REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. 36 OF 2018

KITSAO KATANA YERI.....APPEALLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from conviction in Case No. 111 of 2016 of the SPM's Court at Kilifi)

CORAM: Justice R. Nyakundi

Ms. Sombo for the State

Aoko for the appellant

Appellant absent

Omari-Court Assistant

JUDGEMENT

Issues: attempted defilement, he Right to a fair trial-Legal Representation-Inconsistencies and contradictions in the prosecution case-defectiveness of the charge.

Background

1. The Appellant was charged, tried and convicted of the offence of Attempted Defilement contrary to **Section 9(1)** as read with **9(2)** of the Sexual Offences Act No. 3 of 2006. He was alternatively charged with an offence of committing an indecent Act with a child contrary to **section 11(1)** of the Act. He was sentenced to 10 years imprisonment and he is appealing against both the conviction and sentence.

2. The grounds of appeal are that the Learned Trial Magistrate erred in law and in fact by convicting him when the charge sheet was defective, the offence of attempted defilement was not proved beyond reasonable doubt, the age of the complainant was not conclusively proved, the medical evidence was not sufficient to prove the case beyond reasonable doubt, the prosecution evidence was full of contradictions, the Appellant was not positively identified by the minor and the court rejected his defence without giving any cogent reasons.

The Evidence

3. Three witnesses were called in support of the prosecution case. The Complainant is a minor aged 10 who testified as Pw1. She was subjected to voire dire examination after which the trial court found her to be intelligent enough to understand the question posed to her. Her testimony was translated from giriama to Swahili by Mr. Thoya, Court assistant. She testified that someone picked her while she was asleep and did bad things to her. His name is Mavisi and she doesn't know him. She stated that he took her to his farm and did bad things to her. He removed her clothes and proceeded to defile her.

4. On the material date, she was wearing a skirt and pants while the person who defiled her was in a suit. She stated that her clothes had urine after the defilement. She told the court that the Appellant inserted his penis in her vagina and that when she screamed, the defiler told her that if continues screaming he would stab her with a knife but she did not stop screaming. The defiler then proceeded to his farm and she went

back home. She found her mother drunk and asleep. She told her brother the story who called other family members and later proceeded to the Appellant's house after which he was taken to the police station. She stated that she knew him before the defilement happened.

5. Upon cross examination, she stated that she was rescued by her elder brother from the hands of the defiler. She reiterated that her mother was asleep when he picked her by way of carrying her away and subsequently defiled her. Further that, the Appellant left with her pants after the defilement.

6. The 2nd Prosecution witness is the mother of the complainant herein. She testified that on the material day, the Appellant came earlier to buy palm wine and later at night and he found her asleep. She claims that as she was sleeping outside with S and A, he carried S away, removed her clothes and defiled her. She told the court that there is a boy that told her that he had seen the Appellant carrying her child. She was woken up by the said boy and he asked her if all her children were present. When she looked around, she noticed that one was not present. That is when the unnamed boy told her that he saw the Appellant with the girl. He had a torch.

7. Further, the defilement happened closer to her home and when the complainant came back home, she accompanied her to the police station and hospital. She denied having a grudge with the Appellant. She also said that she went to the farm the following morning and saw the scene where the Appellant perpetrated the heinous act.

8. The 3rd prosecution witness is Doctor Aziza Manji who presented the medical evidence prepared by Doctor Samuel Tunje after the offence had been reported to the police. It was indicated that there was no existence of penetration in her private parts. There were no injuries on her body and the hymen was intact. No infection was noted; no medicine was prescribed and HIV, syphilis was negative. He produced the PRC form which was marked as P Exhibit 1.

9. He also produced an outpatient card filled by Elijah on 15/3/2016. He found that the child had no blood on private parts, she had a few injuries on the private parts, hymen was intact. A second review taken on private parts showed that she was okay. He produced the medical card and the lab tests, marked as P Exhibit 2 and 3 respectively. The investigating officer did not present evidence in court.

10. The Appellant denied having defiled the complainant. He alleged that the judges leveled against him were trumped up and the same ensued due to a protracted grudge between him and him and the mother of the complainant. He stated that he was beaten for no apparent reason.

Submissions on Appeal

11. The Appellant made oral submissions through learned counsel, Miss Aoko in support of this appeal. Counsel's main argument was that the prosecution case was not proved beyond reasonable doubt and she pointed out several gaps in the prosecution case. As a point of reference, she offered several decisions to support her contention. The state opposed the appeal by way of submissions dated 16th January 2019. A brief of the submissions are that: the charge sheet was not defective as alleged by the Appellant in his grounds of appeal; the examination on the child showed that there was an attempt to defile the victim; that the prosecution evidence was not contradictory; that the accused was properly identified and that the appellant's evidence was considered during the analysis and determination of the Appellant's case by the Learned Magistrate.

12. On the defective charge, the counsel for state cited the case of **David Chwea vs Republic CA No. 110. "A" of 2014** in support of its position. Section 137 CPC was also cited to further buttress the state's position.

Issues for Determination

13. I have looked at the evidence on record; the submissions from both parties, the grounds of appeal and case law referred to by both counsels. The main issues for determination are:

> ***a) Whether the prosecution proved the ingredients of the offence of attempted defilement beyond reasonable.***
>
> ***b) Whether there are material inconsistences and contradictions in the prosecution case.***
>
> ***c) Whether the charge sheet relied upon by the trial court was defective.***

The Law

14. The Appellant was charged with the offence of attempted defilement contrary to **Section 9(1)(2)** of the Sexual Offences Act. The Section stipulates that:

> ***"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 of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years"***

Findings, Analysis and Determination

15. As this is a first appeal, I'm under a duty to examine the evidence on record afresh, exhaustively and to form my own independent decision on the evidence. See the Court of Appeal in ***Okeno v Republic (1972) EA 32,36.***

16. In an offence of attempted defilement, the prosecution is required to prove that the victim is minor, that the perpetrator was positively identified and the steps taken by the perpetrator to execute his intention to defile the minor which did not succeed. Attempted defilement is tantamount to failed defilement. The failure owes to the lack of penetration.

An attempt to commence an act is defined in terms of section 388 of the Penal Code. It is stipulated that:

> **"388 (1)** ***where a person intending to commit an offence begins to put his intentions into execution by means adopted to its fulfilment, 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.***
>
> ***(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 is prevented by circumstances independent of his will or whether he desists of his own motion from further prosecution of his intention."***

17. In view of the foregoing provision, it is incumbent upon the prosecution to prove the ***mens rea*** which is the intention and the ***actus reus*** which constitute the avert act which is geared to the execution of the intention. The ***actus reus*** must be more than mere preparation to commit the act as there is a difference between preparation to commit an offence and endeavoring to commit an offence. **(see Abdi Ali Bere -vs- Republic (2015) eKLR**.

18. In the instant case, the facts of the case support the offence of defilement as not attempted defilement. The evidence of PW1 and PW2 states that the Appellant carried away the minor from where she was asleep with PW2. It is alleged that he removed her clothes, inserted his genital organ into her genital organs. Specifically, the minor told the trial court that the Appellant inserted his penis into her vagina. This fact is not supported by the medical evidence produced before court by PW3. He basically stated that the minor had no injuries on her genital organs and more importantly her hymen was intact. Thus, there was no penetration caused to the minor as alleged by the 1st and 2nd Prosecution witnesses.

19. The foregoing speaks to the defectiveness of the charge sheet. The Appellant ought to have charged with the offence of defilement as defined in terms of **section 8(1)** as read with **section 8(2)** of the sexual offences act. This is because the prosecution witnesses tendered evidence of penetration which was not however supported by the medical evidence adduced on the prosecution.

20. On whether the offence of attempted defilement was proved beyond reasonable doubt. The minority age of the minor is not in dispute herein. On proof of intention, the prosecution did not in any way pinpoint any evidence that the Appellant attempted to execute the intention to cause penetration on the minor. Thus, in my view the evidence on record does not support the offence of attempted defilement since the prosecution did not go an extra mile to give evidence pertaining the intention or mens rea of the offence.

21. On whether the Appellant was properly identified as the assailant who attempted to defile the complainant as alleged by the prosecution, I place reliance in the following cases. In ***Cleophas Otieno Wamunga vs Republic*** ***(1989) KLR 424***, this Court stated as follows: -

> ***"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 the defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant on reliance on the correctness of the identification".***

22. I'm conscious of the need for careful scrutiny of identification evidence, before basing a conviction on it. It relied on dicta from the case of ***Abdullah Bin Wendo vs Rex*** ***20 EACA 166*** that:

> ***"Subject to certain well known exceptions it is trite law that a fact may be proved by a testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt from which a Judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted as free from the possibility of error."***

23. In view of the foregoing principles on identification, the evidence of PW1 points at the Appellant as the perpetrator of the heinous act. She made allegations that he is the one who carried her away from her home to some place where the defilement was occasioned by the Appellant. It is not in doubt that the alleged defilement is claimed to have happened at around 9:30pm when conditions favoring a positive identification were very difficult. The minor told the court that she knew the Appellant before the commission of the offence hence this is a matter of recognition as opposed to identification of a stranger. The same is normally considered as a factor that reduces the chances of mistaken identity.

24. The above point was well dealt with in the case of **ANJONONI & OTHERS VS REPUBLIC, (1976-1980) KLR 1566, it was held that when it comes to identification, the recognition of assailant is satisfactory, more assuring and more reliable that identification of a stranger because it depends upon personal knowledge of the assailant in some form or other.**

The same is entrenched in the case of **R VS TURNBULL & OTHERS (1973) 3 ALL ER 549**, where the Learned Judge stated that:

> ***"Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."***

25. PW2 told the court that she was told by some boy that he had seen the Appellant carrying the complainant. She also stated that the said unknown boy had a torch which he used to see able to identify the Appellant. However, the probative value of this evidence is drastically weakened by the fact that the said boy was not called as a witness before the trial court. Neither did the torch he claimed to have used brought before court as an exhibit and to enable the court to examine its brightness. In the criminal appeal case of ***Titus Wambua vs Republic Criminal Appeal 23 0f 2014***, the court observed that we must examine the conditions that existed at the time and scene of the crime and their favorableness or otherwise positive identification or recognition as alleged by the complainant as well as the state of mind of the complainant which would determine whether he or she had capacity to identify the appellant.

26. There is a deficit in the prosecution's evidence in respect of identification. The minor claimed to have seen the Appellant using moonlight. It was incumbent upon the investigating officer to give evidence pertaining whether the area was well lit and/or whether the moonlight around the crime scene was sufficient enough to positively identify the perpetrator. The investigating officer in this case does not seem to have tendered any evidence in this regard if not at all. The brightness of the said torch was also not looked into.

27. In the premises, I'm not convinced that the evidence on record is enough to ascertain whether the Appellant was positively identified as the perpetrator of the alleged attempted defilement. The Prosecution's contention on this limb fails.

28. As regards the inconsistences and/contradictions in the prosecution case, it is trite law that inconsistencies unless satisfactorily explained would usually but not necessarily result in the evidence of a witness being rejected. **(See Uganda vs Rutaro {1976} HCB; Uganda vs George W. Yiga {1979} HCB 217).** In trying to shade light as to why there might be minor discrepancies between two witnesses testifying on the same case, the High Court of Kenya in **Philip Nzaka Watu v Republic (2016) CR APP 29 OF 2015**, had this to say:

> ***"The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self-contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt.***
>
> ***However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."***

29. Again, the court, in **Joseph Maina Mwangi versus Republic Criminal Appeal No. 73 of 1993,** held, *inter alia,* that: -

> ***"In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies, must be guided by the wording of section 382 of the criminal procedure code viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentences"***

I'm also guided by the Court of Appeal decision in **Erick Onyango Odeng' v. Republic [2014] eKLR** citing with approval the Uganda Court of Appeal case of **Twehangane Alfred v. Uganda Criminal Appeal No. 139 of 2001, [2003] UGCA, 6** in which it was held as follows:

> ***"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution case."***

30. The role of an appellate court in the circumstances as spelt out in numerous cases is to assume the role of the trial court, reconcile these and then determine whether they were prejudicial to the appellant and therefore fatal to the prosecution case or were inconsequential to the appellant's conviction and sentence. See the case of ***Josiah Afuna Angulu versus Republic, Nakuru CR Appeal No.277 of 2006 (UR) and Charles Kiplang'at Ngeno versus Republic Nakuru CR. Appeal No.77 of 2009 (UR).***

31. It is also important at this point to examine the nature and meaning of the word contradiction. I'm persuaded by the definition rendered by the Court of Appeal of Nigeria in the case of ***David Ojeabuo vs Federal Republic of Nigeria {2014} LPELR-22555(CA), Adamu JA; Ngolika JA; Orji-Abadua JA; & Abiru JA.*** Where the court stated as follows: -

> ***"Now, contradiction means lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains."***

32. I have noted several material inconsistences in this matter which now endeavor to outline herein-below. I refer to page 16 and 17 of the

proceedings were the minor undergone voire dire and proceeded to give evidence before the trial court after having being said intelligent enough to do so. It is to be seen that the child starts her testimony by referring to the perpetrator as "someone" who picked her and she proceeded to say that his name is "Mavisi". She went on to say that she does not know him. The evidence is as following:

> ***"I was sleeping when someone picked me and did bad things to me. He is called Mavisi. I do not know him……."***

33. That alone shows a variance between the court's finding that the child was capable of giving truthful evidence and the evidence she gave. The minor under page 18 of the proceedings states that the perpetrator inserted his manhood into her vagina, a fact not confirmed by the medical reports produced by PW3 **(see page 28 of the proceedings and the exhibits provided thereto).**

34. The minor says that her mother was inside the house sleeping when she reached home after the ordeal and before the ordeal, they were only two in the compound, whilst the mother says that they were three of them sleeping outside the house when the minor was picked and carried away by the Appellant. Upon cross-examination, PW2 states that the Appellant woke the child from where she was asleep and told her if she agrees to go with him, he would give her mahamri. PW1 also states that her brother rescued her from the perpetrator but earlier in her testimony she states that when the defiler finished the perpetration he went to his farm and she went back home. The later seems to show that the execution of the defilement was uninterrupted.

35. In my view are inconsistencies which cannot be said to be immaterial. The veracity of the prosecution evidence is questionable and its probative value has fallen drastically owing to myriads of inconsistencies and contradictions. The medical evidence could have been the best evidence to corroborate the prosecution's position that the perpetrator inserted his penis into her vagina. This evidence is non-responsive in this matter according to the record. There was no penetration whatsoever.

36. I have also looked at the trial process in respect of the prosecution of the Appellant. My observation of the appellant's demeanor is that he is an elderly man frail and incapable of knowing his surroundings let alone the trial process with its complexity. In my view, the Appellant was not able to effectively defend himself in the trial court. The court ought to have taken judicial notice of the fact that the Appellant is a vulnerable member of our society who needed to be aided in responding to the to the allegations levelled against him. He ought to have been given representation at the expense of the state.

37. In terms of **Article 50 (2)(g) and (h),** every accused person has the right to a fair trial which includes the right to choose, and be represented by, an advocate, and/or to have an advocate assigned to him by the state and at state expense, if substantial injustice would otherwise result, and to be informed of these rights promptly. I'm inclined to adopt the principles of fair trial laid out in **Juma and Others v Attorney General (2003), Mbogholi and Kuloba, JJ** held as follows:

> ***"it is an elementary principle in our system of the administration of justice, that a fair hearing within a reasonable time, is ordinarily a judicial investigation and listening to evidence and arguments conducted impartially in accordance with the fundamental principles of justice and due process of law and of which a party has had a reasonable notice as to the time, place and issues or charges, for which he has had a reasonable opportunity to prepare, at which he is permitted to have the assistance of a lawyer of his choice as he may afford and during which he has a right to present his witness and evidence in his favor, a right to cross-examine his adversary's witnesses, a right to be appraised of the adverse view of him for the judgement, a right to argue that a decision be made in accordance with the law and evidence."***

38. The right to a fair trial and specifically the right to legal representation is jealously protected in terms of article 50 of the Constitution. When legal representation is accorded to a vulnerable person like the appellant herein, its effect is to put the parties to the suit at equal arms since all prosecutors in Kenya are either lawyers or well knowledgeable in law. Having said so, exposing a vulnerable accused person by representing himself against someone knowledgeable in law would likely cause great prejudice.

39. The Criminal justice system is complex and difficult for individuals to navigate through if they are unfamiliar with this processes and procedures. This is more so where the legal battle in the courts is underpinned in an adversarial system like ours reminiscence of a dual fight. It is an obvious truth on observation of the appellant he was haled into court when too poor to hire a legal counsel. The court was not able to provide access to counsel to accord the appellant ample opportunity to meet the case for the prosecution. There is no doubt in my mind that the importance of every accused standing equal before the law should be made an essential component of criminal justice system.

40. The importance of Counsel's participation was succinctly articulated by Lord Denning in his decision **in Pett v Greyhound Racing Association [1968] 2 ALL ER 545, at 549**. He stipulated that:

> ***"It is not every man who has the ability to defend himself on his own. He cannot bring out the point in his own favour or weakness in the other side. He maybe tongue-tied, nervous, confused or wanting in intelligence. He can not examine or cross-examine witnesses. We see it every day. A magistrate says to a man: 'you can ask any question you like;' whereupon the man starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him; who better than the lawyer who has been trained for the task?"***

41. In the instant case, there is no doubt that the vulnerable nature of the Appellant person made him incapable of defending himself. I have gone through the trial proceedings and noted that it does not demonstrate that the Appellant was apprised of his right to fair trial, specifically the right to representation. The honourable trial court did not confirm whether the Appellant was supplied with witness statements as the prosecution had demonstrated the intention to do so. Further, assuming the statements were supplied to the Appellant, several question would arise which may include the following: in what language were they written? Was the Appellant capable of understanding their contents? If written in English, was the Appellant given an interpreter to interpret the same to him? if the answer is no to all or any of these questions, was he aware of his right to be provided with adequate facilities to prepare his own defence?

42. One would also ask further questions such as follows: Was he able to understand the medical language in the treatment notes and the

PRC form? Does he know the effect of the lack of penetration to the prosecution when the allegations say that he inserted him penis in the minor's vagina? What is the effect of contradictions in the prosecution case? It is clear that the Appellant never question the last two aspects despite their existence in this particular case. The above questions and others I have not alluded to demonstrate the complexity of criminal proceedings are to a layman let alone to someone wanting of intelligence or vulnerable. I also wish to note that Article 50 of the Constitution is one of the most and frequently litigated provision of law especially on appeal. Thus, it is of utmost importance that trial records demonstrate that the rights conferred in terms of this article are accorded to every accused person. The same was missing herein.

43. Without any tinge of a doubt, and with all due respect, the trial proceedings subject to this appeal were fault and prejudicial to the Appellant as I have alluded to the same herein-above. The identification of the appellant as the perpetrator of the offence is questionable, the charge was not properly constructed, the prosecution failed dismally to prove the intention to execute an act which causes penetration and the prosecution evidence was tainted with a myriad of contradictions and inconsistences. In the premises, I find merit in the instant appeal and is hereby allowed.

44. Accordingly, the judgment of the trial court is hereby interfered with by setting it aside on both conviction and sentence. The Appellant is at liberty unless lawfully held.

DATED, DELIVERED AND SIGNED IN OPEN COURT AT MALINDI THIS 4TH JULY 2019.

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R. NYAKUNDI

JUDGE