REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL APPEAL NO. 54 OF 2017

JABIR DAYO IBRAHIM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the conviction and sentence in Mandera Senior Principal Magistrate

Criminal Case No. 357 of 2017 by Hon. D. K. Mtai (RM)

JUDGEMENT

1. The appellant was charged in the Magistrate's Court at Mandera with attempted defilement contrary to section 9 (1) (2) of the Sexual Offence Act No. 3 of 20016. The particulars of the offence being that on 27th March, 2017 at about 11 am in Banisa Sub-County within Mandera County, intentionally attempted to course his penis penetrate the vagina of F. A. B. (name withheld) a child aged six (6) years.

2. In the alternative he was charged with committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act, the particulars being that on the same day, time and place intentionally touched the vagina of F. A. B. (name withheld) a child aged six (6) years with his penis.

3. He denied both counts and after a full trial, he was convicted of the offence of attempted defilement contrary to section 9 (1), (2) of the Sexual Offences Act under section 215 of the Criminal Procedure Code. The magistrate held that the alternative count for the offence of committing an indecent act with a child be held in abeyance. The magistrate sentenced the appellant to serve twenty (20) years in prison.

4. Dissatisfied with the decision of the trial court, the appellant has come to this court on appeal. He filed his appeal in person on 23rd October, 2017. Before the appeal was heard however, the appellant instructed Mr. Nyagah advocate who filed a supplementary petition of appeal on 19th June, 2018 listing sixteen (16) grounds of appeal which I will summarize as follows;

1. The trial court erred in sentencing the appellant as an adult while the age assessment report dated 27th March, 2017 was not reliable.

2. The trial court erred in convicting the appellant on incredible evidence especially that of PW1 who acted as an intermediary as well as a witness.

3. The trial court erred in allowing PW2 to testify after she testified through an intermediary.

4. The learned magistrate erred in failing to carry out examination of PW3 to confirm whether the eleven (11) years minor knew the importance of telling the truth or taking an oath.

5. The magistrate erred in finding that the age of the complainant was proved to the required standard.

6. The trial magistrate erred in finding that the appellant had committed an attempted offence while there was no evidence to demonstrate that he had moved from the preparatory stage to an actual attempt.

7. The trial magistrate erred in disregarding the appellant's defence which impeached the prosecution's case.

8. The trial court erred by shifting burden of proof to the appellant.

9. The trial court erred in law and facts by excessively sentencing the appellant.

5. At the hearing of the appeal, Mr. Nyagah learned counsel for the appellant submitted that though the prosecutor doubted the age of the appellant which was assessed at nineteen (19) years, the trial court erroneously went ahead and sentenced the appellant under section 8 (7) of the Sexual Offences Act while the offence was punishable under section 9 (1) (2) of the Sexual Offences Act with a sentence of ten (10) years, therefore the sentence of twenty (20) years imprisonment was harsh and excessive.

6. Mr. Nyagah also submitted that the evidence of intermediary was not credible as she misinterpreted evidence of an attempt. In addition, the intermediary PW1 who was the mother of the complainant went ahead to testify as PW2 which was wrong.

7. Counsel also submitted that though PW3 was a child of tender years aged eleven (11), she was sworn and testified without the court examining her on her intelligence and her evidence should thus not have been relied upon by the trial court.

8. Counsel also complained that though the court declared the complainant to be a vulnerable witness under section 31 (10) of the Sexual Offences Act, the court erroneously went on to convict on the uncorroborated evidence of an intermediary. Counsel further stated that age of the complainant was merely estimated and not proved, penetration was also not proved as the complainant said that she was not touched. Counsel said in particular that attempted defilement was not proved as it was not demonstrated by the prosecution that the appellant went beyond preparatory stage in commission of the offence, and relied on the case of **Charles vs Republic** (in which he did not provide a citation). According to counsel, the evidence of the prosecution on record did not place the appellant at the scene and since the incriminatory evidence was that of the relative of the complainant, such evidence was suspect and should not have been used to found a conviction.

9. Counsel lastly submitted that the learned magistrate disregarded the sworn defence of the appellant and wrongly shifted the burden of proof on an allegation that the appellant failed to ask questions.

10. Mr. Okemwa learned Principal Prosecuting Counsel submitted that both the prosecution and the court where blameworthy in the way the case was conducted, in that even though the court conducted *voire dire* examination on witnesses who were minors, the prosecutor called into play section 31 of the Sexual Offences Act, which was an illegality. This action by the prosecutor; punctured the conduct of all the proceedings that followed.

11. Counsel also noted that the mother of the complainant PW1 testified as an intermediary but later testified as an independent witness which meant that the provisions of section 124 of the Evidence Act (Cap. 80) became inapplicable in this case. According to counsel also, because of the wrong procedure followed, the court ended up in saying that the complainant did not appreciate the truth but in the judgement it contradicted itself my saying that she was truthful and impressive. Counsel noted that the standard of proof required for an attempted offence on which the appellant was convicted, was higher than that for the commission of the actual offence charged.

12. With regard to sentence, counsel submitted that the sentence was legal but the procedure adopted by the trial court was wanting.

13. In a brief response, Mr. Nyagah submitted that once the court found that the complainant was incapable of telling the truth, section 124 of the Evidence Act could not apply.

14. This being a first appeal, I am required to re-examine the evidence on record afresh and come to my own conclusions and inferences. See **Okeno vs Republic [1972] EA 32**.

15. I have re-evaluated the evidence on record and considered the submissions of counsel for the appellant as well as the Principal Prosecuting Counsel. In the trial, the prosecution called six (6) witnesses. PW1 K J K was the mother of the complainant who testified as an intermediary. PW2 was the complainant who also testified. PW3 was L A B an eleven (11) years old girl. PW4 was H M A who testified about what she was told by L A B that a girl had been defiled. PW5 was Mohamed Muktar Shuka the Mandera Sub-County Health Officer at Banisa. He was a qualified clinical officer and filled the P3 form on the complainant. PW6 was Cpl. Lawrence Lepersahleper from Banisa Police station, the investigating officer to whom the report was made. It was his evidence that the appellant chased the complainant into the kitchen and tried to defile her. That the complainant was rescued by L A B.

16. In his defence, the appellant tendered a sworn testimony and said he was a student in secondary school. He denied the charge. He said that he was arrested on a day when he passed near the police station and as he was talking with a police corporal, the mother of the complainant arrived and gave the police Kshs.20,000/= and asked them to lock him up. According to him, his mother's house was near the police station and he had formed a habit of assisting the police with Borana language interpretation. He said he was a Form IV student. In cross-examination he said that he knew the complainant's mother and that his mother and the complainant's mother had previously quarrelled over a sum of Kshs. 300,000/= which was part of money for a women merry go-round group.

17. The learned magistrate convicted the accused for the offence of attempted defilement. In an offence for attempt, the prosecution is required to prove some act or acts that show that the culprit is attempting to commit the offence. The evidence on record clearly shows that there was no defilement as no penetration was established. With regard to attempt, the evidence on record is that the appellant chased a girl into a kitchen. There is no evidence that he did anything more than chasing a girl who entered a house into a kitchen. Does that amount to an attempted defilement?

18. The other evidence is that of the Clinical Officer PW5 who said that he found a bruise on the outer part of the genital organ of the complainant. There is no indication that, that bruise was caused by the appellant, nor that it was caused during that chase.

19. In my view, the prosecution did not prove attempted defilement. There isn't even an indication that the appellant had said that he was chasing the girl to defile her or that he was interested in sexual contact with her. In my view, even if that chase did take place in broad daylight, it cannot be said conclusively that it was for an intended sexual purpose.

20. The magistrate left the charge on indecent act in abeyance. That in my view was a mistake. It was an alternative count which was either to be proved or not proved. The evidence on record did not prove the same and therefore it should never been left in abeyance as if the appellant still stands to be tried for the same. It was a mistake by the magistrate as the charge was not proved and the conviction on the main count means that the alternative charge was not proved and should have been dismissed.

21. The procedure adopted by the trial court also in making the complainant testify through an intermediary PW1 her mother, and then testifying independently as PW2 confused the whole proceedings. Once the complainant testified through an intermediary, she should not have testified again independently. In adopting that procedure, the court acted illegally in order to strengthen unfairly the evidence of the complainant. In effect the complainant was allowed by the trial court to testify twice, firstly through intermediary and secondly independently which in my view occasioned prejudice against the appellant. The trial was thus a mistrial and an appeal would have succeeded on that count in any event.

22. The trial court also did not give due weight to the appellant's defence, as the court did not weigh the said defence against the admissible evidence of the prosecution including the medical report. On the totality of the evidence on record therefore, I am persuaded that the prosecution did not prove its case against the appellant beyond reasonable doubt and the magistrate should thus have given the benefit of doubt to the appellant.

23. As for the sentence, the sentence of ten (10) years imprisonment was the minimum sentence. Twenty (20) years imprisonment was thus within the law. However, for a first offender and looking at the circumstances of the case, and the alleged age of the appellant, in my view, the sentence imposed is excessive. However, since the appeal against conviction has been allowed, I will not deal further on the issue of sentence.

24. Consequently, I allow the appeal, quash the conviction and set aside the sentence imposed by the trial court. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Garissa this 19th day of September, 2018.

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George Dulu

JUDGE