REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARSEN

CRIMINAL APPEAL NO. 34 OF 2016

JOHN GATHERU WANYOIKE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in the Principal Magistrate Court at Lamu criminal case 172 of 2015, Hon. J.W Onchuru (PM) dated 28th September 2016)

JUDGMENT

1. The Appellant was charged with attempted defilement contrary to section 9(1) as read with section 9(2) of the Sexual Offences Act No. 3 of 2006.

2. The particulars of the offence were that on the 23rd March 2015 at around 1230hrs in Lamu West District within Lamu County intentionally attempted to cause his penis to penetrate the vagina of LW a child aged 14 years.

3. The Appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on the 23rd March 2015 at around 1230hrs in Lamu West District within Lamu County intentionally touched the vagina of LW a child aged 14 years with his penis.

4. The Appellant pleaded not guilty and at the conclusion of the trial, he was convicted on the main count and sentenced to imprisonment for 10 years.

5. The Appellant being aggrieved by the conviction and sentence lodged his appeal on the following homemade amended grounds which as far as I can decipher are to the effect that:-

(i) His identification was not free from error and that there was need for an identification parade;

(ii) The evidence of the victim being a person with disability was not captured by the court for reason that the court did not engage the service of a sign language interpreter and;

(iii) The court did not comply with section 31(4) (a)(7) of the Sexual Offences Act, 2006 and which rendered the evidence of the victim's mother inadmissible.

6. The Appellant relied on his written submissions dated the 4thJuly, 2017 in support of his appeal. He submitted that the trial court wrongly relied on visual identification without warning itself of the dangers of such evidence and the prevailing circumstances when he (the Appellant) was said to have been identified. According to the Appellant, PW1 and PW5 were at a distance of 20 footsteps when they claimed to have seen the Appellant, which would make it difficult for them to identify him since he was a stranger to them.

7. He further submitted that PW1 and PW5 alleged that he fled from the scene and that would make it difficult for them to positively identify him. It was his contention that the police should have conducted an identification parade as provided for in chapter 46 of the Police Standing Orders. He relied on the cases of **Abdalla Bin Wendo Anonther v Republic (1953) 20 EACA166; Wamunga v Rep (1989) eKLR 42 Maitanyi v Rep (1986)** and; **Denkeri Ram Kishan Pandanya v Republic Cr.App No. 106 of 1959 EACA 93.**

8. The Appellant further submitted that the trial magistrate failed to adhere to the provisions of section 31 (7) of the Sexual Offences Act when the victim LW testified through PW1 as her intermediary. He argued that there was no interpreter to give to the evidence of the complainant.

9. The Prosecution opposed the appeal by way of oral submissions when the appeal came up for hearing on the 24th October 2018. Mr. Kasyoka, learned counsel for the Respondent submitted that the elements of the offence had been proved and the accused had formed an intent to commit the defilement but failed midway. He also submitted that the conditions for identification were perfect and there was no need to call for an identification parade. Counsel prayed that the appeal be dismissed.

10. This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, re-evaluate and analyze it and come to its own conclusions while taking into account that the trial court had the advantage of seeing the witnesses. See **Okeno v R (1972) EA 32; Eric Onyango Odeng' v R [2014] eKLR.**

11. I have considered the grounds of appeal, the record and the respective submissions. I find that the issues for determination in this appeal to be:-

(i) Whether PW1, GWW, testified as an intermediary and the weight attaching to her evidence.

(ii) Whether the Appellant was properly identified, and;

(iii) Whether the prosecution proved its case beyond reasonable doubt.

12. On the first issue in this appeal, whether PW1, GWW, the mother of the complainant testified as an intermediary, **section 2 of the Sexual Offence Act No. 3 of 2006 (SOA)** defines an intermediary as:-

> ***"a person authorized by a court, on account of his or her expertise or experience, to give evidence on behalf of a vulnerable witness and may include a parent, relative, psychologist, counsellor, guardian, children's officer or social worker;***

13. **Section 31 (1) & (2)** of the **S.O.A** provides instances when a witness is considered as vulnerable among them being ***"a person with mental disabilities"*** and a witness who has "***intellectual, psychological or physical impairment."***

14. **Section 31 (4)(b)** of **S.O.A** provides that a vulnerable witness shall give evidence through an intermediary as a protective measure for the witness and **Section 31(5)** gives powers to the court to appoint an intermediary.

15. **Section 31(7)** provides for the role of the intermediary and states that:-

> ***"If a court directs that a vulnerable witness be allowed to give evidence through an intermediary, such intermediary may—***
>
> ***(a) convey the general purport of any question to the relevant witness;***
>
> ***(b) inform the court at any time that the witness is fatigued or stressed; and***
>
> ***(c) request the court for a recess."***

16. The role of an intermediary was discussed in the Court of Appeal in **M.M v Republic Criminal Appeal No. 41 Of 2013 [2014] eKLR** where it stated that:-

> ***"We have seen that in Article 50(7) of the constitution an intermediary is a medium through which the accused person or complainant communicates with the court. In our understanding, the evidence to be presented is not that of the intermediary himself or herself but that of the witness relayed to court through the intermediary. The intermediary's role is to communicate to the witness the questions put to the witness and to communicate to the court the answers from the victim to the person asking the questions, and to explain such questions or answers, so far as necessary for them to be understood by the witness or person asking questions in a manner understandable to the victim, while at the same time according the victim protection from unfamiliar environment and hostile cross-examination; to monitor the witness' emotional and psychological state and concentration, and to alert the trial court of any difficulties.***
>
> ***The key work in sub section 7 is emphasized as shown below to demonstrate the place of the intermediary's evidence….***
>
> ***The word through is used also in subsection 4(b) in describing the protection of the witness by providing an intermediary through whom his evidence is relayed. It is the witness who gives the evidence which is explained communicated to the court and the reverse through an intermediary in the manner and style developed between the two."***

17. In the present case, on the 4th June, 2015, the trial magistrate observed the minor victim, went through the medical notes and relied on the history given by the mother and arrived at the conclusion that the minor was mentally unfit and physically challenged. The learned magistrate using the powers vested in him by section 31(5) appointed the victim's mother GWW as an intermediary for purposes of the proceedings.

18. During hearing on the18th June, 2015, the victim's mother GWW, was called as PW1. She gave evidence of what transpired on the fateful day on how she happened upon the accused and her daughter and how the accused came to be arrested. Despite the presence of the minor in court, there is no evidence to indicate that PW1 was relaying communication from the prosecutor to the witness and giving the answers to the court in her capacity as an intermediary. It is clear that PW1 gave her direct evidence in her capacity as a witness.

19. On whether the prosecution proved its case of attempted defilement, section 9(1) establishes the offence of attempted defilement and states that:-

> ***"(1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement."***

20. It is clear that the elements of the offence of attempted defilement are similar to those of defilement save that there was no penetration. The prosecution must prove that the child was a minor, that there was an act to cause penetration, which was not successful, and that there was positive identification of the accused defiler.

21. On age of the victim, unlike the offence of defilement where the actual age of the victim has to be proved for purposes of sentencing, in the offence of attempted defilement all that the prosecution has to prove is that the victim was a child.

22. In **Charles Nega v Republic Criminal Appeal No. 38 OF 2015 [2016] eKLR** Mrima J stated that:-

> ***"I however wish to further state that from the wording of Section 9 of the Sexual Offences Act (and unlike in the offences of defilement and rape where the exact age of the victim must be proved bearing the weight it has in sentencing), in an attempted defilement charge the prosecution only has to tender evidence that the victim was below the age of eighteen years and not necessarily the specific age. Needless to say if the specific age is availed to a trial court it equally has a bearing in sentencing upon conviction."***

23. PW7, P.C Stephen Kakai produced as evidence the birth certificate of L.W., which established that the victim was 14 years and 4 months at the time of the offence occurred and she was therefore a child within the meaning of **section 2** of the S.O.A.

24. On whether the Appellant attempted to cause penetration, **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 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."***

25. In **Bernard Kariuki Chege v Republic [2016] eKLR** Mativo J relied on **Mussa s/o Saidi v Republic [1962] E.A. 454** where Spry, J. (as he then was) stated that:-

> ***"The principles of law involved are very simple but it is their application that is difficult. If the appellant intended to commit the offence of larceny and began to put his intention into effect and did some overt act which manifests that intention, he is guilty of attempted larceny. The burden on the prosecution is therefore first to prove the intention and secondly to prove an overt act sufficiently proximate to the intended offence. The intention will, in the majority of cases, only be capable of proof by inference and it follows in such cases that an act must be of such a character as to be incompatible with another reasonable explanation. Secondly, if the intention is established, the act itself must not be too remote from the alleged intended offence."***

26. In the present case, it was the testimony of the victim's mother PW1 that she was on her way back home at 12:30pm on the material date. Upon reaching her gate she saw the minor on the ground with her skirt folded upward halfway and a man on top of her with his trousers pulled down to his knees. When the man saw her, he started running, she tried to ask the man what was the problem but he continued running and entered David Mungai's (PW3), farm. She called PW3 and informed him that there was a man who was in his farm and she informed him what the man had done and PW3 managed to arrest him.

27. PW1 stated that she went to the place where PW3 and the accused were and identified him as the man she had seen. He was taken back to PW1's compound where she examined the minor and found a discharge in her private parts. She also stated that the minor did not have her underwear. She called PW2, Julius Maganga, a Kenya Police Reservist (KPR) who came and interrogated the accused. Thereafter the accused was taken to Mpeketooni Police Station while the minor was taken to Mpeketoni sub-county hospital where she was examined.

28. PW5, Mariam Wangui, corroborated the evidence of PW1 and stated that on the said day she had gone to the posho mill together with PW1 in the morning. On their way back at around 12:30pm when they arrived at PW1's gate she saw the accused with his trousers halfway down his legs while the minor was on the ground with her dress folded to the hip area. That the accused ran away when he saw them. PW1 called PW3 and he arrested the accused and took him back to PW1's compound. They called PW2 who took the accused to the police station.

29. Stephen Ewoi, a clinical officer at Mpeketoni sub-district hospital testified as PW6. He produced a P3 together with medical notes which showed that a vaginal examination could not be attained as the child was noted to have a mental disorder and was un-cooperative. It also showed that the minor did not have any lacerations and that no blood, semen or discharge was found. He concluded that the examination was not conclusive as penetration could not be ascertained.

30. The absence of medical evidence to corroborate the testimony of PW1 and PW5 did not weaken the prosecution case in any way. This is

because the act of penetration was not completed. The evidence of the PW1 and PW5 showed that the Appellant was caught in the act.

31. The prosecution proved that the accused was found with his trousers halfway down his legs while the minor on the ground with her dress folded upwards to her hips from which the intention to defile the Complainant may be inferred. It is logical to conclude that the Appellant was in the process of preparing to defile the minor. It is my finding that if PW1 and PW5 had not returned home at the time they did then the Appellant would have succeeded in defiling the minor.

32. In his defence, the accused gave an unsworn statement and stated that PW1 had a grudge with him. That on the said day, he went to the market at around 11:00am and on his way back he met with the minor's father and proceeded together and they parted ways when the complainant reached his home. He proceeded to Wangui's place, who was his friend, to ask for water but on finding that she was not in, he proceeded to PW3's home to ask for water. That PW3 ordered him to sit down and slapped him with a panga and shortly thereafter PW1 and PW5 arrived at PW3 place and they threatened him and beat him up. They called PW2 and informed him that he had defiled the minor. He was taken back to PW1's compound where his belt was cut and checked his private parts and thereafter he was beaten and he lost consciousness. That on regaining consciousness he was taken to the police station where he was charged with attempted defilement.

33. I have considered the Appellant's defence. It did not cast doubt in the prosecution case and as the trial magistrate found, the defence was an afterthought. He never raised the issue of frame up in his defence or during cross-examination of the witnesses, which would have given some credence to his defence.

34. On identification, the Appellant was identified based on visual identification and recognition. It is trite that the court has to warn itself on the dangers of relying on visual identification the Court of Appeal in **Cleophas Otieno Wamunga vs Republic Court of Appeal Criminal Appeal No. 20 of 1989 KLR 424** held that:

> ***"Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification".***

35. At the lower court, PW1 stated that she saw the accused when she arrived at the gate, which was about 20 footsteps from where she was. She saw the man had a bald head and was holding a black hat as he ran away. When PW3 caught the accused, she was able to identify him and he was still holding the hat on his hand.

36. PW5 corroborated PW1 evidence and stated that she was at PW1's gate when saw the accused on top of the minor which was approximately 10 meters from where they were. She further stated that she knew the accused and even knew his home.

37. PW3 testified that PW1 called him and asked to stop the accused who he saw running through his farm. He asked him to stop but he continued running so PW3 ran after him and arrested him and ordered him to sit down.

38. The Court of Appeal in **Suleiman Kamau Nyambura v Republic [2015] Criminal Appeal No. 5 Of 2013 eKLR** cited **R V Turnbull, [1977] QB 224** where the court gave guidelines on identification and stated that:-

> ***"If the quality [of the identification evidence] is good and remains good at the close of the accused's case, the danger of mistaken identification is lessened; but the poorer the quality, the greater the danger. In our judgment when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbor, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it; provided always, however, that an adequate warning has been given about the special need for caution[…..]"***

39. I am guided by the by the above holding and find that the conditions under which the Appellant was identified were good. The accused was identified at 12:30pm in the afternoon and that the distance from the gate to where the accused was, was relatively short. PW5 was familiar with the Appellant and even knew where he lived. There was no evidence that the vision of PW1 and PW5 had been hindered. Additionally, the Appellant was the only person found on the farm of PW3 at the time he was arrested.

40. I find that the Appellant was properly identified as the assailant in the attempted defilement of the Complainant

41. In the upshot, having evaluated all the evidence on record, it is my finding that the prosecution proved the charge against the Appellant beyond reasonable doubt. It was he and no one else who attempted to defile the complainant. I uphold both the conviction and sentence

42. The Appeal has no merit and is dismissed.

Orders accordingly.

Judgment dated delivered and signed at Garsen on this 22nd day of May, 2019.

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R. LAGAT KORIR

JUDGE

In the presence of:

S. Pacho Court Assistant

The Appellant

Mr. Kasyoka For Respondent