REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

CRIMINAL APPEAL NO. 141 OF 2019

WALTER MUUO MUTUKU...APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(From the original conviction and sentence by Hon. E.Muiru (SRM) in Kilungu

Principal Magistrate's Sexual Offence Case No. 41 of 2019delivered on 17th September, 2019).

JUDGMENT

1. **Walter Muuo Mutuku** the Appellant was charged with the offence of attempted defilement contrary to section 9(1) as read with section 9(2) of the Sexual Offences Act. The particulars were that the Appellant on the 13th day of May 2019 at about 5:20 am within Makueni county intentionally and unlawfully attempted to commit an act which would cause penetration of his genital organ to the genital organ of AM a child aged 16 years.

He faced an alternative 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 being that the Appellant on the 13th day of May 2019 at about 05:20 am within Makueni county intentionally and unlawfully committed an indecent act with AM a child aged 16 years by touching her genital organ.

2. The Appellant denied the charge and the matter proceeded to full hearing with the prosecution presenting four (4) witnesses. The Appellant gave a sworn statement of defence without calling any witness. The learned trial Magistrate later found him guilty convicted and sentenced him to ten (10) years imprisonment.

3. Being aggrieved he filed this appeal based on the following amended grounds as by his submissions:

a) **That,** the learned trial Magistrate erred in law and fact when she convicted and sentenced him without regard to his basic right for disclosure of the prosecution evidence which was intended to be brought against him as laid down in Article 50(2)(j) of the constitution.

b) **That,** the trial Magistrate erred both in law and fact by convicting him without observing ingredients of attempted defilement were not proved.

c) **That,** the trial Magistrate erred on both facts and law when he acted on contravention of section 150 of the Criminal Procedure Code, in failing to observe that the prosecution did not avail essential witnesses and evidence in terms of important medical documents in court.

d) **That,** the prosecution did not prove its case beyond reasonable doubt as required by law hence there was shifting of burden.

e) **That,** the learned pundit Magistrate erred in both fact and law when she convicted and sentenced him without observing that the procedure to admit *voire dire* evidence was contravened.

4. AM is the complainant and she testified as Pw1. She was born on 4th July 2003. It was her evidence that on 13th May 2009 at about 5:20 am she was walking alone to school with her torch in hand. There was a bush along the path she was using. There were people ahead of her at a distance. She however noticed that there was somebody following her. She turned and saw that the person was not in uniform and so was not a student.

5. Shortly the person started chasing her and she ran. He reached her, held her by the back and dropped her to the ground. She was screaming and he told her to keep quiet as he strangled her. By mistake he placed his finger in her mouth and she bit it, making him loose her abit.

6. She got a chance to shout out to Benedict who was ahead. She was up though still held by the person by the collar. Benedict came with Cornelius and on seeing them the person escaped. She explained to them what had happened and they went to school. She reported the incident to the head teacher HK.

7. The D.O later arrived with the Appellant already arrested. They were both taken to hospital and treated. She identified the white blouse and sweater she wore that day (Exb1 and 2). She said the Appellant was telling her he wanted to defile her as he strangled her. She used to see him on the road as they left school but she never talked to him. She knew him as Muuo Mutuku. In cross examination, she said she flashed at the Appellant using a torch and that's how she was able to see him. She said the Appellant left blue slippers at the scene. The said slippers and her torch were not in the court.

8. **Pw2 BMM** attends the same school with AM though they are in different classes. He said he was headed to school on 13th May 2019 at 5:20 am when he heard screams from behind. He returned behind to check who was screaming. He met two others and on checking they found it was Pw1 who was screaming. He flashed his torch but did not see anybody though he heard footsteps of a person running away. Pw1 told them Muuo wanted to rape her. The matter was reported to the head teacher by a parent who was with them.

9. **Pw3 AM** is the grandmother to AM who lived with her. She testified that on 13th May 2019 10:00 am she was called by the principal who informed her that AM had been attacked. She went to the chief and D.O to make a report when she found the Appellant already arrested. AM told her how the attacker wanted to rape her and she bit his finger.

10. **Pw4 No. 106956 PC Cynthia Chebet** was the investigating officer. She testified that on 15th May 2019 she received the Appellant and AM at the Kilome police station when AM reported that at 5:20 am the Appellant had chased her, caught up with her and held her. He told her he had to sleep with her. She struggled with him and bit his finger. She screamed and was rescued by her colleagues.

11. AM identified the Appellant. She escorted them to hospital where the Appellant's finger was treated while AM was treated on the throat where the Appellant had strangled her. She produced AM's birth certificate O.P card (EXB4) and P3 form (EXB5). In cross examination she said the Appellant had an injury which showed he had been involved in the incident.

12. The Appellant gave a sworn statement of defence. He stated that he worked in a hotel, and on 13th May 2019 he left home for work. On the way he saw a torch ahead of him. He walked fast to see what the torch was all about. He heard someone screaming and noted that it was a school child so he continued with his journey. While at work the chief and DO came and arrested him and they did not tell him the reason for the arrest. He was taken to the police station then charged in court.

13. In cross examination he said he heard screams ahead of him while on the way. It was dark and he could not identify the person screaming. He was wearing a red trouser and a white shirt and closed shoes.

14. The appeal was canvassed by way of written submissions.

15. The Appellant summits that he was not supplied with witness statements which was a violation of his right under Article 50(20(c)(j) of the constitution. He relied on the case of **Thomas Patrick Gilbert Chomondeley –vs- Republic (2008) eKLR** where the Court of appeal stated that:

> "*We think it is now established and accepted that to satisfy the requirement of a fair trial guaranteed under our constitution 2010 (this case was decided before the promulgation of constitution 2010), the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial, all the relevant material such as copies of statement of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items.*

16. He wondered why he was being asked by the court to pay for witness statements. Still on the issue of disclosure of evidence he relied on the cases of **Natasha Singh –vs- CB (2013) 5 SCC 741 and Republic –vs- Ward (1993) 2 ALL E.R 557**.

17. He refers to the **Indian P.C(Act XLV of 1860) by Ratanlal Ranchhoddas & Dhirajlal Keshavlal Thakore (20th Edition (Reprint 1991**) which was relied upon by the learned trial Magistrate in her judgment at page 22 of the Record of Appeal lines 11-16 where she quoted the following:

> "*In every crime there is first intention to commit it, secondly preparation to commit it, thirdly attempt to commit it. If the third, that is, attempt is successful, then the crime is complete. If the attempts fail, the crime is not complete but the law punishes the act. An "attempt" is made punishable because every attempt, although it fails of success, must create alarm which, of itself, is an injury, and the moral guilt of the offender is the same as if he had succeeded.*

Relying on the above quotation and stressing on the words "*moral guilt*" he submits that the evidence adduced did not point to any moral guilt. Further that no evidence was adduced to show that he had any injury.

18. He further submits that the prosecution's failure to present the chief and DO to the court as witnesses was fatal to its case. He relied on the following cases to buttress his argument:

- **Bukenya –vs- Uganda (1972) E.A 548;**
- **Nganga –vs- Republic Court of Appeal Criminal Appeal No. 50 of 1981**
- **Wendo –vs- Republic (1953) 20 EACA 166**
- **Sections 144 and 150 of the Criminal Procedure Code and section 107 of the Evidence Act.**

19. He has submitted so much on the assumptions that the trial court erred by not subjecting AM to a *voir dire* examination. Later he submits that the trial court erred by conducting an improper *voir dire* examination on Pw1. He therefore contends that there was a breach of section 19 of the Oath and Statutory Declaration Act.

20. The appeal is opposed by the Respondent through learned counsel Mrs. Anne Penny Gakumu who submits that the record shows that the Appellant duly participated in the trial and he always indicated his readiness to proceed whenever the matter came up for hearing. On the ingredients of the offence she refers to section 388 of the Penal Code which 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.***
>
> ***(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.***

21. She contends that this section brings out two main ingredients of the said offence i.e. *mens rea* which constitutes the intention and *actus reus* which constitutes the overt act towards the execution of the offence. She submits that the evidence reveals that the Appellant's intention was to defile AM had she not screamed for the intervention of Pw2 and Cornelius. That his own defence placed him at the scene.

22. Counsel refers to the case of **Francis Mutuku Nzangi –vs- Republic (2013) eKLR** where the Court of Appeal stated:

> ***".. If a person conceives an idea or plan to commit an offence and sets out to effectuate the intention by taking definite steps or puts in motion a chain of events or state of things calculated to attain that objective as manifested by some open and discernible act or acts but fails to achieve his objective, he will be guilty only of an attempt to commit the offence. The attempt is proved whether or not that person did all the acts necessary to perfect the offence and quite irrespective of what intervening act or change of heart may have aborted the fulfillment. It also matters not that circumstances did in fact exist, unbeknown (sic) to the person that would have rendered his success impossible.***

23. She urged the court to find that the evidence confirmed attempted defilement and the Appellant was identified by use of torch light and the fact that AM had been seeing him on her way to school.

24. In regard to failure to call witnesses she submits that the prosecution is not obliged to call a superfluity of witnesses. She refers to **section 143 of the Evidence Act** which provides:

> ***"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact".***

25. She argues that the treatment card (EXB3) and the P3 form (EXB5) were produced as no objection was raised. The same had been prepared by a medical practitioner. The court had the discretion to summon the doctor to clarify any matters arising on the documents. She relies on the case of **Hiram Mwangi Gathonjia –vs- Republic Criminal Appeal No. 44 of 2013 Nakuru** which held:

> ***"Even though the P3 form, the PRC form and age assessment (which the Appellant seeks to be excluded from the evidence) were tendered by Pw3, the police investigating officer, and not the maker thereof (that is to say the medical officer who examined the child and filled the form) contrary to the Appellant's contention otherwise the said documents were properly admitted in evidence, under section 33 and 77 (1) and (2) of the Evidence Act."***

She urges the court to note that the Appellant does not dispute the fact that him and AM were escorted to the hospital.

26. It's her submission on ground **4** that AM's evidence was consistent and placed the Appellant at the scene. On the failure to conduct a *voir dire* examination she submits that this was not necessary as AM was not a child of tender years as provided for by section 19(1) of the Oaths & Statutory Declaration Act. She referred the court to the cases of **Samuel Warui Karimi –vs- Republic (2016) eKLR , Mohammed –vs- Republic (2005) eKLR 138 and Harco Guffil Jillo –vs- Republic (2014) Eklr**.

27. She submits finally that the sentence meted out is lawful by virtue of section 9(2) of the Sexual Offences Act No. 3 of 2006. She urges the court to disallow the appeal.

Analysis and determination

28. The duty of the first appellate court is to re-analyse and reconsider the evidence tendered before the trial court with a view of arriving at its own independent conclusion. In **Kiilu & Another –vs- Republic (2005) I KLR 174** the Court of Appeal stated thus:

> *1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.*
>
> *2. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.*

29. I have considered the evidence on record, the grounds of appeal, submissions by both parties and the law. The main issues for determination are as follows:

i. Whether the Appellant's rights under Article 50(2)(c)and (j) of the constitution were violated.

ii. Whether crucial witnesses did not testify.

iii. Whether failure to conduct a voir dire examination on AM was fatal to the prosecution case.

iv. Whether the ingredients of the offence of attempted defilement were proved.

Issue no. (i) Whether the Appellant's rights under Article 50(2)(c)and (j) of the constitution were violated.

30. Article 50(2)(c) and (j) of the constitution provides that:

> **(2) Every accused person has the right to a fair trial, which includes the right –**
>
> ***(c) To have adequate time and facilities to prepare a defence;***
>
> ***(j) To be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;***

We have many authorities on this issue and the bottom line is that an accused person has a right to access the evidence the prosecution wishes to rely on in advance to enable him prepare for his defence. See:

- **Olum & Another –vs- A.G (2002) 2 EA 508;**
- **George Ngodhe Juma & 2 Others –vs- AG (Nairobi High Court)**
- **Miscellaneous Criminal application No. 345 of 2001;**
- **Thomas Patrick Gilbert Cholmondeley –vs- Republic (2008) eKLR**

31. The record shows that the Appellant took plea on 27th May 2019, and an order made for him to be supplied with witness statements at his own cost. The matter was fixed for hearing on 19th June 2019. On the hearing date there were three witnesses present and the prosecution was ready to proceed. The accused responded thus:

> "*I am not ready as I was supplied with my statements late. Hence I have not prepared."*

An adjournment was granted on this ground and the matter listed for hearing on 5th August 2019.

32. On 5th August 2019 three witnesses testified and an adjournment was sought by the prosecution to call more witnesses. The matter was fixed for hearing on 19th August 2019. The accused applied to be supplied with treatment notes, PRC form, P3 form and investigations diary. An order was made to that effect. The matter did not proceed on 19th August at the instance of the prosecution. It was adjourned to 4th September 2019. The Appellant raised no issue about the medical documents.

33. On 4th September 2019 Pw4 testified and produced the treatment notes (EXB4) and the P3 form (EXB5) without the Appellant raising any issues. It would appear he had been supplied with all documents/witness statements otherwise he would have raised the issue with the trial court as he had done before. He always expressed his readiness to proceed whenever the matter came for hearing. It is thus my finding that the Appellant's rights under Article 50(2)(c)(j) of the constitution of Kenya were not violated in any way.

Issue no. (ii) Whether crucial witnesses did not testify.

34. The Appellant mentions that the DO, the head teacher, and the parent present were vital witnesses who were not called by the prosecution. That the court should hold it against the prosecution for the omission. The Respondent while relying on section 143 of the Evidence Act submits that the prosecution is not bound to call a superfluity of witnesses. The prosecution should avail witnesses to prove its case. It's nowhere stated that the more the witnesses the better the prosecution case. There is therefore no need of calling witnesses to come

and repeat the same thing.

35. It’s clear from the record, that the head teacher only received a report from AM and informed the DO. The Appellant was then arrested He does not deny having been arrested and neither does he challenge the arrest. The parent who was with Pw2 did not identify the perpetrator and so there was nothing much he/she would come to tell the court. Yes, under section 144, and 150 CPC the court has the power to summon any witness if it finds that the evidence of such witness would shed light on a matter before the court. The court will not call a witness to come and repeat before it what has already been stated. I find no merit on this ground.

Issue no. (iii) Whether failure to conduct a voir dire examination on AM was fatal to the prosecution case.

36. Section 19(1) of the Oaths and Statutory Declaration Act provides:

> ***Evidence of children of tender years (1) Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section.***

37. The witnesses for whom a *voir dire* examination should be conducted are children of tender years and not all children. Through the examination the court will assess the competency of the child to testify. Secondly it will test whether the witness understands the solemnity of taking an oath. See **Samuel Warui Karimi –vs- Republic (2016) eKLR.**

38. Section 2 of the Children’s Act defines a child of tender years to mean "a child” under the age of 10 years”. The court of Appeal has in contextualizing the definition of tender years within the Oaths and Statutory Act and defined a child of tender years to be a child of 14 years and below. See **Patrick Kathurima –vs- Republic (2015) eKLR; Haro Guffil Jillo –vs- Republic (2014) eKLR**. The birth certificate (EXB3) showed that AM was born on 4th July 2003. She was therefore aged 16 years and seven weeks at the time of the alleged offence. She was therefore not a child of tender years to require a *voir dire* examination.

Issue no. (iv) Whether the ingredients of the offence of attempted defilement were proved.

39. The elements of the offence of attempted defilement are similar to those of defilement save that there is no penetration. Thus in determining this appeal, the court has to establish:

a) Whether the age of the complainant was proved.

b) Whether there was an act to cause penetration, which was not successful.

c) Whether the Appellant was positively identified as the perpetrator.

40. As clearly stated above the age of AM was proved through her own evidence and the birth certificate (EXB3).

41. On whether there was an act of penetration which was not successful I will first consider the definition of attempt to commit an act under section 388 of the Penal Code. The prosecution must prove:

i. The *mens rea* which is the intention an d

ii. The *actus reus* which is the overt act.

The *actus reus* must be more than mere preparation to commit the act as there is a difference between mere preparation to commit an offence and attempting to commit an offence.

42. Makau J in the case of **David Aketch Ochieng –vs- Republic (2015) eKLR** while faced with a similar case stated thus:

> “*The Appellant was charged and convicted with an attempted defilement contrary to section 9(1) of the Sexual Offences Act No. 3 of 2006. **What is attempted defilement?** It can safely be stated to be 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. This may in my view include bruises or lacerations from complainant’s vagina and or bruises or lacerations of culprits genital organ and finding male discharge such as semen or spermatozoa outside the complainant’s vagina or inner wear without there being penetration or even linking the culprit with the offence of attempted defilement.”*

43. In **Daniel Ombasa Omuoyo –vs- Republic (2016) eKLR Okwany J.** held as follows:

> “*In the instant case, can the encounter between the Appellant and the complainant be defined as attempted defilement? I do not think so. I say so because from the evidence adduced by the complainant she stated that the Appellant merely tried to remove her clothes, she screamed and members of the public came to her rescue. The mere action of attempting to remove clothes by the*

Appellant in my view does not qualify to be attempted defilement and neither does the same even qualify to be deemed as indecent assault as the complainant, who was the only eye witness in this case did not state in her testimony that the complainant touched her breasts or buttocks as he attempted to remove her clothes. The complainant was categorical that other than attempting to remove her clothes, the Appellant did not do anything else to her. She did not say how far the attempt to remove the clothes went"

44. In the instant case, AM testified that the Appellant dropped her down and tried to strangle her, telling her that he would defile her. She screamed and Pw2 and two others came and he took off. She bit his finger. In the process of strangling her, he injured her neck (EXB5). Her blouse and sweater (EXB1 and 2) were soiled as she had been placed on the ground. At no point in her evidence does she state that the Appellant touched her private parts, breasts or buttocks.

45. It is clear that the injury on the neck was as a result of the struggle between them. AM did not say that the Appellant at any point tried to unzip his trousers. After all he was in pain over his bitten finger (EXB5). He had been somehow disabled. This evidence shows that the Appellant was preparing to commit the act and did not get the opportunity to attempt to do so and there was therefore no attempted penetration

46. As regards the alternative count of committing an indecent act with a child, I find that AM did not state anywhere that the Appellant touched her genital organ as stated in the particulars. I cannot therefore convict on the alternative count.

47. The result is that the appeal has merit and is allowed. The conviction is quashed and sentence set aside. The Appellant to be released forthwith unless otherwise lawfully held under a separate warrant.

Orders accordingly.

Delivered, signed & dated this 10th day of November 2020, in open court at Makueni.

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H. I. Ong'udi

Judge