REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO.105 OF 2019

(An appeal arising out of the conviction and sentence of Hon. Andayi W. F –C M delivered on 30th April 2019 in Nairobi CMC. CR. Case No.634 of 2015)

ANDREW WANDURUA.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGMENT

The Appellant, Andrew Wandurua 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 of the offence were that on the 7th April 2015 within Nairobi County, the Appellant intentionally attempted to cause his penis to penetrate the vagina of CW, a girl aged nine (9) years. He was alternatively 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 7th April 2015 within Nairobi County, the Appellant intentionally committed an indecent act by touching the female genital organ (vagina) of CW, a child aged nine (9) years. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was found guilty as charged and sentenced to serve ten (10) years imprisonment. The Appellant was aggrieved by his conviction and sentence. He has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted of a crime he had not committed. He took issue with his conviction stating that the trial magistrate had relied on contradictory and unreliable evidence to convict him. He was further aggrieved that the trial magistrate had failed to find that essential witnesses and exhibits were not availed to prove the prosecution's case. In summary, he was aggrieved that he had been convicted on the basis of evidence that did not establish his guilt to the required standard of proof beyond reasonable doubt.

During the hearing of the appeal, this court heard oral rival submission made by Mr. Muriuki for the Appellant and Ms. Nyauncho for the State. Mr. Muriuki submitted that the Appellant had been charged with a sexual offence, but the evidence of the minor was uncorroborated as it was not supported by medical evidence. The minor was examined by Dr. Shako, the police surgeon. Dr. Shako was not called to testify as a prosecution witness. Learned Counsel further submitted that crucial witnesses were not availed to testify i.e. PW2's house help. The complainant's father did not record a statement despite prosecution witnesses stating that he was at home when the incident occurred. Mr. Muriuki was of the view that failure by the trial magistrate's court to call such crucial witnesses would have aided the court to come to a different verdict. He urged the court to allow the appeal.

Ms. Nyauncho for the State opposed the appeal. She submitted that the prosecution had established its case on the charge of attempted defilement to the required standard of proof. Learned State Counsel stated that the complainant testified that it was the Appellant who had touched her private parts. The complainant's testimony was comprehensive. She further submitted that that the evidence of PW1's father and their house help would not be necessary to prove the prosecution's case. Failure to call an independent witness did not vitiate the minor's testimony because she was the only witness when the incident happened. For the above reasons, Ms. Nyauncho urged the court to disallow the appeal as it lacked merit.

The facts of the case according to the prosecution are as follows: The Appellant and the complainant's families were neighbours and stayed in the same compound at [particulars withheld]. On 6th April 2015 the complainant testified that she saw the Appellant burning rubbish. She approached him and asked for Kshs. 10/=. The Appellant promised to give her the money the following morning. The next morning when the Appellant was leaving for work, PW1 went to his house and reminded him that he had promised he would give her Kshs.10/=. PW1 testified that the Appellant carried her to his bedroom. He then kissed her twice on her cheeks and on her lips. PW1 stated that the Appellant removed her trouser and her panty. He started touching her vagina and buttocks. The Appellant then removed his trousers and started hugging PW1. When the Appellant was finished, PW1 testified that the Appellant gave her Kshs 30/= and thanked her. PW1 left the Appellant's house crying. Their house help asked her what had happened at the Appellant's house.

When PW2 the complainant's mother came back from work, the house help informed her what had transpired during the day. She noticed that PW1 had swollen eyes which were as a result of crying the whole day. PW1 told PW2 what had happened. When asked which neighbour

had touched her indecently, she pointed at the Appellant who was standing outside his house. PW2 inquired from the Appellant what he did to PW1. The Appellant told PW2 to calm down. He asked her to enter his house so that they could have a further discussion. PW2 declined. She called her sister and brother in-law. Together they took the Appellant to Kabete Police Station. They recorded their statements and took PW1 to Nairobi Women's Hospital. They were referred to a Nairobi Hospital for examination by the police surgeon.

The case was investigated by Cpl. Sauda Odero. She recorded statements from the complainant, PW2 and the Appellant. Upon concluding her investigations, she established that indeed a case had been made for the Appellant to be charged with the offence for which he was convicted.

When the Appellant was put on his defence, he testified that at the material time, he was staying with his daughter and granddaughter at [particulars withheld]. He was a school manager at [particulars withheld] Secondary School. On 6th April 2015 as he was collecting and burning rubbish in the compound, PW1 approached him and asked for Kshs.10/=. The Appellant told PW1 he did not have Kshs.10/=. On 7th April 2015 at about 7.30 a.m., the Appellant got out of his house to go to work. He had just stepped outside his house when PW1 approached him and insisted in the presence of the house help that he gives her the Kshs.10/=, which he had promised her the previous day. He testified that he only had bus fare. He went back to his house and the complainant followed him inside. He took Kshs.20/= coin from his sitting room and gave it to the complainant. He did this in the presence of the house help. PW1 then left. The Appellant closed the door and left for work.

On that material date, the Appellant arrived from work at 6.30 p.m. He had barely settled in his house, when he heard people outside saying **"he has come in".** Three women from their compound and others from outside came shouting **"here he is"**. Some young men frog-marched him outside his house and thereafter escorted to Kabete Police Station. The Appellant told the court that S, who was PW2's househelp, had befriended him when he started living with his daughter in Uthiru Cooperation.

The Appellant testified that he occasionally would give S money to make her hair. He was aware S wanted to have an intimate relationship with him but he had declined. S was not happy and she had sworn to the Appellant that she would make him suffer. S was later dismissed from work three days after the incident. He testified that there was bad blood between S and himself.

This being a first appeal, the role of this court is well settled. It was held in the case of **Okemo vs R [1977] EALR 32**, and further in the Court of Appeal case of **Mark Oiruri Mose vs R [2013] eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance in that regard. The issue for determination by this court is whether the prosecution established its case on the charge brought against the Appellant to the required standard of proof.

This court has carefully re-evaluated the evidence adduced before the trial court in light of the submission made by the parties to this appeal. It has also considered the petition of appeal put forward by the Appellant. The Appellant was charged with the offence of **attempted defilement** contrary to **Section 9 of the Sexual Offences Act**. The section provides:

> ***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."***

In an offence of attempted defilement, the prosecution must prove the other ingredients of the offence of defilement except penetration; it must prove the age of the complainant, positive identification of the Appellant, and then prove steps taken by the Appellant to execute the defilement which did not succeed. Attempted defilement is a failed defilement, failed because there was no penetration. Attempt to commence an act is defined as:

> ***"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 avert 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 fulfilment of his intention is prevented by circumstances independent of his will or whether he desists of his own motion from further prosecution of his intention."***

The above section brings out the two main ingredients of an attempt offence; the ***mens rea*** which constitutes the intention and the ***actus reus*** which constitutes the overt act towards the execution of the intention. In **Charles Nega v Republic [2016] KLR the High Court** held thus:

> ***''For clarity purposes, the evidence must be led which goes beyond the preparatory stages and right to the doorstep of possible commission of the offence. It ought to be demonstrated that the accused had committed the last act to the actual commission of the specific offence attempted. Likewise, the intention to commit the crime must also be proved.''***

When a court of law is faced with any charge on an attempted offence, care has to be taken to ensure that the attempt, as opposed to mere acts of preparation, is proved since however strong the evidence maybe, if it only relates to the action in preparation to commit a crime, that cannot justify a conviction on an attempted charge.

Upon re-evaluation of the evidence adduced before the trial court, it was clear to this court that the prosecution failed to prove the charge of

attempted defilement to the required standard of proof beyond any reasonable doubt. The complainant in this case was a child aged nine (9) years. From her testimony, she was the one who initiated conversation with the Appellant. In fact, she was the one who harassed the Appellant to give him money, specifically Kshs.10/-. She was the one who went to the Appellant's house on her own accord. The Appellant played no role at all in enticing the complainant to go to his house. The Appellant's conduct at the time was not suspicious nor did he behave in a manner likely to suggest that he intended to defile the complainant. It cannot be ruled out that in the imagination of the complainant, she formed the view that the Appellant, a person she referred to as her grandfather, had evil intention against her. However, this view may have been far from reality.

From her evidence, it was evident that during the entire interaction between the Appellant and the complainant, a house help employed by the complainant's mother (PW2) was present. The evidence of the house help was critical for the prosecution to establish its case. Her failure to testify meant that the testimony of the complainant in regard to the circumstances of what transpired on that particular day was not corroborated. Further, it was clear from the testimony of the prosecution witnesses that there were gaps in their testimony that raised reasonable doubt as to the complainant's testimony. This court identified the following gaps: it was alleged that after the incident, the complainant was taken to hospital and was examined by a doctor. However, the evidence of the doctor was not placed before the court. While it is acknowledged that it is not necessary for the evidence of the doctor to be adduced in a case of attempted defilement, such evidence in the circumstance of this case would have corroborated the assertion by the complainant that the Appellant undressed her and even attempted to have sexual intercourse with her.

Whereas the **Proviso** of **Section 124** of the **Evidence Act** allows a court to admit evidence of a victim of sexual offence without the necessity of corroboration, there is a caveat to admission of such evidence. The court must be satisfied that the victim of the sexual assault is telling the truth. In the present appeal, it was clear to this court that the complainant was not telling the truth or at any rate the whole truth. As stated earlier in this judgment, the complainant testified that she was with the house help the whole time the incident is said to have taken place. The house help was terminated from employment three days after the alleged incident. The Appellant stated in his defence that the whole incident was cooked up by the said house help because he failed to positively respond to her request for intimacy. This court also notes that evidence of children of the age of the complainant should be admitted with caution especially where that evidence is the only one that is being adduced by the prosecution to secure the conviction of an accused.

Further, the evidence of a child ought to be treated with caution because of several factors. The court in the case of **FAPPYTON MUTUKU NGUI –VS- REPUBLIC – CRIMINAL APPEAL NO.296 OF 2010** held thus:

> ***"Indeed courts should be cautious before convicting on the uncorroborated evidence of minors. There are many reasons for this. In J Heydon Evidence: Cases and material 2nd ed Butterworths London 1984, 84, the reasons were put this:***
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> ***First, a child's power of observation and memory are less reliable than on adult's. Secondly, children are prone to live in a make-believe world, so that they magnify incidents which happen to them or invent them completely. Thirdly, they are also very egocentric, so that details seemingly unrelated to their own world are quickly forgotten by them. Fourthly, because of their immaturity they are very suggestible and can easily be influenced by adults and other children."***

In the present appeal, it was evident to this court that the evidence of the complainant, taken by itself was insufficient to secure the conviction of the Appellant. In the absence of corroboration from the evidence of the house help (who was not called to testify as prosecution witness), this court is not convinced that the complainant was telling the truth. The **Proviso** of **Section 124** of the **Evidence Act** cannot therefore apply. Taking into consideration the entire circumstance of this case, this court holds that the prosecution failed to establish its case on the charge of attempted defilement to the required standard of proof beyond any reasonable doubt.

In the premises therefore, the Appellant's appeal is allowed. His conviction is quashed. He is acquitted of the charge. 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 JULY 2019

L. KIMARU

JUDGE