REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT NYERI

CRIMINAL APPEAL NO. 38 OF 2017

MICHAEL GITHINJI KABANGI................APPELLANT

VS

REPUBLIC...RESPONDENT

(Appeal from the judgment of the Principal Magistrate's Court at Mukuruwieni (V.O.Chianda,SRM.) delivered on 4th July, 2017 in Criminal Case No. 103 of 2016)

JUDGMENT

1. The Appellant, **Michael Githinji Kabanga** was charged with the offence of attempted defilement contrary to **Section 9(1)(2)** the **Sexual Offences Act.** The particulars of the charge was that on the 18th March, 2016 within Nyeri County intentionally attempted to cause his member to penetrate the member of **GW** a child aged 12 years.

2. In the alternative, the appellant was charged with indecent act with a child aged seven (7) years contrary to **Section 11(1)** of the **Sexual Offences Act, 2006.**

3. The facts of the case as recorded by the trial magistrate are that the appellant would waylay the complainant **(PW3)** on her way from school mainly on Fridays he would defile her by lying on top of her until he ejaculated and later threaten her with death if she revealed what had transpired; the complainant eventually gathered courage and notwithstanding the threats revealed all to her mother **(PW2); PW2** upon being informed on the on-goings reported the matter at Ngamwa Police Post; thereafter the minor was taken for treatment at Mukurweini Hospital and was issued with a P3Form; the Appellant was arrested and subsequently charged, tried and convicted at the Senior Principal Magistrates Court Mukuruweini on the main charge and sentenced to thirty (30) years imprisonment.

4. Being aggrieved by both conviction and sentence, the appellant filed a Petition of Appeal and raised the following grounds of appeal; as are summarized hereunder;

(i) The complainants evidence that she was defiled was doubtful; as it was not corroborated by the medical evidence;

(ii) The trial court in convicting the appellant on charges that were not proved beyond reasonable doubt;

(iii) The trial court believed the evidence of **PW2** was hearsay evidence;

(iv) The trial court rejected the appellants sworn defence without considering that it was not displaced by the prosecution's case;

(v) The sentence was not legal;

5. When the appeal came up for hearing Mrs Gicheha appeared for the State and the appellant was unrepresented; the appellant relied on his written submissions whereas Prosecuting Counsel for the State made oral presentations; hereunder is a brief summation of their respective submissions;

APPELLANTS' SUBMISSIONS

6. The appellant contention was;

(i) that he was charged and convicted with an offence that is non-existent in the Sexual Offences Act; that the Charge Sheet clearly indicates Section 9(1)(2) of the Sexual Offences Act; that the words **"as read with"** were omitted; that no attempt was made by the prosecution to cure this defect; that he was prejudiced by this defect as the offences he faced were not disclosed in a clear manner;

that he was unable to clearly understand the charges laid out and was unable to plead to a specific charge; and that due to insufficient information he was unable to conduct his case properly;

(ii) The prosecution failed to prove its case beyond reasonable doubt; there was no medical evidence from **PW4** to corroborate the evidence of **PW3**; the evidence of **PW2** was hearsay as she never witnessed the commission of the offence;

(iii) The trial court did not analyze his sworn statement of defence as it was duty bound to;

(iv) At Section 9(2) of the Sexual Offences Act does not provide for imprisonment of thirty (30) years for the offence of attempted defilement;

RESPONDENTS SUBMISSIONS

7. In response Counsel for the State opposed the appeal and stated that;

(i) The complainant finally disclosed what had been happening to her which then led to the arrest of the appellant; the minor was taken to hospital and treated; the doctor who examined the complainant noted on the P3Form that there were no injuries or lacerations on her genitalia; this was attributed to the fact that the appellant never completed the insertion;

(ii) That the evidence against the appellant was overwhelming and that the prosecution had proved its case against the Appellant beyond reasonable doubt.

(iii) On sentence it was the appellants contention that the sentence was not as provided in law; but Section 9(2) provides for ten (10) years and not less; that the sentence was at the discretion of the trial court and it gave the appellant a lenient sentence and it ought to have

8. Counsel prayed for the dismissal of the appeal; and that the conviction and sentence both be upheld.

ISSUES FOR DETERMINATION

9. After taking into consideration the submissions of both the Appellant and Respondent this court has framed the following issues for determination;

(i) Whether the Charge Sheet was defective;

(ii) Whether the appellant was positively identified;

(iii) Whether the prosecution proved the key ingredients of the offence;

(iv) Whether the trial court rejected the appellants defence;

(v) Whether the sentence was harsh and excessive in the circumstances.

ANALYSIS

10. This being the first appellate court it behoves me to re-evaluate the evidence on record and to reach an independent conclusion. Refer to the case of **Okeno vs R (1972) EA 32.**

Whether the Charge Sheet was defective;

(v) The appellant contends that his conviction was based on a defective Charge Sheet; that he was charged and convicted with an offence that is non-existent in the Sexual Offences Act; that the Charge Sheet clearly indicates Section 9(1)(2) of the Sexual Offences Act; that the words **"as read with"** were omitted; that no attempt was made by the prosecution to cure this defect; that he was prejudiced by this defect as the offences he faced were not disclosed in a clear manner; that he was unable to clearly understand the charges laid out and was unable to plead to a specific charge; and that due to insufficient information he was unable to conduct his case properly;

11. This court has noted from the record that the Charge Sheet reads **"attempted defilement contrary to Section 9(1)(2)";** the correct wording of the charge ought to have been **"attempted defilement contrary to Section 9(1) as read with Section 9(2);** does the mis-joinder of the sections and the omission of the words **'as read with'** render the charge as being non-existent as contended by the appellant?;

12. Section 134 of the Criminal Procedure Code provides that the charge shall state the specific offence and the particulars shall give reasonable information on the nature of the offence; this means that the Charge Sheet is defective when it fails to disclose an offence; a Charge Sheet can also be defective if the particulars are at variance with the offence;

13. Upon perusal of the Charge Sheet it is noted that it makes a clear reference to the offence of attempted defilement and the particulars also relate to the attempted defilement and thus disclose the offence;

14. The court record shows that the plea was taken in a language the appellant understood; to which a plea of **"Not Guilty"** was entered; the record also shows that he participated in the proceedings through-out and when invited to defend himself he gave a sworn statement of defence; which goes to demonstrate that he was fully aware and was not in any way misled as to the nature of the offence with which he had been charged; the sections of offence and the Statement of Facts in Count I sufficiently disclosed and established the nature of the offence that the appellant was faced with; which was that of attempted defilement; and the appellant knew the exact offence that he was alleged to have committed and faced;

15. As such this court is satisfied that the omission of the words **"as read with"** did not render the Charge Sheet incurable defective; this court finds no evidence of miscarriage of justice or prejudiced occasioned to the appellant; the defect is therefore curable under the provisions of Section 382 of the Criminal Procedure Code;

16. This ground of appeal has no merit and is disallowed.

Whether the appellant was positively identified;

17. The court record indicates that the trial court conducted a ***'voire dire'*** examination and that the minor proceeded to give her evidence under oath; from the evidence recorded by the trial court it is apparent that the appellant was well known to the complainant; they both hailed from the same village; that she knew his family and where he lived and she even referred to him by his full name **'Michael Kabangi'** when testifying; the incidents were seven (7) in number and had taken place during the day and in particular on Fridays when the complainant was headed for home after school;

18. The complainants mother also corroborated the minors evidence that the appellant was well known to them; that she had known him for a period of over five (5) years and that he was from the neighbourhood;

19. From the evidence adduced this court is satisfied that evidence against the appellant is credible and that this is a case of recognition; and that there was no mistake as to the identity of the appellant;

Whether the prosecution proved the key ingredients of the offence;

20. The key ingredients of attempt are set out in Section 9(1) of the Sexual Offences Act and they include intention to do an act that would cause penetration; the Section reads as follows;

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

21. This courts considered view is that the offence being an attempt all that the prosecution needed to prove is the appellant's steps and actions that would have demonstrated his intention and or objective.

22. **PW3** in her evidence states that the appellant lured her into the house; then he would remove her clothes and put something white inside her private parts and then he would lie on top of her; he would also caress her thighs; that he had defiled her on several occasions; her evidence is found to have prior sequential steps and discernable acts taken by the appellant to show intention and or objective.

23. That it goes without saying that to effectuate his intention the appellant applied the white substance inside her private parts was so as not to achieve full penetration and also to attain his objective of leaving no evidence in the form of lacerations; these actions or steps taken that were painfully narrated by the complainant demonstrated the appellants intention and or objective.

24. The Court of Appeal in its decision **Francis Mutuku Nzangi vs R [2013] eKLR** described an attempt as follows;

> **"…..if a person conceives an idea or plan to commit an offence and sets out to effectuate the intention by taking definite steps or puts in motion a chain of events or state of things calculated to attain that objective as manifested by some open and discernable act or acts but fails to achieve his objective, he will only be guilty of an attempt to commit the offence.**

25. The evidence of **PW3** was that the appellant used his member in his attempt to defile her; in its judgment the trial court stated as follows;

> ***"…that the complainant gave a clear and uncontroverted account of the accused's molestations. Her demeanor was sincere and moving…….***
>
> ***Her disposition was sincere.***
>
> ***The fact of the intact hymen can be attributed to the complainant's testimony that the accused would be on top of her for a "very short time."***

26. That the offence being one of an attempt and all that the prosecution needs to prove was an overt act; it is this courts considered view that the trial court ought to have invoked the proviso to Section 124 of the Evidence Act as the evidence adduced by the complainant has no corroborative medical evidence; and therefore it is her word against that of the appellant;

27. Nevertheless this court is satisfied that the evidence tendered was credible and sufficient to prove the offence of attempted defilement;

this court finds that the trial court properly addressed itself based on the evidence on record and came to the right conclusion.that the offence was proved;

28. This court is thus satisfied that the prosecution proved its case to the desired threshold.

29. This ground of appeal is found lacking in merit and is hereby disallowed.

Whether the trial court rejected the appellants defence;

30. The appellant contends that the trial court did not consider his defence that the mother of the complainant had fabricated the case against him after he had resisted her sexual advances;

31. This court notes that the appellant gave sworn evidence and the record shows that he stated the following;

> **"I have known PW2 from 2015. We were lovers. From 2015 January to December. We are village mates. She is the aunt to the complainant herein. The complainant's aunt's evidence is false after I rejected her sexual advances.'**

32. The record reflects that the trial court considered the appellants defence and made a finding that it did not dislodge the evidence adduced by the prosecution.

33. It is also noted that during the original trial the appellant when cross-examining **PW2** brought forth the issue of the existence of the friendship but **PW2** denied the such existence and responded as follows;

> ***"I know the accused. I have known him over 5 years as a person I see in the neighborhood. I have never had any relationship with the accused."***

34. Further the appellant did not elaborate in cross-examination nor in his defence on any specific incidences as between him and **PW2** that would have been a basis of the existence of such an affair and incidences of when and how it went sour; therefore this ground is unfounded and this court is satisfied that the appellant has not demonstrated that there existed a sour relationship as between **PW2** and himself that would have displaced the prosecutions' case.

35. This court is satisfied that the trial court considered the appellants' statement of defence and had good grounds for rejecting it as it did not raise any doubts in the prosecutions' case.

36. This ground of appeal is found lacking in merit and is hereby disallowed.

Whether the sentence was harsh and excessive in the circumstances.

37. The case of **Wanjema vs Rep [1971] EA 493** lays down the principles as to when an appellate court may interfere with a sentence imposed by a trial court. The principles to be taken into consideration by the appellate court are that it must satisfy itself that the trial court overlooked material factors; or took into account immaterial factors; or acted on a wrong principle; or in the circumstances of the case the sentence was harsh and excessive.

38. This court makes reference to Section 9(2) of the Sexual Offences Act which reads as follows;

> ***9(2). A person who commits the offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years.'***

39. The trial court convicted the appellant after finding him guilty of the offence and proceeded to sentence him with imprisonment for a term of thirty (30) years; the prosecution stated that the appellant be treated as a first offender; when called upon to mitigate the appellant stated that he was apologetic; that he had a family and also had elderly parents; the presumption being that they were all dependant on him.

40. It is this courts considered view that the trial court when passing sentence ought to have taken into consideration the circumstances of the case in that the complainant managed to speak out and break the routine in good time before maximum damage was inflicted; that the appellant was also a first time offender and ought to have given him the minimum sentence prescribed by the section, which is a term of ten (10) years.

41. For those reasons this court finds that the sentence imposed to be harsh and excessive in the circumstances of the case and that the sentence warrants interference.

FINDINGS

42. For those reasons this court makes the following findings;

(i) The defect on the Charge Sheet is found to be curable;

(ii) The appellant was positively identified by way of recognition;

(iii) This court finds that the prosecution proved its case to the required and desired threshold.

(iv) The trial court gave good reasons for rejecting the appellants defence;

(v) The sentence imposed of thirty (30) years is found to be harsh and excessive in the circumstances.

DETERMINATION

43. The appeal on sentence is found to be meritorious and it is hereby allowed.

44. The conviction is hereby upheld and the sentence is hereby set aside and substituted with a term of ten (10) years with effect from 4/07/2017.

Orders accordingly.

Dated, Signed and Delivered at Nyeri this 8th day of February, 2018

HON.A. MSHILA

JUDGE.