REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO.96 OF 2017

DKM.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from Judgment before Hon. E.M. Muiru (R.M) in Makindu Principal Magistrate's Court Criminal Case No. 637 of 2014 delivered on 29th day of April, 2016).

JUDGMENT

1. **DKM** the Appellant herein was charged with the offence of attempted defilement contrary to section 9(1) as read with section 9(2) of the Sexual Offences Act No. 3 of 2006. The facts being that the Appellant on the 15th day of April 2014, at Kathyaka sub-location, Kibwezi district within Makueni county, intentionally attempted to cause his penis to penetrate the vagina of **LWM** a child aged 10 years.

2. He denied the charge and the case proceeded to full hearing with the prosecution calling two (2) witnesses. The Appellant gave unsworn defence and did not call any witness. He was thereafter found guilty, convicted and sentenced to serve ten (10) years imprisonment.

3. Being aggrieved by the judgment, he filed this appeal. A glimpse through the grounds of appeal gives the impression that his main complaint is on the sentence. He claims that the period spent in prison custody ought to have been considered when he was being sentenced. He relies on Section 333(2) Criminal Procedure Code.

4. It's his submission that having remained in the prison remand cells during the trial, his stay in prison from 16th April, 2014 to 29th April, 2016 when he was convicted and sentenced should have been considered. He also submits that his stay in prison has done him a lot of good and he is now a changed person. He further submits that he is remorseful for what he did and promises not to repeat such an offence. He produced copies of certificates of his achievements in prison.

5. The State through learned counsel Mr. Kihara opposed the appeal against conviction. He has submitted that there was no indication that the Appellant's period of incarceration for 2 years and 13 days had been considered during the sentencing. He therefore had no objection to this period being considered as part of the sentence.

6. As a first appeal court, I have considered the evidence on record afresh. I have also considered the grounds of appeal and the submissions by both parties. See **Okeno –vs- R (1972) E.A 32; Kiilu & Anor –vs- R (2005) IKLR 174, David Njuguna Wairimu –vs- R (2010) Eklr.**

7. Though the Appellant is only raising issues with the sentence, I have a duty to satisfy myself that the conviction is safe. Only two witnesses testified before the trial court i.e. the complainant (LW) who testified as Pw1 and Pw2 who was asked by Pw1's mother to go and check on the minor.

8. Pw1's mother, W, doctor/clinical officer and the investigating officer did not testify for reasons best known to the prosecution. The trial court relied on the sole evidence of

Pw1 to convict the Appellant. The learned trial magistrate in his judgment at **page 29** lines **16-39** of the record of appeal found as follows:

> *"The court observed that the minor gave sworn evidence upon the court conducting a voire dire examination. She gave a detailed account of what the accused person did to her whom she referred to by name and indicated that he was her uncle. Though the minor was hesitant in giving her testimony and the court had to exercise patience with her, she did not contradict herself. The minor weathered cross examination very well from the accused person and informed the court that she had not been told what to tell the court. It was the complainant's testimony that the accused person put his thing on her private parts however there was no medical evidence adduced. Nevertheless, the charges before the court are of attempted defilement contrary to Section 9(1) of the Sexual Offences Act that provides that, "A person who attempts to commit an act which would cause penetration with a child is guilty of an*

offence termed attempted defilement." In light of the said provision, the court opines that though no medical evidence was adduced and noting that the investigating officer did not testify to shed more light in to the circumstances of the case, the charges could have been preferred in that manner as there was no sufficient evidence to sustain a charge of defilement. Therefore, though the minor testified that the accused person placed his thing on her private parts, the court forms the considered opinion that the investigations carried out established that penetration did not occur.

The minor having been the sole witness linking the accused person to the offence, the court duly warns itself of the dangers of convicting on the uncorroborated evidence of a minor and takes cognizance of the provisions of Section 124 of the Evidence Act. In this case herein the court found the minor to have been candid and consistent in her evidence and believed her testimony".

9. Though the age of Pw1 was not established, it is not disputed that she was a minor. The trial court took her through a voire dire examination and directed that she gives sworn evidence in respect to what transpired on the material date. This is what she stated at **page 10** lines **10-14;**

"*I recall 14/04/2014 at 4:00 pm. I was at home with Kyalo and he took me to my brother's house and placed me on the bed and he removed my clothes and put a sweater on my mouth and he put his thing there. (places her hand on her private parts.*

I later told Winfred what had happened and she called my mother. I was taken to hospital at Kibwezi. We also went to Kathyaka and reported the incident."

10. It is this statement that formed the basis of the Appellant's conviction. The first person to be told of this incident by Pw1 was W who in turn called Pw1's mum who asked Pw2 to go and see the child. Winfred who was a crucial witness did not testify. It's not even clear who W is but the Appellant in his defence referred to her as Pw1's sister.

11. The Appellant had in his unsworn defence testified that he had on this day found W with a man in the house. When he sounded his bicycle bell near their house the young man took off. When she answered him rudely he caned her thoroughly. He blames her for his incarceration.

12. Can what the Appellant is said to have done amount to attempted defilement? Section 9 of the Sexual Offences Act 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.

13. Section 388 of the Penal Code defines **"attempt"** as

(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 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 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.

In the cases of:

i. Daniel Simiyu Wanyonyi –vs- R (2019) eKLR

ii. Benson Musumbi –vs- R (2019) eKLR both courts were of the view that in order to prove an attempt to commit an offence, the prosecution must prove the *mens rea* which is the intention and the *actus reus* which constitutes the overt act which is geared towards the execution of the intention. That the *actus reus* must be more than mere preparation to commit the act as there is a difference between mere preparation to commit an offence and attempting to commit an offence.

14. Justice Makau in **David Aketch Ochieng –vs R (2015) eKLR** in making it more elaborate observed as follows:

"*The Appellant was charged and convicted with an attempted defilement contrary to Section 9(1) of Sexual Offences Act No. 3 of 2006. What is attempted defilement? It can safely be stated to be the unsuccessful defilement. For a successful prosecution of an offence of attempted defilement, the prosecution must adduce sufficient evidence to the required standard to prove an attempted penetration. This may in my view include bruises or lacerations of culprit's genital organ and finding male discharge such as semen or spermatozoa outside the complainant's vagina or innerwear without there being penetration. There was absence of penetration or evidence linking the culprit with the offence of attempted defilement."*

15. In the instant case, Pw1 simply says she was with the Appellant who took her to her brother's house and placed her on the bed. Where were they in the first instance and where was her brother's house? Where was her brother at the time and were there any people in the said house? How was access gained?

16. From her evidence, Pw1's panty was not removed unless clothes are inclusive of panty. The Appellant appears to have removed her clothes and just placed his thing on her private parts. Did he ever attempt to insert his penis into her vagina? The evidence is silent on this. Even Pw2 who went to check on the child never examined her. All she did was get a village elder and the Appellant was arrested from his house while drunk that evening.

17. In sexual offences, the court can rely on a victim's evidence alone to convict by virtue of Section 124 of the Evidence Act. The evidence of the victim must however be watertight. It is clear from the exposition above that the evidence of Pw1 was not strong enough to be a stand-alone evidence to found a conviction especially when weighed against the defence by the Appellant. For that reason, there ought to have been some other evidence to support it.

18. I also wish to point out that the evidence is clear that the Appellant is a brother to Pw1's father. He is therefore an uncle to Pw1 who is his niece. He should therefore have been charged with incest under Section 20(1) of the Sexual Offences Act which provides

> 20(1) *"Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:*
>
> *Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person."*

19. Incest covers both the offences of committing an indecent act and an act causing penetration. I am pointing this out because of the frequency of courts within this jurisdiction not keenly taking note of relationships between victims and culprits in sexual offences and just going by the charge sheet presented to them. Be it as it may neither an offence under Section 8(1) or Section 20(1) of the Sexual Offences Act was proved.

20. **The upshot is that the appeal has merit and it is allowed. The conviction is quashed and sentence set aside. The Appellant shall be set free unless lawfully held under a separate warrant.**

Orders accordingly.

Delivered, Signed & Dated this 20th Day of November 2019, in Open Court at Makueni.

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H. I. Ong'udi

Judge