REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 80 OF 2015

GABRIEL LEDAMA.....APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(*Being an appeal against the conviction and sentence of the subordinate court dated 10th April 2015 in Criminal Case No. 1058 of 2014 at Kilgoris Law Courts before Hon. A.K. Mokoross(SRM).*

JUDGMENT

1. The appellant herein was charged with the offence of attempted defilement contrary to **Section 9(1)** as read with **Section 9 (2)** of the **Sexual Offences Act No. 3 of 2016.** The particulars were that on 24th July 2014 at [particulars withheld] village in Transmara West District of the Narok County he attempted to penetrate his penis into the vagina of M. L. a girl aged 5 years.

2. He also faced an alternative charge of indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars were that on 24th July 2014, at[particulars withheld] village in Transmara West District of the Narok County he unlawfully and indecently assaulted M.L. a girl aged 5 years by touching her private parts namely vagina.

3. The appellant was found guilty of the alternative charge and sentenced to 10 years' imprisonment. Being dissatisfied with the trial court's decision, the appellant appeals against the conviction and sentence on the following grounds;

a. That the Honourable Magistrate never gave him the opportunity and information to digest the evidence of the prosecution;

b. That the trial court erred in both law and fact by not allowing him to consult any law experts or advocate so as to make the right decision on the plea;

c. That the learned magistrate erred in law and fact by convicting and sentencing the appellant to serve twenty (sic) years imprisonment without considering the age of the appellant;

d. That the trial magistrate erred in law and facts by not considering the appellant's mitigation; and

e. That the conviction and the sentence is irregular and bad in law.

4. Counsel for the prosecution opposed the appeal. He submitted that the appellant was acquitted of the main charge but had been found guilty of the alternative charge which had been sufficiently proved. Counsel submitted that the complainant had vividly described how the appellant removed her clothes and skirt and had done bad manners to her. PW4 had also witnessed the appellant defile the child. He stated that the conviction was proper and the sentence of 10 years 'imprisonment the minimum stipulated for the offence.

5. I will proceed to analyse the evidence in its entirety, weighing any conflicting facts and reach my own conclusion as is required of a first appellate court. In doing so I will bear in mind the fact that the trial court had the advantage of seeing and hearing the witnesses testify.

6. The prosecution called 6 witnesses in support of its case. After voir dire examination the complainant gave her unsworn statement. She testified that she had gone to make a broom with other children when she met the appellant whom she knew as *"Babu"*. He had carried her to the bushes, removed her skirt, taken off his trousers and had done "bad manners" on her private parts. She told the court that she did not feel any pain as the appellant was caught by PW4 before he could injure her. Her father had taken her to hospital after the incident.

7. PW4 recalled that on 24th July 2014, he was coming back home from school when he decided to cut through a field to get home faster. He saw the appellant carrying his cousin, the complainant, towards a thicket he had been clearing. PW4knew the appellant whom he said had

been working at their home for 6 years. He got curious and he decided to follow the appellant towards the bush. He peered through the thicket and saw the appellant remove his belt and trousers. He then watched as the appellant undressed the complainant, placed her across his legs and started to defile her. From his hide out, PW4 asked him why he was defiling a child. When the appellant saw him, he ordered the complainant to go home. She took her clothes in her hand and ran home. Fearing that the appellant would attack him, PW4 used another route to get home. He narrated to his mother what had happened and his mother informed PW2, the complainant's mother. Together, they went to the scene where they found the appellant. They asked him whether he had committed the offence but he kept denying it. He ran away when he heard that the police had been called.

8. PW 2 testified that on the material day, at around 6 p.m. she had seen the appellant slashing vegetation in the land they had given him to farm, adjacent to their house. He had been farming on the land for about 6 years prior to the incident. At that time, her mother in law sent the complainant and other children to get brooms. Later on PW4 had narrated to her what had transpired. She asked the complainant to tell her what had happened to her and she had told her how *"Babu"* had taken her to the bushes, undressed her and had wanted to do bad manners to her. PW2 stated that she had been working and living with the appellant on the same compound for 6 years and they had never differed. He ran away from home that day but was arrested on 25th July, 2014.

9. PW3 testified that he heard screams coming from his brother's home and had soon after received a call from his brother instructing him to go to his home as the appellant had attempted to defile his daughter. When he got to the scene, he looked for the appellant but could not find him.PW3 met the appellant the following day about 17 kilometres from home and arrested him.

10. PW5 a clinical officer from Transmara District Hospital examined the complainant who had been brought in by her father on 21st September 2014.Henoted that the complainant's labia minora and majora were red and had bruises, which in his opinion, were indicative of attempted penetration. However, the complainant's hymen was intact and there was no discharge or blood. The urine test did not show anything unusual and a swab but did not reveal any spermatozoa. He concluded that there had been partial penetration by a penis. An assessment of the complainant's age ascertained that she was 5 years old. PW5 produced the P3 form and age assessment report he had prepared.

11. PW6, the investigating officer attached to Lolgorian police station stated that the incident had been reported on 25th July, 2014. He took the complainant to hospital for examination the same day and she was found to have been defiled. The appellant was later on arrested about 15 kilometres from the scene.

12. When put on his defence the appellant stated that the charges against him had been fabricated because he had worked for 5 years and 6 months without being paid.

13. The trial court found that the prosecution had sufficiently proved the alternative charge but had failed to prove the main charge. The main issue arising for determination in this appeal is whether the trial court erred in convicting and sentencing the appellant for the offence of committing an indecent act with a child.

14. The appellant faced a main charge of attempted defilement and an alternative charge of indecent act with a child. The **Sexual Offences Act** defines the offence of attempted defilement at **Section 9 (1)** and **9(2)** thus;

> *"**9(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."*

15. In interpreting **Section 388** of the **Penal Code**, the Court of Appeal in the case of ***Francis Mutuku Nzangi v Republic Criminal Appal No 358 of 2010 [2013]Eklr*** explained the meaning of an attempt to commit an offence as follows;

> *"Our understanding of this provisions is that 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 fulfilment. It also matters not that circumstances did in fact exist, unbeknown to the person that would have rendered his success impossible."*

16. For an offence of attempted defilement, there is no need for physical evidence of bruises or lacerations on the complainant's body for the offence to be proved. The prosecution need only prove that the person charged came up with a plan to commit the offence of defilement, that he set out to fulfil his plan and did what was necessary for him to commit the offence of defilement but failed in his unlawful quest.

17. In this case the evidence of PW1 and PW4 was that the appellant carried the complainant into a bush undressed her and took off his trousers and proceeded to do "bad manners" on the complainant's private parts. PW1 told the court that the appellant was found before he caused her pain. In my opinion, the appellant's actions of carrying the complainant to a secluded place, taking off his and the complainant's clothes and placing her across his legs were acts sufficiently proximate to commission of the offence of defilement.

18. The complainant's age was not in dispute. PW5 testified that he had assessed the complainant's age and concluded that she was aged 5 years. Both PW1 and PW4 were familiar with the appellant. PW1 referred to him as "Babu" whereas PW4 testified that he had been working at their home for 6 years. There was therefore no doubt that he was the perpetrator of the offence.

19. The trial court was of the view that the charge of attempted defilement had not been proved. The court's doubts stems from the fact that the complainant was examined by PW5 2 months after the act. The doubts in the trial court's mind were enhanced by the fact that no treatment notes had been adduced to show that the complainant had been treated on 24th or 25th of July, 2014.

20. As already stated above, for the offence of attempted defilement, it is not necessary to show that the minor was physically injured to prove commission of the offence. In sexual offences, other forms of evidence may be presented in support of the charge. This was the position taken by the Court of Appeal in **Kassim Ali v Republic [2006] eKLR** where the court held;

> "*The absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim or by a circumstantial evidence."*

21. The direct evidence of PW1 and PW4 was consistent and remained undisputed on cross-examination. When put on his defence, the appellant's defence was to the effect that he had been falsely accused of committing the offence because he had worked for the complainant's parents for more than 5 years without pay. He did not bring this up during his cross examination of PW2 and when weighed against the consistent evidence of the prosecution's witnesses, his defence comes off as an afterthought and the trial court was right to reject the same. In my view, the prosecution presented sufficient evidence to sustain a conviction on the main count.

22. The appellant has also argued that due process was not followed during trial and that this caused him material prejudice. It is the appellant's contention that he was neither given an opportunity to digest the evidence of the prosecution nor was he given an opportunity to consult an advocate before he took his plea. He further argued that the trial magistrate had erred in failing to consider his mitigation. A look at the proceedings before the trial court shows that procedure was followed. The substance and elements of the main count and the alternative charge were read to the appellant in the language he understood to which he pleaded not guilty.

23. As for his constitutional right to legal representation, the appellant did not show that substantial injustice occurred as a result of his lack of representation. The record shows that the appellant was given a copy of the statements and had the opportunity to cross examine all the prosecution witnesses in accordance with **Section 208** of th**e Criminal Procedure Code** which provides as follows;

> ***208. (1)*** *If the accused person does not admit the truth of the charge, the court shall proceed to hear the complainant and his witnesses and other evidence (if any).*
>
> ***(2)*** *The accused person or his advocate may put questions to each witness produced against him.*
>
> ***(3)*** *If the accused person does not employ an advocate, the court shall, at the close of the examination of each witness for the prosecution, ask the accused person whether he wishes to put any questions to that witness and shall record his answer.*

13. The appellant also argued that the trial court had disregarded his mitigation when issuing its sentence. I find the appellant's argument untenable as the trial court gave the appellant the minimum sentence stipulated by the Act for the offence of indecent act with a child.

14. For the reasons given above, the trial court's conviction of the appellant on the alternative charge is set aside in accordance with **Section 354 (3) (a) (ii)** of the **Criminal Procedure Code**. I find **Gabriel Ledama** guilty of attempted defilement contrary to Section 9(1) as read with Section 9 (2) of the Sexual Offences Act No. 3 of 2016. He is convicted of the said offence. The minimum sentence for the offence of attempted defilement is 10 years' imprisonment. Consequently, the appellant's sentence is maintained. He shall continue to serve his sentence from the date of sentencing before the trial court.

Dated and delivered at **Kisii** on this **9th** day of **January 2019.**

R.E.OUGO

JUDGE

In the presence of;

Appellant **In person**

Mr. Orinda **For the State/Respondent**

Rael **Court clerk**