellant is to be set at liberty forthwith unless otherwise lawfully held.

SIGNED at Meru

A. MABEYA

JUDGE

DATED AND DELIVERED AT MERU THIS 13TH DAY OF FEBRUARY, 2020.

F. GIKONYO

JUDGE