REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 22 OF 2018

FERNANDES KILONZI KIEMA.....……..…….APPELLANT

VERSUS

REPUBLIC……..…..…..RESPONDENT

*(Being an Appeal from Original Conviction and Sentence in **Mutomo Principal Magistrate's Court Criminal Case (S.O.) No. 25 of 2015** by **Hon. S. K. Ngii (RM)** on **23/02/16)***

J U D G M E N T

1. **Fernandes Kilonzi Kiema,** the Appellant, 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.** Particulars of the offence were that on the **2nd** day of **March, 2015** at about **6.00 p.m.** in **Ikutha District** within **Kitui County** intentionally attempted to penetrate the vagina of **GD** a girl aged **15 years** with his penis.

2. In the alternative he was charged with the offence of **Committing an Indecent Act with a Child** contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006.** Particulars of the offence were that on the **2nd** day of **March, 2015** at about **6.00 p.m.** in **Ikutha District** within **Kitui County** intentionally and unlawfully touched the buttocks and breasts of **GD** with his hands.

3. Evidence as presented by the Prosecution was that on the **2nd** day of **March, 2015,** the Complainant herein was coming from the posho mill when she encountered the Appellant, their neighbour who made sexual advances towards her. When she declined he grabbed her and dragged her into the forest. He offered to give her money in exchange for a sexual encounter but she declined. When he persisted she tricked him by pretending that she had been pierced by a thorn. He released her and she seized that opportunity to run. The Appellant grabbed her dress which got torn. She went home and informed her grandmother. They reported the incident to **Mutomo Police Station.** The Appellant was arrested and charged.

4. Upon being put on his defence, the appellant stated that he was framed following family differences. He stated that he went to work to **[particulars withheld] Secondary School** on the **29th** day of **February, 2015.** On the **3rd** day of **March, 2015** he was called by his sons, went to pay school fees at **[particulars withheld] Primary School** and he travelled back home. He faulted the Complainant for not being able to explain the tears that were on the blouse. He alleged that he was arrested on the **6th** day of **June, 2015** following another case of assault. That the arresting officer was fully aware of the fact that is why he did not testify. That many months passed by prior to his arrest.

5. The trial Court considered evidence adduced, found the Appellant guilty, convicted and sentenced him to **ten (10) years imprisonment.**

6. Aggrieved, he appeals on the following grounds:

- That the learned trial Magistrate erred in fact and in law when he convicted the Accused person on basis of uncorroborated evidence.
- That the learned trial Magistrate erred in fact and in law when he convicted the Accused on basis of contradicted evidence.
- That the learned trial Magistrate erred in law and in fact when he held that the Accused person had been properly identified by the Complainant by relying mostly on hearsay evidence.
- That the learned trial Magistrate erred in law and in fact when he held that the charge against the Accused person had been proven beyond reasonable doubt and failed to consider the fact that Prosecution did not parade the key witness alleged to have rescued the Complainant.
- That the learned Magistrate erred in law and fact when he dismissed the Accused person's defence.
- That the learned Magistrate erred in law and fact when he convicted the Accused person against the weight of evidence placed before him.
- The learned Magistrate erred in law and fact when he held that the duly sentence that could be imposed upon the Accused person

was that of custodial sentence of 10 years when no sufficient proof had been tendered in Court to warrant a conviction at all.

7. The Appeal was canvassed by way of written submissions. It was urged for the Appellant the trial Court convicted on uncorroborated evidence, a fact he admitted in evidence which he sought to cure by invoking the proviso to **Section 124(1)** of the **Evidence Act.** But, the provision could not be invoked in the circumstances.

8. That the Complainant and PW2, her grandmother contradicted themselves on material facts. That evidence called in support of the Complainant's case was hearsay hence inadmissible.

9. That the Complainant gave her name as **GD** without identifying any age assessment document. That PW4 the Investigation Officer produced in evidence a Birth Certificate in the name of **GK** that was not identified by any witness.

10. The Prosecution was faulted for not calling **Sharon** who was alleged to have rescued the Complainant to testify and the Appellant having been arrested for an alleged physical assault created a doubt to the Prosecution's case and that the alibi defence put up weakened the Prosecution's case.

11. The Respondent opposed the Appeal. It was urged that evidence adduced demonstrated how the Appellant tried defiling the minor but he was not successful.

12. This being the first Appeal, I must reconsider evidence adduced in the trial Court. In **Kiilu and Another vs. Republic (2005) 1 KLR 174** the Court of Appeal stated thus:

> ***"1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.***
>
> ***2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses."***

13. The offence of attempted defilement is defined in **Section 9(1)** of the **Sexual Offences Act** thus:

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

14. The Prosecution which had the duty of proving the charge beyond reasonable doubt was expected to prove:

(i) The age of the child.

(ii) An intent to cause the act of penetration.

(iii) Positive identification of the perpetrator.

15. **Section 2** of the **Children Act** defines a child as any human being under the age of eighteen years. In the case of **Mwalango Chichoro Mwajembe vs. Republic (2016) eKLR** the Court of Appeal stated that:

> ***"... the question of proof of age has finally been settled by a recent decisions of this court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof" It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. (See Denis Kinywa -Vs- Republic Criminal Appeal No. 19 of 2014) and (Omar Ucher -Vs- Republic Criminal Appeal No. 11 of 2015). We doubt if the courts are possessed of requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decisions of the Court of Appeal of Uganda in Francis Omuroni -Vs- Uganda Criminal Appeal No. 2 of 2000. We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable ..."***

16. The Complainant told the Court that she was 15 years old and a pupil in standard eight (8).

17. A Birth Certificate was adduced in evidence by the Investigation Officer which bore the name **GK.** The maiden name of the mother of the child was indicated as **DN.** The child was born on the **5th April, 1999.** The trial Magistrate who had the opportunity of observing the Complainant basing on the evidence of the Complainant that was corroborated by the certificate of birth reached a finding that the Complainant was a child. The Complainant having been a child in standard 8 was intelligent enough to know her age. Therefore, the fact of the Complainant having been a child was proved as required.

18. It was alleged that the Appellant attempted to defile the Complainant. **Section 388** of the **Penal Code** defines an attempt thus:

"(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."

19. **Black's Law Dictionary, Tenth Edition** defines at attempt as:

"1. The act or instance of making an effort to accomplish something, especially without success.

2. criminal law – An overt act that is done with the intent to commit a crime but that fails short of completing the crime … includes any act that is substantial step towards commission of a crime, such as enticing, lying in wait for or following the intended victim …"

20. There was no eye witness to what happened, therefore, the only direct evidence available was that of the Complainant. The requirement of corroboration in sexual offences was abolished by statute such that a conviction can be founded on sole evidence of a Complainant provided that she is reliable and truthful. This is summed up in the proviso to **Section 124** of the **Evidence Act** that provides thus:

"Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

21. The Complainant stated that the Appellant made sexual advances to her but she refused to accept. His aim of sweet-talking her was to gain some sexual gratification. And when she made it clear to him that the request was unwanted, he dragged her into the forest. He set her free when she tricked him to believe that she had been pierced by a thorn. But as she ran he seized her blouse that got torn.

22. PW4, **No. 102152 PC (w) Ruth Wafula** introduced in evidence the allegation of the Appellant having attempted to force the Complainant down in order to have coitus with her. That he grabbed her hand caressed her breasts and buttocks. This must have been her own creation since the Complainant was silent on such an allegation.

23. Penetration is described as:

"penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person;"

24. What the Complainant described fell short of an attempt to defile her, for no overt act of an intent to penetrate her genital organs was demonstrated. What happened per her testimony amounted to sexual harassment. This is because the Appellant made unwelcome or inappropriate promise of reward (money) in exchange of a sexual favour. As she ran the Appellant held her blouse which got a tear. This was a transgression.

25. However, in the case of sexual harassment the statute provides for a case of a perpetrator being in a position of authority or holding a public office making sexual advances that are unwelcome which was not the position herein.

26. The trial Court found that the Complainant was truthful therefore the act must have been done to her.

27. The kind of report the Complainant made to the police in respect of the incident according to PW4 was totally different from what she told the Court. The police officer alluded to an act of indecency perpetrated by the perpetrator. She claimed that the individual grabbed her, caressed her breasts and buttocks. He forced her to lie down and have sex with her while covering her mouth. The Complainant's evidence was silent on that allegation. There was also a contradiction as to whether it was a dress or the blouse that got torn. Weighing evidence adduced it is apparent that there was no evidence of an overt act that demonstrated the action of intended defilement that was thwarted.

28. From the foregoing, I find that the conviction was not safe. Consequently, the Appeal is allowed. I quash the conviction and set aside the sentence imposed and order the Appellant to be released forthwith unless otherwise lawfully held.

29. It is so ordered.

Dated, Signed and **Delivered** at **Kitui** this **2nd** day of **December, 2019.**

L. N. MUTENDE

JUDGE