REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.163 OF 2018

JUSTINE MWANYOLO DAN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. A.R. Kithinji SPM delivered on 18th July 2018 in Makadara CM Cr. Case No. 5816 of 2014)

JUDGMENT

The Appellant, Justine Mwanyolo Dan, was charged with two counts of the offence of **attempted defilement** contrary to **Section 9(1)** as read with **Section 9(2)** of the **Sexual Offences Act.** The particulars of the offence were that on 14th December 2014 at Sinai Slums in Industrial Area within Nairobi County, the Appellant intentionally attempted to cause his penis to penetrate the vagina of PK and GMS, children aged ten (10) years and nine (9) years respectively. In the alternative charges, the Appellant was charged with the offence of **committing an indecent act with a child,** contrary to **Section 11(1)** of the **Sexual Offences Act.** The particulars of the offence were that on 14th December 2014 at Sinai Slums in Industrial Area within Nairobi County, the Appellant unlawfully and intentionally committed an indecent act with PK and GMS, aged ten 10 and nine 9 years respectively by touching their vaginas.

When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges in both counts. After full trial, the Appellant was convicted as charged in both counts on the main charge of **attempted defilement** contrary to **Section 9(1)** as read with **Section 9(2)** of the **Sexual Offences Act.** He was sentenced to serve fifteen (15) years imprisonment on each count.

In his petition of Appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that the trial court contravened the provisions of **Section 200** of the **Criminal Procedure Code** by failing to start the case *de novo* when a new magistrate took over the case. He asserted that the prosecution failed to avail a key witness to adduce evidence, *i.e.* the lady who was alleged to have rescued the minors from the Appellant's house. He was aggrieved that the prosecution violated his right to a fair trial by failing to furnish him with witness statements as well evidence they intended to rely on during the trial, prior to commencement of the trial.

The Appellant faulted the trial court for failing to consider the amount of time he had spent in custody during trial, as well as his mitigation, when meting out the sentence. He was of the view that the sentence meted by the trial court was harsh and excessive in the circumstances. The Appellant was further aggrieved that the trial court, in convicting him, relied on the evidence of PW4, PW5 and PW6, which was not direct evidence, contrary to Section 63 of the Evidence Act. He maintained that the prosecution failed to discharge its burden of proof to the required standard beyond any reasonable doubt. In the premises, the Appellant urged this court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the Appeal, the Appellant presented to court written submissions in support of his appeal. He urged the court to allow his appeal. Mr. Momanyi for the State opposed the appeal. He submitted that the Appellant attempted to defile PW1 and PW2. He averred that PW1 had been sent to a nearby shop by her father to buy *mandazi*. She went with her friends. On their way back home, they saw the Appellant seated outside his house. He invited them inside his house. He undressed the minors and placed them on the bed. PW1 bit the Appellant's hand and knocked him on the head. The minors screamed. A passerby heard their screams. The minors were rescued from the Appellant's house. The minors informed PW4 and PW5 of the ordeal. Learned State Counsel was of the view that the prosecution established its case against the Appellant to the required standard of proof beyond any reasonable doubt. He asserted that the minors' evidence was corroborative. He therefore urged this Court to dismiss the Appellant's appeal.

The facts of the case according to the prosecution are as follows: PW1, GMS, is one of the complainants. She stated that she was ten (10) years old at the time. On 14th December 2014, her father sent her to a nearby shop to buy *mandazi*. At the shop she met her friends K and J. On their way back home, they saw the Appellant seated outside his house. It was about 6.00 p.m. The Appellant asked them to go inside his house and prepare for him some bathing water. His house was a single room. While inside the house, the Appellant put the three of them on

the bed. He tried to undress them. They screamed. A woman who was passing by heard their screams. The door was unlocked. She came inside the house and rescued them. PW1 went home and reported the incident to her father. Her father beat up the Appellant. The Appellant was later arrested. She stated that the Appellant's house was close to the shop. She had seen the Appellant on several occasions whenever she had been sent to the shop. On cross-examination, PW1 stated that she bit the Appellant's hand as he was trying to undress her. She said that the Appellant only tried to undress her; he did not do anything else to her.

PW2 PK, was the second complainant. She told the court that she was ten (10) years of age at the time. On the material day of 14th December 2014, she was at PW1's house. PW1's father sent them to a nearby shop to buy cigarettes. They were accompanied by another girl by the name J. On their way back home, they saw the Appellant seated outside his house, which was near the shop. The Appellant took them to his house. He put them on a bed and lifted up their dresses. PW1 bit his hand. They screamed. A woman who was passing by came inside the house and rescued them. They went home and reported the incident to PW1's father. The Appellant was later arrested. PW3 JM was with PW1 and PW2 when the Appellant took them to his house. She corroborated PW1 and PW2's evidence.

PW4 SM is PW2's father. He stated that PW2 was eleven (11) years of age when the incident occurred. He was not at home on the material day of 14th December 2014. When he came home the next day, his wife informed him what the Appellant had done. He reported the incident at Industrial Area Police Station. PW5 Samuel Mutune is PW1's father. He testified that on 14th December 2014, he sent PW1 to a nearby shop. She was accompanied by PW2. After sometime, PW2 came to the house running and informed him that the Appellant had forced them into his house. He rushed to the Appellant's house. They took the Appellant to the Chief's Camp where they were referred to Industrial Area Police Station. He stated that he had seen the Appellant on several occasions in the neighbourhood. He however did not know him by name.

PW6 CPL Catherine Wanjohi, investigated the case. She was based at Industrial Area Police Station. She was assigned the case on 15th December 2014. The Appellant was already in custody. She interviewed the witnesses and recorded their statements. The minors had been sent to a nearby shop when the Appellant called them to his house. He put them on a bed and started undressing them. PW2 took a piece of wood and hit the Appellant on the head. The minors screamed. A lady who was passing by opened the door and let them out. After concluding her investigations, she charged the Appellant with the present offences. The Appellant was put on his defence. He chose not to adduce any evidence having exercised his right to remain silent.

As the first appellate court, it is the duty of this court to subject the evidence adduced before the trial court to fresh scrutiny and re-evaluation, before reaching its own independent determination whether or not to uphold the conviction and sentence of the Appellant. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot therefore make comment regarding the demeanour of the witnesses (See **Okeno vs Republic [1972] EA 32).**

In the present appeal, the issue for determination is whether the prosecution established the offence of **attempted defilement** contrary to **Section 9(1)** as read with **Section 9(2)** of the **Sexual Offences Act** to the required standard of proof beyond any reasonable doubt. This court has re-evaluated the facts of this case as well as the rival submission by the parties to the Appeal. **Section 9(1) of the Sexual Offences Act** provides that:

> ***"A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement."***
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> **Section 388** of the **Penal Code** defines ***"attempt"*** as follows:-
>
> ***(1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfillment, and manifests 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 attempt to commit the offence.***
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> ***(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 fulfillment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.***
>
> ***(3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence."***

The ingredients forming the offence of **defilement** required to be established by the prosecution are: the age of the complainant, proof of penetration and positive identification of the Appellant.

In the present appeal, PW1 and PW2 who were the complainants stated that they were ten (10) years of age at the time. PW4, who is PW1's father, testified that PW1 was 11 years old. **The trial magistrate, who had the benefit of seeing the complainants testify,** assessed their ages to be that of children of tender years. This is evident since the trial magistrate deemed it necessary to conduct a *voire dire* examination on the complainants before proceeding to take their evidence. **The Appellant did not challenge the evidence adduced with regards to the complainants' age. This court therefore holds that the prosecution did establish that the complainants were under the age of eighteen years, and therefore children within the meaning of Section 2(1) of the Children Act to the required standard of proof.**

It was PW1, PW2 and PW3's evidence that they had been sent to a nearby shop by PW5. On their way home, they saw the Appellant seated outside his house. He blocked their path and asked them to go inside his house. The Appellant's house was a single room. He placed them on his bed and started lifting up their dresses. PW1 bit him on the hand. The girls screamed. A lady who was passing by, opened the Appellant's door and managed to let the girls out. The complainants informed PW5 who immediately went to the Appellant's house and took him to the Chief's Camp before reporting the incident at Industrial Area Police Station.

Upon re-evaluation of the evidence on record, this court is of the view that the offence of **attempted defilement** was not established by the

prosecution to the required standard of proof beyond any reasonable doubt. The complainants stated that the Appellant tried to undress them. He lifted up their dresses. He started with PW1 who allegedly bit him on his hand when he tried to lift up her dress. The minors screamed. A lady who was passing by entered the Appellant's house and asked him what he was doing. The minors left the Appellant's house with the said lady. The said lady was not availed by the prosecution to adduce evidence. She was a material witness as she would have informed the court the state in which she found the Appellant and the complainants when she entered the Appellant's house. As it is, the Appellant had not undressed the complainants by the time they were rescued. PW1 on cross-examination stated that the Appellant only lifted up her dress. He did not do anything else. She also stated that the Appellant was fully dressed. He was wearing a vest and a pair of shorts.

In the case of **David Aketch Ochieng vs Republic [2015] eKLR** Makau J observed as follows on **attempted defilement**:

> ***"The appellant was charged and convicted with an attempted defilement contrary to Section 9 (1) of Sexual Offences Act No. 3 of 2006. What is attempted defilement? It can safely be stated to be the unsuccessful defilement. For a successful prosecution of an offence of attempted defilement, the prosecution must adduce sufficient evidence to the required standard to prove an attempted penetration."***

In the present appeal, the prosecution did not adduce sufficient evidence to establish the ingredients of attempted penetration. The prosecution's case was to the effect that the Appellant attempted to undress the complainants before they were rescued by a member of the public. This alone does not prove to the required standard of proof that the Appellant attempted to penetrate the complainants. PW1 stated that the Appellant was dressed. The lady who rescued the complainants was not availed before court to give evidence as to the state in which she found the Appellant and the complainants when she entered his house.

PW1 asserted that other than attempting to undress her, the Appellant did not do anything else. He did not attempt to remove their underwears neither did he make any attempt to undress himself so that it can be said that he had put in motion steps to defile the complainants but was thwarted from completing the act when the lady who did not testify intervened. He did not touch the vagina, buttocks or breasts of the complainants. A conviction in a criminal case cannot be founded on mere suspicion. The Court of Appeal in **Sawe vs Republic [2003] eKLR** held thus:

> ***"Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt".***

Having reviewed the evidence on record, this court is of the view that the element of attempted penetration was not established by the prosecution to the required standard of proof beyond any reasonable doubt. The evidence adduced by the prosecution was tenuous to say the least. His conviction by the trial court was based on mere suspicion. There was no evidence of attempted penetration.

In the premises therefore, this court holds that the prosecution failed to prove the charges of **attempted defilement contrary to Section 9(1) as read with Section 9(2) of the Sexual Offences Act** to the required standard of proof beyond any reasonable doubt. The Appellant's appeal therefore has merit. It is hereby allowed. His conviction is hereby quashed. The Appellant is acquitted of the charge. The custodial sentence imposed upon him is set aside. He is ordered set at liberty and released from prison forthwith unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 4TH DAY OF FEBRUARY 2020

L. KIMARU

JUDGE