REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL APPEAL NO. 19 OF 2015

RONALD ALLEN NALIANYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgement of Hon. E. Mbicha (R.M) IN Criminal Case No. 547 of 2013 on both conviction and sentence delivered on 28the February 2014)

JUDGEMENT

Ronald Allen Nalianya hereinafter referred to as the appellant was charged in the court below with the main offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No.3 of 2006. In the alternative, the appellant also faced the of indecent Act with a child contrary to section 11 as read with section 11(1) of the Sexual Offences Act. The particulars contained in the charge were that on the 16th July 2013 within Kajiado County the appellant intentionally and unlawfully attempted to cause his genital organ penis to penetrate genital organ of Elizabeth W. M. a girl aged 10 years. The appellant denied both counts but after the trial he was convicted on the main charge and sentenced to twenty (20) years imprisonment.

Being dissatisfied with both conviction and sentence the appellant now appeals to this court. His memorandum of appeal contains the following grounds.

(a) That his defence statement was not properly considered in the light of section 169 (1) of the CPC

(b) That his conviction was bad in law and manifestly unsafe

(c) That the Learned Trial Magistrate erred in both law and facts by shifting the burden of prove from that of prosecution to his side

(d) That the offence of attempted defilement was not proved beyond reasonable doubt.

Evidence before the trial court

The prosecution evidence against the appellant centered on the four witnesses whose summary is as follows: **PW1 E.W.M,** the minor complainant testified that on the material day the 16th July 2013 she was travelling to [particulars withheld] Academy at about 2.00pm on her way she met with the appellant who apparently was well known to her. In her testimony they had a conversation with the appellant. According to PW1 the appellant asked her to go to his house so that she could pick a message for her father. The appellant on arrival in his house closed both the door and window. According to PW1 while in the house door closed the appellant removed all her clothes and at the same time he also removed his clothes. PW1 further stated before the trial court that both of them now naked the appellant held his penis and put it into her vagina. When the appellant accomplished his mission, he released her to go back home.

The complainant PW1 who was in pain left for home and informed her father **PW2 B. M. M.**on what had transpired. PW2 testified that on receipt of her complaint from PW1 he deemed it fit to report the matter to the police. The complainant PW1 was escorted to Mahsuru Health Centre and later to Kajiado District Hospital. PW2 further told the trial court that on examination of PW1 the medical doctor filled the P3 indicative of the positive findings as to the alleged offence. PW2 further informed the court that the appellant prior to this incident was his employee and therefore known to him and the complainant.

PW3 Leah Naipanoi Kiseri a nurse at Mashuru Health Centre examined the complainant PW1 who came with a history of defilement. PW3 further testified that on medical examination she confirmed bruises on the inner thighs going all the way near labia majora. In her opinion the penis did not penetrate the genitalia. The P3 was admitted in evidence as Exhibit 2.

PW4 PC Dedan Cherok police detective attached to Mashuru police station recorded the defilement complaint from PW1 who was accompanied by her father PW2. He later referred the complainant to go to Mashuru Hospital as he pursued the arrest of the appellant. PW4 evidence further confirmed that he asked the age assessment of PW1 to be carried out and a report dated 7th November 2013 was prepared to that effect. Having recorded statements from witnesses and other documentary evidence PW4 recommended a charge of defilement against the appellant.

The appellant defence at the trial

The appellant testified on oath in his defence. He denied the charges and called it a fabrication by PW2 the father to the complainant. The version given by the appellant involved the sale of a motor cycle owned by the father to the appellant herein PW2. This offer required of the appellant to go and examine the condition of the motor cycle before negotiating the price. The appellant told the court in his defence that finally both of them agreed to transact by paying Ksh. 40,000 to PW2. After using the motor cycle and spending about Ksh 20,000 to make repairs, the appellant testified that PW2 demanded It back. This contract in the appellant evidence escalated into a dispute. What happened later according to the appellant was an arrest by police from Mashuru that he had defiled PW2's daughter.

At the trial both the prosecution and the defence case the Learned Trial Magistrate analyzed the evidence and stated as follows in his judgement:

> ***"I am satisfied that the prosecution has successfully proved its case to the required standard. From the evidence adduced the accused did not manage to penetrate into the vagina of the complainant. I however hold that the accused was keen and had tried hard to penetrate the vagina of the complainant. I therefore find that the prosecution has proved beyond reasonable doubt that the accused attempted to defile the complainant contrary to section 9 of the sexual offences Act. I therefore find him guilty and convict him of the offence."***

This decision was the basis upon which conviction and sentence against the appellant was made by the trial magistrate.

Hearing on appeal: Ground one

The appellant submitted that section 169 (1) of the CPC was not complied with by the Learned Trial Magistrate. The contention by the appellant was that from the record the Learned Trial Magistrate did not evaluate both the prosecution case and the defence testimony sufficiently to establish the prosecution proved its case beyond reasonable doubt on the offence.

The appellant further submitted that failure by the Learned Trial Magistrate not to take into account his defence occasioned an error of Law and fact hence arriving at a wrong conclusion.

The appellant argued that this was a clear case involving a contract of sale of a motor cycle which went sour and escalated into a fabrication of an offence which he did not commit. According to the appellant this issue was never dealt with by the learned trial magistrate in his judgement.

Ground 2 was on medical evidence

The appellant submitted and argued that the Learned Trial Magistrate fell into error while analyzing the complainant's testimony PW1 with that of **PW3 Leah Kiseru** – the nursing officer who examined PW1 and filled the P3. The bone of contention by the appellant is that the evidence by PW1 is at variance with that of the Nurse PW3 who conducted the medical examination. According to the appellant the error is on the complainant alleging penetration whilst PW3 concluded that there was no penetration to the genitalia. He therefore submitted that the offence of defilement was not proved beyond reasonable doubt.

In the appellant further submissions, the charge then should have been amended pursuant to section 214 of the CPC to reflect the correct position of the particulars. It was his submission that failure to amend the charge occasioned a fatal defect which the Learned Trial Magistrate would not have used to make any positive findings in the matter. The appellant prayed that error and omission substantially prejudiced his trial in a manner that he was not able to put up a proper defence.

On the part of the state Mr. Akula, the Senior Prosecution Counsel submitted that the prosecution proved the charge and the elements of the offence beyond reasonable doubt. Learned Prosecution Counsel contended that penetration as defined under section (2) of the Sexual Offences includes partial penetration. That line of submission by the appellant therefore argued Mr. Akula cannot stand the legal test on penetration.

Secondly, Learned Prosecution Counsel further submitted that the elements of the offence on defilement in respect to the age, confirmed to be 10 years is not in dispute. Thirdly, the Learned Prosecution Counsel argued and submitted that the trial Magistrate had compared the evidence in totality and the charge in question and found it proved beyond reasonable doubt. Mr. Akula submitted that the appeal should be dismissed for want of merit.

Analysis and Resolution

The appellant submissions and rejoinder by the Learned Counsel for the state and scrutiny of the trial court record and judgement will form the basis of this appeal. This is the first appeal from the conviction and sentence before a subordinate court. In deciding this appeal, I am guided by the principles articulated in the cases of **Achera Versus Republic 2003 KLR 707, Okeno Versus Republic 1972 EA 32, Ngilu Versus Republic 1984 KLR 729.** The legal principle in these authorities is that an appeal on a first appeal the court is entitled to expect the evidence to scrutiny as a whole to be submitted to a first exhaustive examination and the courts to draw its own conclusions on the evidence

in coming up with a decision. ***"In doing so should make allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses".*** Bearing in mind these principles I proceed to make the following findings.

The first key issue is whether the prosecution proved the case of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences or that of attempted defilement contrary to section 9(1) of the Act beyond reasonable doubt as the trial magistrate resolved in the judgement.

As regards this offence the following ingredients must be proved in order for this court to affirm the Judgement of the lower court.

(a) the act of intentional and unlawfully attempted penetration

(b) the attempted penetration should be against a minor female human being

(c) that the appellant was positively identified as the perpetrator of the sexual assault.

On consideration of the above elements as an appellant court it behooves of me to re-evaluate the evidence of the trial court with a view to come up with my own conclusions as whether the prosecution discharged the burden of proof against the appellant.

(a) The first ingredient is that of attempted penetration.

Section 2 of the Sexual Offences Act defines penetration as: ***"The partial or complete insertion of the genital organs of a person into the genital organs of another person".***

The offence of defilement is created by section (8) (1) of the Sexual Offences Act which provides as follows: ***"a person who commits an act which causes penetration with a child is guilty of an offence termed as defilement."*** Section 2 of the Children's Act No. 8 of 2001 defines child for purposes of the Sexual Offences Act **"as any human being under the age of eighteen years.** ***The same Act goes further to define a child of tender years as one under the age of ten years."*** It follows therefore under the provisions of section 8 (1) (2) (3) and (4) of the Sexual Offences Act proof of age is an essential ingredient more so when it comes to sentencing the accused upon conviction.

As stated elsewhere, the prosecution in this appeal had the task to prove the elements of the offence within the scope of section 9(1) Sexual Offences of the Act on Attempted defilement. The definition of what constitutes penetration as defined under section 2 of the Sexual Offences Act ***"means the partial or complete insertion of the genital organs of a person into the genital organs of another person."*** The knock of the penis at the door of the female genitalia of the PW1 is clearly inferred from her testimony.

In proving attempted penetration, the prosecution adduced the following evidence. PW1 minor identified as **E.W** a daughter to PW2 **B. M. M.** told the court that on 16/7/2013 at about 2.00pm he was travelling from her home to [particulars withheld] Academy, PW1 narrated how she was approached by the appellant to stop and take a message to her father PW2. she reported that since the appellant was someone known to the family she agreed to accompany him to the house. it was while in the house PW1 testified that she was undressed by the appellant. it also followed with the appellant removing his trouser and inner wear and placed her on the mattress.

According to PW1 the appellant took his penis and placed it on her vagina. In a short while she experienced pain as the appellant released her. On cross-examination PW1 confirmed that she identified the appellant because the offence took place at on or about 3.00pm. the next person PW1 informed of the sexual assault was her father PW2 in the evidence by PW2 he made arrangements to report to the police station at Mashuru. He was issued with a P3 which was filled at Mashuru Health Centre by one **Leah Kiseru** who testified as PW3. On examination of PW1 by PW3 the following positive findings were noted; bruises on the inner thighs going all the way near the labia majora. PW3 ruled out any physical penetration of the vagina. The testimony of PW1 as corroborated with the medical evidence enabled the prosecution to meet the burden of proof on attempted penetration. The trial court therefore had the advantage of the expert witness PW3 and an Independent evidence of PW2 who knew the complainant before the crime was committed.

The evidence at the trial court was therefore admissible under section 124(1) of the evidence Act on corroboration of the complainant testimony on the offence of defilement. Section 124 (1) of Cap 80 mirrors the statutory provision on corroboration; In cases like the one the appellant was faced with at the trial court.

The attempted penetration here was from the appellant genitalia to that of the complainant genitalia. The observations made by PW3 involving the inner thighs and labia majora amplifies intentional and unlawful acts of attempted defilement. The defence by the appellant never addressed any of these pieces of evidence on the intention and acts of attempted defilement. In my view the trial magistrate was faced with prima facie evidence which remained uncontroverted.

Proof of age of the complainant

I now turn to the proof of age of the victim of the offence. Age of the complainant is a critical element under the Sexual Offences Act. The basic objective being the key indicator when it comes to sentencing the offender upon conviction on any of the defined offences involving a child victim.

In the case of **Francis Omuron Versus Uganda CR. Appeal No. 2 of 2000** the court of Appeal of Uganda held as follows on how age is to be proven:

> ***"in defilement cases medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. apart from medical evidence age may***

also be proved by birth certificate. the victim's parent or guardian and by observation and common sense."

The importance of proving the age of the victim in defilement cases was also stated by Mwilu J as she then was in the case of **Hillary Nyongesa Versus Republic Criminal Appeal No. 123 of 2009** where she held:

> ***"Age is such a critical aspect in sexual offences that it has to be conclusively proved and this becomes more important punishment (sentence) under the Sexual Offences Act is determined by age of the victim".***

Referring to the evidence in this case the complainant testified that she was aged ten (10) years at the time of the offence. This was corroborated by the evidence of PW2 **B. M. M.-** the father. Further, it is also stated that the age of PW1 was assessed to be ten years at Mashuru Health Centre as indicated in exhibit 1.

I must state that from the defence of the appellant there was no attempt that the statutory defence under the provisions of section 8 (5) of the Sexual Offences Act did apply to this case. The prosecution prima facie evidence on the age of the complainant remained unchallenged that she was a minor aged 10 years at the time the offence was committed. It is therefore not possible that the appellant could have presumed her age to be older than that of ten years. It follows that the prosecution proved this ground beyond reasonable doubts.

(c) I now turn to the ingredient of recognition of the appellant.

It is trite law that a fact may be proved by a single witness but when such evidence is in respect of identification is must be tested with greatest care.

In many respects the circumstances of an identification in this case are similar with those stated in the case of **Roria Versus Republic 1967 EA 583**. It should be pointed out that evidence applied by the trial court to place the appellant at the scene was that of recognition.

Dealing with this issue of identification it is covered by the evidence of PW1 E.W. who stated that while on the road going to school between 2 - 3.00pm she was called by the appellant to go to his house allegedly to be given some information meant for her father PW2. After she entered the house the appellant executed the mission of removing her clothes in order to commit the offence. As far as PW1 testimony goes the appellant next cause of action was to undress and have carnal knowledge with the complainant. It is obvious from PW1 description she knew the appellant before this fateful day.

I accept the guidelines to be appended on visual identification of all appellant in this case as laid down in the case of **(Roria Versus Republic (Supra).** It was not the first time PW1 saw the appellant in the context of her evidence and tat of PW2 they indicated to be neighbours with the appellant. There is no hesitation to conclude that the appellant was positively identified and placed at the scene of crime.

The evidence against the appellant was incapable of any other hypothesis than that of his guilt. I therefore conclude that the prosecution proved the ingredients of the offence of attempted defilement before the trial court beyond reasonable doubt.

Ground 2: Non-compliance with the provisions of section 169 of the Criminal Procedure Code

Section 169 of the Criminal Procedure Code

> ***"provides for the contents of a judgement written by or under the direction of the presiding officer of the court in the language of the court and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it. In the case of a conviction the judgement shall specify the offence of which and the section of the penal code or other law under which an accused person is convicted and the punishment".***

The appellant in this appeal has questioned the correctness regarding the findings in the impugned judgement of the trial court. I have reviewed the judgement prepared and written by the presiding officer of the lower court in which the appellant was an offender indicted with an offence of defilement which finally was substituted with that of attempted defilement under Sexual Offences Act.

In my opinion the trial magistrate has analyzed the evidence based on the case for the prosecution and the defence. The scheme of section 169 of the Criminal Procedure Code is that the presiding officer has to set out the issues for determination render appreciation of the evidence with the facts of the case, the arguments that transpired in a manner to establish whether the prosecution has discharged the burden of proof of beyond reasonable doubt. The vital important aspect of section 169 is to provide reasons for the decision, explain the decision to the parties and communicate the reasons together with the decision to the public. From the record of the impugned judgement I hold the view that the learned trial magistrate set out the issues to be decided and the order in which they are to be decided.

The structure of the judgement has the outline of the facts and the legal principles applicable, the points for determination and reasons for the decision have been stated in the judgement conclusively. The judgement has been signed and dated by the presiding officer as required of him pursuant to section 169 of the Criminal Procedure code.

I therefore hold that the trial magistrate addressed all the elements in his judgement in conformity with section 169 of the Criminal Procedure Code (Cap 45 of the Laws of Kenya). I find no error or omission which did occasion prejudice or a failure of justice on the part of the appellant. This ground of appeal therefore fails.

Ground 3: Complainant on the amendment of the charges under section 214 of the Criminal Procedure Code.

Section 2(4) (1) of the Criminal Procedure Code provides as follows:

> ***"Where at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such orders for the alteration of the charge, either by way of amendment of the charge necessary to meet the circumstances of the case provided a charge is so altered. The court shall therefor call upon the accused to plead to the amended charge. (ii) where a charge is altered under this subsection the accused may be directed that the witnesses or any of them be recalled and give their evidence a fresh or be further cross-examined by the accused or his advocate and in the last-mentioned even the prosecution shall have the right to re-examine the witnesses on matters arising out of further cross-examination".***

From the record on 1/11/2013 an application for amendment of the charge was made by the prosecution counsel. The application was granted by the learned trial magistrate and the appellant allowed to cross-examination based on the amendment. The inference to be drawn from the amendment can be discerned in the final decision of the trial magistrate, making refence to section 9(1) of the Sexual Offences Act. The particulars of the offence he made reference to the following acts against the appellant that he intentionally and unlawfully attempted to cause his penis to penetrate the vagina of E.W.W a girl aged 10 years.

There appears to be no confusion on which charge the appellant was facing. This is made crystal clear by the elements of the offence as crafted in the charge. The restatement by PW1 in her evidence that the penis reached the vagina does not lessen either the intention or the *actus reus* being unlawful act of defilement. The appellant's action and moved from the level of indecent acts to that of attempted defilement. The appellants action of confining the complainant in his house, placing her on the mattress naked and proceeding also to undress can only be said to denote one an act of attempt to have sexual intercourse with the complainant.

The offences of attempted defilement consist all the statutory elements required to fulfil the actual act. In this case the charge contained a specific offence in the statement but the particulars as a necessity giving reasonable information as laid down under section 137 of CPC is in the brief facts containing the ingredients.

According to the appellant he was not given due notice that the unlawful act was on attempt to defile the complainant. The basic attributes of the charge as demanded by section 137 of the CPC confirmed what kind of defence appellant was to prepare in rebuttal. Apart from catch word of attempted, the name of the complainant, date and place where the offence took place was also stated in the particulars of the charge

At least the words intentional and unlawful attempted to cause genital organ to penetrate the genitalia of the complainant aged 10 years ought to have been present in both information. This deficiency was further recognized and cured by the trial Magistrate by invoking section 186 of the Criminal Procedure Code Cap 75 of the Laws of Kenya.

Consequently, find and hold that is the law that the court at the conclusion of the criminal case can convict the accused of a minor offence though not charged with that offence (see the provisions under section 179 of CPC) the procedure adopted by the trial magistrate to cure any deficiencies is fully grounded on the statute.

The question is whether in all these the prosecution proved its case beyond reasonable doubt. In answer to this I borrow a leaf from the passage expressed by the supreme Court of Nigeria in the case of **Bakarer Versus State 1987 INWLR** on this doctrine of proof beyond reasonable doubt the court held interalia;

> ***" Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To dispute the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. absolute certainty is impossible in any human adventure including administration of criminal justice. it does not admit of plausible and forceful possibilities but it does not admit of a high degree of cogency consistent with an equally high degree of probabilities".***

For the respondent Republic this is the standard of proof that their case before the trial court must be ostensibly considered. Going by the record of the trial court I find no error of fact or law to render this court interfere with the conviction of the appellant.

Ground on Sentence

The appellant was sentenced pursuant to the provisions of section 9 (2) of the Sexual Offences Act which states as follows: A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term not less than ten years. the provision of section 8 (6) (7) and (8) shall apply *Mutati's Mutandis* to this section.

The Trial magistrate sentenced the appellant to 20 years imprisonment. The question I ask is the sentence wrong or is it manifestly excessive? In deciding appropriate sentence for offenders of this nature from the stand point of an appellant court one has to be guided by the following principles:

The objects of criminal Law in our justice system to punish crime. The severe psychological or physical harm to vulnerable victims like the complainant in this case, forced entry into the victim's privacy exploiting contact with the child, age of the victim and relative maturity of the offender are all aggravating factors to be considered in sentencing. This is serious offence as specified under section 8 and 9 of the Sexual Offences Act No. 3 of 2006. It therefore calls for appropriate length custodial sentences to put away such child predators from society in general and also to accord an opportunity for reform and rehabilitation within correctional facility.

It is trite that this court may not interfere with the sentence of a subordinate court other than by the principles outlined in the case of **James S/O Yoram Versus Republic 1950 18 EACA/47 Ogalo S/O Owuora Versus Republic 1954 2 EACA 270.** Adopting the dicta in these

cases I do not find anything to suggest that the learned trial magistrate applied wrong principles or took into account irrelevant factors in sentencing the appellant. The sexual offences penalties have a minimum sentence threshold. The legislature intended them to be punitive, designed and calculated to deter others and to safeguard society from such crimes.

In my view the sentence of 20 years was never harsh or excessive in the circumstances of the offence the appeal is hereby dismissed in its entirety and the judgement of the lower court dated 28/21/2014 affirmed.

Dated, delivered and signed in open court on this day of 5th April 2018.

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R. NYAKUNDI

JUDGE

Representation

Mr. Akula for Director of Public Prosecutions - Present

Appellant - Present

Mr. Mateli - Court Assistant