REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO. 4 OF 2018

ALI HASSAN WARE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

(From the original conviction and sentence in the Senior Resident Magistrate Court at Hola criminal case 264 of 2014, Hon. M. D. Kiprono (SRM) dated 12th August 2015)

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. The particulars of the offence were that on 16th September 2014 at [Particulars Withheld] village Tana River Sub-County within Tana River County intentionally attempted to cause his penis to penetrate the vagina of HA a child aged 13 years.

2. 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, and a second count of malicious damage to property contrary to section 339(1) of the Penal Code. The particulars of the second count was that on 16th September 2014 at [Particulars Withheld] village Tana River Sub-County within Tana River County willfully and unlawfully destroyed a dress valued at Ksh. 500/- the property of HA.

3. The prosecution case before the trial court was presented through the testimony of seven witnesses. HA who was the complainant and victim testified as P.W1. She told the court that on 16th September 2014, she had gone to fetch firewood near their manyatta and had just placed the firewood on her head when someone grabbed her from behind, made her fall and produced a knife. That the assailant then proceeded to choke her until she vomited blood. He sat on her and tore her clothes. She struggled with her assailant and managed to escape but not before her assailant left a whitish substance from his penis on her laps.

4. PW 1 further told the court that as she ran home, she met two men, Said Eyowa (PW2) and Musa Abdullah (PW5), on the way and informed them what had happened. She fainted on reaching home. Later she informed her father what had happened and the police were called. She was examined at Masalani hospital and issued with a P3 (Exh1). The following day she recorded her statement and attended an identification parade in which she identified her assailant.

5. Said Muhmin (PW2) and Musa (PW5) testified that on the 16.9.2014 at around 4:00 pm, while at home, they responded to an alarm that PW1 had been defiled. They ran in the direction they were told and they found a panga, firewood and torn clothes. They pursued the assailant and caught up with him at [Particulars Withheld] village.

6. The victim's father AA testified as PW6. His testimony was that he was informed that PW1 had been raped by a person described as Pokomo and that the Appellant was brought to the police station on the second day while they were there. He testified that PW1 was 13 years old having been born in 2001. Collins Mayabi (PW3), was the clinical officer who examined the victim (PW1) on the 17.9.2014 and produced the P3 (Exh 1) and the age assessment report (Exh. 6).

7. PC Julius Muhia (PW7) the investigating officer told the court that on 16.9.14 the Officer Commanding Station (OCS) informed him of the incident at Kilindini. That together with other officers they went to the village where the victim led them to the scene of the crime where they found the clothes that had been torn. They took the items recovered and went back to the station together with the victim where she recorded her statement. The following day they were informed that the Appellant was seen boarding a vehicle heading to Hola and they informed the OCS Hola, who arrested the Appellant.

8. When placed on his defence the Appellant told the court that he was at home on the night of 16.9.14. The next day he worked on his farm doing repairs on his wall up to around 4:00pm when he went to bath at the river. That as he was heading to the shops he saw three Somali

men looking at him but he did not talk to them. The next day he was heading to his sister's place to collect materials for making mats when he was arrested at Lenda and taken to Msalani. That two somali women and a girl came to the police station where the girl said it did not look like him but she was told to say that it was him. The Appellant said that he was placed in an identification parade where the girl picked him out.

9. At the conclusion of the trial, the Appellant was found guilty and was sentenced to imprisonment for 10 years in count 1 and to imprisonment for 1 year in count 2. Both sentences were stated to run concurrently.

10. The Appellant was aggrieved by the conviction and sentence and lodged his homemade appeal on the grounds reproduced verbatim thus:-

> ***(i) That the learned trial Magistrate failed and did not consider that the Appellant identification was unsatisfactory hence the sentence imposed was not safe; (sic!)***
>
> ***(ii) That the trial Magistrate erred in law and fact in failing to see that my arrest had no link to with the matter in question;(Sic!)***
>
> ***(iii) That the learned trial Magistrate did not consider that the parade conducted was invalid in law.***
>
> ***(iv) That the learned trial Magistrate failed to consider that the prosecution failed to prove their case beyond reasonable doubt.''***

11. At the hearing of the appeal on the 24th June, 2019, the Appellant relied on his written submissions filed on the 4th December 2018. It was his submission that the victim was attacked from behind and therefore there was no chance for positive identification; and therefore the victim could not give a description of the assailant to the police officers to enable them conduct an identification parade. He faulted the manner the identification parade was conducted claiming that the victim saw him in the office before the parade was carried out. He argued that the exhibits produced by the prosecution failed to link him to the offence and that the prosecution had failed to prove its case to the required standard in law. It was his final submission that his defence was reliable enough to afford him the benefit of doubt.

12. The Respondent on its part opposed the appeal in its entirety through oral submissions. Mr. Kasyoka, learned counsel for the Respondent, submitted that the elements of the offence being that the Appellant formed a design to execute certain unlawful acts but failed midway; that the Appellant was identified, and; the age of the victim had been proved beyond reasonable doubt. He relied on the case of **Francis Mutuku v Republic HCRA No. 358 of 2010.** On sentence, he submitted that the sentence was lawful and prayed that the findings of the trial court be upheld.

13. 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 conclusion 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.**

14. I have considered the grounds of appeal, the record and the respective submissions. The key issue for determination is whether the prosecution proved its case beyond reasonable doubt by proving the elements of the offence as well as the positive identification of the Appellant.

15. Section 9(1) of the SOA 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."***

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

17. On the age of the victim, the offence of defilement requires the actual age of the victim to be proved for purposes of sentencing. However, for the offence of attempted defilement all that the prosecution has to prove is that the victim was under the age of 18 years and therefore a child.

18. In **Charles Nega v Republic Criminal Appeal No. 38 OF 2015 [2016] eKLR** Mrima J, elaborated thus:-

> ***"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."***

19. In the present case, there was no dispute that the victim was a minor. Collins Mayabi (PW3), the clinical officer at Ijara District Hospital, produced an age assessment report (Exh 6) which indicated that the victim (PW1) was below the age of 18 years. He told the court that age assessment was carried out by looking at the dental formula, which showed that the first molar was empty at the age of 17 and 18 years. His evidence was corroborated by A.A. (PW6), the victim's father, who told the court that PW1 was born in the year 2001 and that she was 13 years old at the time the offence occurred.

20. It was apparent to the trial court, from the evidence above that the apparent age of the victim was below 18 years and therefore a child within the meaning of **section 2** of the S.O.A. I have no reason to think otherwise.

21. **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 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."**

22. Decisions abound on the application of the law in charges of 'attempted' offences. 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) illuminated the principles thus:-

> ***"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."***

23. According to PW1, whose evidence I have closely considered she was fetching firewood when she was attacked and fell on the ground. The assailant pinned her down, choked her, tore off her clothes and reached for her private parts. A struggle ensued during which the assailant left a whitish substance from his penis on her thighs. PW1 managed to escape and run home. PW1's evidence was corroborated by PW2 and PW5 who testified that they found the victim's torn dress, panga and firewood at the scene of the crime.

24. It is clear from the evidence that the attack on PW1 was aimed at defiling her. If she had not fought herself free, there is no doubt in my mind that the assailant would have succeeded in defiling her. I find that attempted penetration was proved.

25. It must however be proved beyond reasonable doubt that it was the Appellant who attempted to defile HA or PW1. It is trite that evidence of identification must be closely examined so as not to cause injustice. See R.V Turnbull [1976] ALL ER 540; Wamunga V. R (1989).

26. In this case the Appellant has raised in his first and second grounds of appeal that his identification was not satisfactory and that there was no link between his arrest and the offence. His 3rd ground of appeal, faults the identification parade. It was the Appellant's submission that the conditions for identification were difficult as the victim was attacked from behind and therefore she could not have given a description of her assailant to the police.

27. I will start with the issue of the identification parade. The law on identification parades is provided for under the **Police Service Act** and the **Police Force Standing Orders**. It is generally accepted that where the law is flouted, the value of evidence of identification depreciates considerably. In this regard, the Court of Appeal in **David Mwita Wanja & 2 others vs. Republic [2007] eKLR** rendered itself thus:-

> ***"The purpose for, and the manner in which, identification parades ought to be conducted have been the subject matter of many decisions of this court over the years and it is worrying that officers who are charged with the task of criminal investigations do not appear to get it right. As long ago as 1936, the predecessor of this Court emphasized that the value of identification as evidence would depreciate considerably unless an identification parade was held with scrupulous fairness and in accordance with the instructions contained in Police Force Standing Orders. See R v Mwango s/o Manaa (1936) 3 EACA There are a myriad other decisions on various aspects of identification parades since then and we need only cite for emphasis Njihia vs. R [1986] KLR 422 where the court stated at page 424: -***
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> ***"It is not difficult to arrange well-conducted parades. The orders are clear. If properly conducted, especially with an independent person present looking after the interests of a suspect, the resulting evidence is of great value. But if the parade is badly conducted and the complainant identifies a suspect the complainant will hardly be able to give reliable evidence of identification in court…***

28. The victim PW1 stated that she picked out the assailant in an identification parade. She also stated that the parade was conducted twice. Chief Inspector Francis Oyiengo, OCS Msalani police station (PW4) was the officer who conducted the identification parade. He told the court that the victim was placed in his office while he arranged the identification parade. That he took a group of 8 people 'of the Appellant's nature' and that he explained to the Appellant the reason for the parade and the Appellant chose to stand between No. 7 and 8. He thereafter called for the victim and asked her to identify her assailant from the group. That the victim identified the Appellant by touching him on the shoulder. PW 4 further stated that when he asked the accused if he had anything to say, the accused said that the complainant knew him. PW4 produced the ID parade forms (Exhibit 5) signed by himself and the accused.

29. On the other hand, the Appellant told the court in his defence that when he was arrested and taken to the police station, he found two Somali women and a girl. That the girl stated that he did not look like the one but she was told to name him. Later during the identification

parade the girl picked him out. This was in sharp contradiction to the evidence of PW5 who told the trial court that the Appellant was in the cells while the victim was in the office and that it was only after he had constituted the parade and informed the Appellant the reason of the parade that the victim was brought.

30. My analysis of the evidence relating to the identification parade does not demonstrate any fatal shortcomings in the conduct of the parade and the same seems to have been conducted in accordance with the law. The requisite number of persons was lined up and the witness identified the suspect. The forms are clearly signed by the parade officer and the suspect. I would hesitate to believe the Appellant's assertion that he was in a place and position where he could hear the complainant being directed to identify him. He must have been in a police cell since he was already under arrest. Besides, he did not register any protest on the parade forms which he duly signed.

31. I also observe that the Appellant acknowledged that the victim picked him out because he was with her the previous day. This begs the question whether the parade was necessary at all. It indeed waters down the weight to be put on the evidence regarding the identification parade. See **Nathan Kamau Mugwe vs. Republic, Court of Appeal Criminal Appeal No. 63 of 2008 (UR).**

32. The identification parade was however not the only evidence that linked the Appellant to the offence. The victim testified that he wrestled her to the ground, sat on her and proceeded to tear her dress and splashed a whitish substance from his penis onto her thighs. This evidence, which I find credible, shows that the attack took some moments which enabled the victim to register the face of the Appellant. I can safely conclude, as the trial court did, that the victim was not mistaken in her identification of her attacker. Indeed the victim was unshaken in cross examination when she categorically stated that *"I saw you very well. I cannot be mistaken. It was not far from where you were later found. You ran away without a shirt. Pokomo and Somali live at the place. No distinct boundaries. I saw you. I marked your face. I don't know your name. The incident was around 2.00pm."*

33. The circumstances of the Appellant's arrest corroborates the identification evidence given by PW1 and rules out any possibility of error. Said Muhmin (PW2) testified that they were at his home with one Musa when they heard screams. On inquiring, they were told that H had been defiled. They ran in the direction pointed out to them where they found a panga, firewood and torn clothes. They saw the assailant at a distance running away and gave chase. They managed to catch him at Kilindini village but the villagers surrounded them. Hussein Baricha, described as 'a man of peace in the village', came and told them to leave the assailant and to report the matter to the chief. That PW2 took hold of the assailant's shirt (Exhibit No. 4) while PW5 took his cap (Exhibit No. 3). PW2 further told the court that when the chief came, Hussein Baricha informed them that he let go of the assailant because the villagers wanted to lynch PW2 and PW5. They then went to PW1's house where chief called the police. That he (PW2) recorded his statement on 17th September, 2014 the next day.

34. MA (PW5) stated that on 16.9.14 he was at home while his sister, the victim (PW1), had gone to collect firewood. He heard noise from the direction where his sister was collecting firewood and rushed to there. He found the Appellant holding PW1, who was naked, on the ground. That when the Appellant saw him he ran away but PW5 and his uncle, PW2, gave chase and managed to apprehend him at Kilindini village. That many people came to place and the Appellant pulled out a knife. That some Pokomo elders came and told them to let the Appellant go, as they knew him and he would not run away. That he took the Appellant's shirt and cap and they called the chief who later called the police.

35. The testimonies of PW2 and PW5 are similar in many material respects. The two witnesses were together and heard some screams. They were informed by the complainant's mother that she (PW1) had been defiled. However while PW2 stated that they saw the assailant from a distance running away, PW 5 who is the complainant's brother said that he saw the Appellant pushing her to the ground and that the accused ran away when he saw him and they gave chase.

36. It is unlikely that PW5 saw the Appellant on top of his sister. That element of his testimony is exaggerated. This is because PW1 said that after she managed to break lose, she ran home where she told the mother, and it was then that the two witnesses gave chase to the Appellant whom they saw running away. However, I do not consider the discrepancy in the evidence of the two witnesses material.

37. From the evidence of PW2 and PW5, they arrested the Appellant at Kilindini Village where they confiscated his cap(Exhibit 3) and his shirt(Exhibit 4) However, they let the Appellant go on the plea of one Hussein Baricha who informed them that he knew the Appellant and assured them that he would not run away. PW 5 explained that when they got hold of the Assailant, the villagers surrounded them and it was then that Hussein Baricha, a peace elder intervened fearing that the PW2 and PW5 could be lynched. The appellant was later rearrested by the police.

38. I observe that the prosecution did not call Hussein Baricha as a witness. However the court is alive to the provisions of section 143 of the Evidence Act which states that:-

> ***'No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact"***

39. In the case of **Keter V Republic [2007] 1 EA 135** the court held inter alia that:

> ***"The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt."***

40. In this case, it was not in doubt that the man who wrestled the complainant to the ground and attempted to defile her was the same person who was chased to Kilindini village. He was the same person who was later re-arrested by the police after being called in by the chief. I am satisfied that failure by the prosecution to call additional witnesses did not weaken the prosecution case in any way. The identification of the Appellant was proved. His conviction was safe and I uphold it.

41. The Appellant was sentenced to 10 years imprisonment on Count 1. The sentence under section 9(2) of the SOA is a term not less than 10 years imprisonment and is therefore mandatory. However, on the authority of the Supreme court decision in **Francis Karioko Muruatetu & another – v- Republic SC Petition No. 16 of 2015,** and subsequent decisions from the court of appeal, it is apparent that he mandatory nature of the minimum sentences in the SOA was no longer tenable and that in an appropriate case, the court can take into account the unique circumstances of the case and the mitigating factors in meting out sentence. **See Rophas Furaha Ngombo V Republic 2019 eKLR**.

42. In this case I have taken into account the circumstances of the case. I have also considered that the Appellant has already served a substantial part of his sentence. I consider the period served sufficient. The Appellant is set at liberty forthwith unless otherwise lawfully held.

43. Orders accordingly.

Judgment dated delivered and signed at Garsen on this day 5th of November, 2019.

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R. LAGAT KORIR

JUDGE

In the presence of:

S. Pacho Court Assistant

Appellant in person

Mr. Mwangi for Respondent