REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

HIGH COURT CRIMINAL APPEAL NO. 148 OF 2017

SIMON NJUGUNA KAMAU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment delivered on 20th December,2013 by Hon. B.M. Nzakyo (Ag. Principal Magistrate) Principal Magistrate's Courts at Githunguri in Criminal Case No. 576 of 2013).

JUDGMENT

1. The Appellant, Simon Njuguna Kamau was charged with the **offence of attempted defilement contrary to Section 9 (1) as read with Section 9 (1) of the Sexual Offences Act No. 3 of 2006.**

> **The particulars of the offence being that the Appellant on the 3rd day of July 2013 at [particulars withheld] area of Githunguri, district in Kiambu County, intentionally unlawfully attempted to cause his penis to penetrate the vagina of M W a child aged 3 ½ years.**

2. In the alternative **Indecent act contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2007 (2006).**

> **The particulars of the offence being that the Appellant on the 3rd day of July, 2013 at [particulars withheld] area at Githunguri district in Kiambu County unlawfully and intentionally did commit an Indecent Act with M W, a child aged 3 ½ years by touching her private part (vagina) with his penis.**

3. The case for the prosecution was that on the material day at about 2.00 p.m. the 3½ year old complainant, M W, a nursery school pupil disappeared from outside their house where she had been playing with other children. While the complainant was being looked for, the door to the house of the Appellant was opened by the Appellant's brother. The Appellant came out. That the complainant also emerged from the same house as the Appellant. That upon being questioned the complainant explained that the Appellant had done bad manners by removing her trousers and his. That the Appellant then touched her private parts in the area between her legs and kissed her on the mouth.

4. The Appellant gave unsworn evidence in his defence case. He described himself as a worker at a primary school. He denied having committed the offence and stated that the doctor told the court that the child had not been defiled.

5. The trial magistrate found the Appellant guilty as the offence of attempted defilement and convicted him accordingly. The Appellant was sentenced to a fine of Ksh.200,000/= in default to serve ten years imprisonment.

6. The Appellant was aggrieved by the conviction and sentence and appealed to this court on grounds that can be summarized as follows:

a. That his mitigation was not taken into account.

b. That the sentence imposed was manifestly harsh and excessive.

7. Prior to the hearing of the appeal, the Appellant was given a Notice of enhancement of sentence. The Appellant however chose to proceed with the appeal, the notice notwithstanding.

8. In his submissions, the Appellant asked the court to reduce the sentence.

9. The learned counsel for the state stated that the law imposes a minimum sentence of ten years upon conviction for the offence of attempted defilement as charged.

10. This being a first appeal, this court is duty bound to re-evaluate the evidence and the record afresh and come to its own conclusions and inferences – See **Okeno v Republic (1972) EA 32.**

11. The complainant (PW1) testified after the trial magistrate carried out a *voire dire*. The complainant gave unsworn evidence after the court found her unable to understand the meaning of oath.

12. The complainant's evidence that the Appellant called her to his house is supported by that of the other witnesses she was playing with. PW4 R N who gave her age as 8 years old when she testified and PW5 F M who gave her age in court as 7 years were the children who were playing outside the plot with the complainant. Both PW 4 and PW5 were examined by the trial court and found to understand the meaning of oath and gave sworn evidence.

13. Their evidence is that the complainant disappeared from where they were playing and they started looking for her. That later the Appellant came out of his house after a boy opened the door of the house. That the complainant also came out of the same house as the Appellant. It was their evidence that the complainant then explained that the Appellant had done bad manners to her. PW4's evidence was that the complainant said the Appellant had touched her between the legs and on her mouth. The evidence of both PW4 and PW5 was not challenged during cross-examination.

14. PW3 R N a neighbour and PW2 J W N the complainant's mother found the complainant's playmates looking for the complainant. It was then they saw a brother to the Appellant enter the house and the Appellant come out of his house and the complainant also came out of the same house. That upon being questioned the complainant said that the Appellant had touched her mouth and private parts and kissed her.

15. Thus the evidence of PW4 and PW5 corroborated the evidence of the children who have testified herein. The evidence of PW2 and PW3 is that they knew the accused as a neighbour and that they saw the complainant walking out of the house of the Appellant. The time of the incident is described at about 2.00 p.m. which is in broad daylight. PW 2 & PW 3 maintained their evidence during cross examination.

16. A case of recognition, not identification is more satisfactory, more assuring and more reliable than that of identification of a stranger because it depends on the personal knowledge of the assailant in one form or the other. (See for example **Anjononi & another v Republic 1980 KLR.**)

17. PW6 Susan Njeri a Clinical Officer who examined the complainant assessed the complainant's age as 3 ½ years old. The Clinical Officer's evidence was that the complainant's genitalia was normal with no bruises or laceration and the hymen was intact with no evidence of defilement. This corroborates the complainant's evidence that the bad manners involved touching without penetration.

18. The Appellant in his evidence denied having committed the offence. However, the evidence of the complainant is corroborated by strong circumstantial evidence from the two children who she was playing with (PW4 & PW5), the mother and neighbour (PW 2&3) whose evidence is categorical that they saw the Appellant come out of his house where the complainant also emerged from.

19. PW 7 APC Amunze Jariel and PW8 APC Esther Mwangi gave evidence of the report made to them and the handing over of the accused to them by the members of public who had arrested him. The evidence of PW9 CPL Charity Warima confirmed the investigations carried out including taking the report of the incident and escorting the complainant to the hospital for examination and treatment.

20. Having considered both the prosecution case and the defence case, I am satisfied that the prosecution case in respect of the offence of attempted defilement was proved. There is no other inference in the absence of any other explanation in the circumstances of this case.

21. The case of **Sawe v Republic Criminal, Appeal No. 2 of 2002** clearly defined the legal requirements of circumstantial evidence. The court held that:

> **"In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. Circumstantial evidence can be basis of conviction only if there is no existing circumstances weakening the claim of circumstances relied on."**

22. The appeal by the Appellant that the sentence be reduced finds no support in the law Section 9 (2) of the Sexual Offence Act No. 3 of 2006 provides for a minimum sentence of 10 years. The fine imposed by the trial court is unlawful and is hereby set aside. The Appellant to serve 10 years imprisonment.

Dated, signed and delivered in Kiambu this 6th day of July, 2018

B. THURANIRA JADEN

JUDGE