REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CRIMINAL APPEAL NO. 108 OF 2017

[FORMERLY NAKURU HCCRA NO. 22 OF 2016]

JOHN MANYONGE WALUNYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the Principal Magistrate's Court at Eldama Ravine Cr. Case no 689 of 2014 delivered on the 3rd day of February, 2016 by Hon. R. Yator, SRM]

JUDGMENT

1. The appellant was convicted and sentenced to life imprisonment for the offence of attempted defilement contrary to section 9 (1) and 9 (2) of the Sexual Offences Act with the particulars of the offence being that he *"on the 22nd day of July 2014 at [particulars withheld] Estate Mogotio District within Baringo County attempted to commit an act which would cause the penetration of his penis into the vagina of I.O a child aged 7 years"*. An alternative charge of indecent act with a child contrary 11(1) of the Sexual Offences Act was laid on the same facts.

2. The appellant appealed on the ground of insufficiency of evidence to support the charges and urged that the charges were framed up.

3. The DPP did not oppose the appeal, submitting that from the evidence "the appellant did not make any attempt to remove the clothes of the appellant [and that] in order to prove attempt to commit an offence, the prosecution must prove the *mens rea* and the *actus reus* which must be more than the mere preparation to commit the offence. It was further urged that the witnesses other that the complainant did not see the appellant lying on the complainant, and Pw2 only testified that he only saw the complainant following the appellant. It was unsafe, DPP submitted, to convict the appellant on the evidence of Pw1 alone which was uncorroborated and which did not prove the offence of attempted defilement.

4. As a first appellate Court, I have examined the evidence produced before the trial Court (see ***Okeno v. R*** (1972) EA 32) and I would agree with the DPP that the evidence of the only eye witness, the complainant herself, does not disclose an offence of attempted defilements she said (of the appellant):

> *"He came inside the toilet and he told me to go to nearby bush and did not tell me what I was going to do, and I went by myself without Leah.*
>
> *At the bush he came also and slept on me and when I was standing he told me to lie down and he made me lie down and I lied down facing down and there was no one else around.*
>
> *I was wearing home clothes and my clothes were not removed and the person did not remove his clothes. When he slept on me I cried because he injured me on the back. He did not give me the sweet he had and it was only one. He held my shoulders and I did not hear him touch me elsewhere when I cried he left me and someone was passing and when the accused saw him he left me. I do not know the person who was passing and he did not talk with us. My clothes were okey when I stood up. I did not see his clothes when he stood up and I went home and did not find anyone at home and I informed my father."*

5. The trial Court had on *voire dire* examination of the complainant Pw1 found that:

> *"The child should give unsworn evidence as she does not lack enough knowledge and understanding of oath taking".*

With respect, if the child is not possessed of sufficient intelligence she should not have given evidence, in terms of section 19 of the Oaths and Statutory Act which provides as follows:

19. 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 the 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 proceeding 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.

(2) If any child whose evidence is received under subsection (1) wilfully gives false evidence in such circumstances that he would, if the evidence had been given on Oath, have been guilty of perjury, he shall be guilty of an offence and liable to be dealt with as if he had been guilty of an offence punishable in the case of an adult with imprisonment.

The evidence of PW1, being a child of tender years, ought to have been corroborated by other material evidence. See ***Onserio v. R*** (1985) KLR 618.

6. PW2, the neighbour who saw the appellant with the complainant only testified as to seeing the complainant with the appellant who was not a "good" person with children, as follows:

PW2

On 22.7.2014 at 3.30 pm I was from a neighbour fetching water when I saw some man who was wearing a vest and holding a lollipop sweet and a young girl following behind on the road heading towards sisal farm and were coming towards where I was and when they saw me entered a shortcut and I heard him telling the girl to go for the sweet as he showed the girl and I was around 5 steps away from them. They went towards the machine (posho mill) area where there is also a bush and sisal besides and I did not talk with them. I never used to know the girl before I have seen her in court and its PW1. The person who was holding the sweet was working also at sisal farm and I knew him. I then called a woman neighbour to where I was fetching water and I told a woman called Mary that the person had been said not to be good with children and Mary saw the child was child of O. There is a time he entered into house of children of a neighbour while asleep. Mary then called the girl telling her to return home as the person was not good and I then went to fetch water. I did not see the place accused had gone to with the child. When child was told to return home the man went behind the sisals and called the girl again and the child told us that day and that he lied on her chest.

She clearly did not see the appellant lying on the complainant's chest, and could not have corroborated the complainant's evidence that the appellant lay on her back, as PW1 said *"he made me lie down and I [lay] facing down"*, and *"he injured me on the back"*.

7. It would appear that the appellant was only suspected of being up to no good as he was not a *"good"* person according to PW2 and M PW4 who testified as follows:

PW4

On 22.7.2014 around 2.00 pm I was a neighbour winnowing maize and neighbour namely R when M (PW2) arrived with a basin and asked us there was a child boy was calling and did not know whose child she was and I used to know boy and I used to see at the estate and he is in court (points out accused) and I left the compound and I saw accused coming ahead while child was behind him and I did not bother with accused and I called the child by name and she saw me and she told me accused was calling her for a lollipop and I told her to return home and not to follow accused because whenever he is drunk he always gets hold of anyone. It was on the road where he was living with the child. When I told the child to return home she did and I also went to my work and at night the child's father PW3 came around 8.00 pm to my house and told me he had arrested accused after calling him and he ran away and was assisted by members of public to arrest him and was taken to the main gate where there were AP officers and later he asked me to go record by statement at Mogotio police station.

8. PW3, the father of the complainant only arrested the appellant on the information by PW2 that his daughter had been seen with *" someone called Boy who is not good"* as follows:

PW3

On 22.7.2014 at 2.00 pm. I had come from work and I was at the home working at my shamba and at 2.30 pm one M. (PW2) came where I was working asking me if I knew a child by name Y A and I told her she was my child and that there was someone called Boy who is not good and was calling the child to have a lollipop he was eating and I used to know Boy who is J.M (accused pointed out) and that the child started to follow him and that he had come next to gate to my house and the M asked M who the child belonged to and M is next witness and M told her the child was mine. When PW2 informed me I then came to the estate to look for accused whom we lived with at one estate but a distance but I knew him and I found him while eating roasted maize around ½ KM away within the estate and I called him and he came and suddenly started saying there was a woman alleging he wanted to rape my child and I [told] him I will want to hear from the child and I went with accused to my home where the child was and when the child started saying what accused wanted to do that he showed her lollipop as she followed him he met a woman asking her to return home which she did but again accused followed her with a lollipop and accused went behind the toilet and opened it and asked the child to go to bush so he gets her the sweet there……..…

9. The evidence of PW3 that Miriam (PW2) had found the appellant *"while trying to lie on the child so as to defile her"* was not supported by the evidence of PW2 herself, or the complainant herself.

Section 388 of the Penal Code defines attempt as follows:

> ***388.*** *(1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil 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 fulfilment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion form 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.*

10. The appellant's conduct may only amount to an overt act if it is *"sufficiently proximate to the intended offence"* to constitute an attempt. See ***Keteta v. R*** (1972) EA 532.

See also ***Saidi v. R*** (1962) EA 454. There was no overt act on the part of the appellant towards the execution of any intention to defile the child. Inconsistent evidence of the child (PW1) that the appellant lay on her but did not remove his or her clothes does not support a finding of an attempt to defile her.

See **Mutisya v. R** (1959) EA 18 on requirement of act constituting attempt to go beyond were preparation.

11. It would appear that the appellant may have run away when PW3 slapped him during his interrogation and it is no corroboration of any wrong doing, which he denied from the very beginning at his arrest and in the defence before the trial Court.

12. It would appear to me that the accused was charged on mere suspicion on account of his bad reputation as being not a "good" person according to PW2 and PW3. However, suspicion, no matter how strong or grave cannot be the basis of a conviction. See ***Anguko v. R*** (1985) KLR 755.

It was whole unsafe to convict on the evidence before the trial Court.

13. For the reasons set out above, this Court is unable to uphold the finding of the trial Court that:

> *"From the evidence herein and in particular that accused was see together with the child, I am quite convinced that the accused herein did lead the child to the bush while convicting to give her a sweet and with an attempt to defile her"(*sic)

Orders

14. Accordingly, the court finds merit in the appeal and pursuant to section 354 (3) (a) and (b) of the Criminal Procedure Code quashes the conviction of the appellant for the offence of attempted defilement contrary to section 9 (1) as read with 9 (2) of the Sexual Offences Act and sets aside the sentence of imprisonment for life imposed therefor.

15. There shall, therefore, be an Order for the release of the appellant from custody forthwith, unless he is otherwise lawfully held.

Order accordingly.

DATED AND DELIVERED THIS 6TH DAY OF FEBRUARY 2019

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent