REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 106 OF 2016

VINCENT KIPNGENO KIRUI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of Honourable R. Amwayi Resident Magistrate, delivered on 21st June, 2016 in Molo Chief Magistrate's Court Criminal Case No. 1735 of 2015)

JUDGMENT

1. The Appellant, Vincent Kipngeno Kirui, was charged before the Molo Chief Magistrate's Court in Criminal Case NO. 1735 of 2015 and convicted of the offence of attempted defilement contrary to section 9(1) of the Sexual Offences Act.

2. The allegations in the charge sheet were that on 01/07/2015 in Londiani Sub-county of Kericho County, the Appellant intentionally attempted to cause his penis to penetrate the vagina of FCS, a child aged 2 years.

3. The charge sheet had an alternative count of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars of the alternative charge were generally the same as those in the main charge except that it was alleged that the Appellant intentionally touched the vagina of FCS with his penis.

4. After entering a plea of not guilty, the case proceeded to full trial. The Prosecution called five witnesses. When put on his defence, the Appellant gave a sworn statement. The Learned Trial Magistrate entered a plea of guilty at the conclusion of the case and sentenced the Appellant to twenty years imprisonment.

5. The Appellant is aggrieved and has preferred the present appeal. He has listed the following grounds of appeal:

> ***1.*** *The trial magistrate erred in law and fact by failing to appreciate that the charge preferred against was irreversibly defective.*
>
> ***2.*** *The trial magistrate erred in law and fact in failing to appreciate the medical evidence produced before the trial court.*
>
> ***3.*** *The trial magistrate erred in law and fact by failing to appreciate my defence however plausible*

6. During the hearing of the appeal, the Appellant relied wholly on his written submissions while Mr. Motende, the Prosecution Counsel, submitted orally.

7. Mr. Motende submitted that there was enough evidence to support the conviction. He referred to the evidence of PW1 – the Mother of the victim – who, he said, found the Appellant red-handed with unzipped trousers and an erect penis; ready to defile the victim. The Appellant had already removed the underwear of the victim. Mr. Motende submitted that evidence showed that PW1 screamed and the Appellant ran away only to be arrested by members of the public later.

8. Mr. Motende submitted that given the circumstances, the issue of identification was not an issue since PW1 knew the Appellant well. On the issue of age, Mr. Motende submitted that an age assessment report was produced in Court demonstrating that the victim was 2 years old.

9. As the first appellate Court, I am duty bound to re-evaluate and reconsider all the evidence adduced during the hearing afresh and come to my own conclusions about all the elements of the crimes charged. In doing so, I am to be guided by two principles. First, I must recall that I must make appropriate allowance for the fact that I did not have a chance to see or hear the witnesses. This means that I must give due deference to the findings of the Trial Court on certain aspects of the case. Second, in re-evaluating and re-considering all the evidence, I must consider the evidence on any issue in its totality and not any piece in isolation. This principle constrains me to reach my own conclusions on the totality of the evidence as opposed to merely using the Trial Court's findings as a foil to endorse or reject its findings.

See ***Okeno v Republic*** **[1973] E.A. 32**; ***Pandya vs. R*** **(1957) EA 336**, ***Ruwala vs. R*** **(1957) EA 570**.

10. The evidence adduced at the trial was short and straightforward. PW1 was JC. She is the mother of the victim. She told the Court that on 01/07/2015, she left her 2-year old child, FC under the care of her other child, a 5 year old son. She needed to go and do some casual work in the afternoon. When she returned a few hours later, she testified that she found the Appellant seated outside near the kitchen with FC on his lap. JC testified that the Appellant had unzipped and lowered his trousers. Although she had left FC with a biker (underwear) on, JC testified that she had nothing on when she saw her when she returned.

11. On realizing that the Appellant was, in her perception, defiling her 2-year old child, JC raised the alarm. Upon her screams, she testified that the Appellant took off as the members of the public made it to her compound.

12. JC then reported the matter to Londiani Police Station where she was issued with a P3 Form. She then took her child to the hospital for examination.

13. Among members of the public who took action upon learning what had happened, was Julius Kibet Tanui. He testified as PW5. He learnt of the incident on 01/07/2015. The following day, he organized a group of other men to go up the hill where they had learnt the Appellant had disappeared to, to go look for him and arrest him. They found him there and arrested him. Julius and the other members of the public took the Appellant to the Chief's Camp and handed him over to the Chief and Administration Police there. Later on, he went and recorded his statement at Londiani Police Station.

14. When incident happened, JC (FC's mother) first reported at the Kipsirchet Administration Police Post in Londiani at around 5:00pm on 01/07/2015, she was attended to by APC Jennifer Rono. It was this same Officer who re-arrested the Appellant when he was brought by Julius and other members of the public on 02/07/2015. She testified as PW2.

15. The Investigating Officer in the case was PC Prisca Onchonga. She narrated to the Court about how the Appellant was brought to Londiani Police Station on 02/07/2015 – and the investigations she did to reach the conclusion that the Appellant had committed an offence.

16. Finally, FC was taken to Londiani District Hospital for medical examination on 02/07/2015. Dr. Biwott did the examination. Dr. Biwott was not available to testify during the trial. Upon the stipulation of the Appellant, Mr. Alfred Chesire, a Clinical Officer in the same hospital who is familiar with Dr. Biwott's handwriting attended Court and gave evidence on his behalf. He also produced the P3 Form filled by Dr. Biwott as an exhibit.

17. In short, the medical examination showed that FC had not been defiled. Physical examination showed no injuries or blood stains on FC's genital organs; and all other tests were negative. The doctor concluded that there was no penetration. This explains why the Prosecution decided to prefer attempted defilement charges.

18. Put on his defence, the Appellant denied that he had committed the offence. He stated that he was being framed by the victim's mother because of a land dispute.

19. The Learned Trial Magistrate framed the issues for determination as three:

a. Whether the Complainant in the case was less than eighteen years old;

b. Whether there was an attempt to penetrate the Complainant's genitalia; and

c. Whether it was the Appellant who attempted to so penetrate the Complainant's genitalia.

20. The Learned Trial Magistrate answered all three questions in the affirmative and proceeded to enter a guilty verdict. In doing so, the Learned Trial Magistrate dismissed the defence narrative as incredible. She stated as follows:

> *The Accused in his defence stated that PW1 had just implicated him as they had a land dispute. However, he never called any witness to confirm that indeed he owned a parcel of land and that he actually had a dispute with PW1 in regard to the land. He also never produced any document of ownership of land as evidence in this Court.*
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> *The Accused's defence to me did not in any way shake the evidence of the Prosecution which to me remained water-tight and was overwhelming. I find the defence a mere afterthought. Immediately the offence took place, PW1 took the child to hospital and the matter was reported to Police the same day. If indeed the offence had not taken place, then PW1 would not have taken the steps she took. The defence by Accused Person does not cast any doubt to the evidence by the Prosecution*.

21. I am equally persuaded that all the ingredients for the offence of attempted defilement were proved to warrant the guilty verdict. First, there is no question that the victim in question was less than eighteen years old as required under section 9(1) of the Sexual Offences Act.

22. Second, the evidence of PW1 was straightforward and forthright: she testified that she found the Appellant seated with FC on his lap with this trousers lowered and unzipped. The Learned Trial Magistrate was correct in concluding that the only reasonable inference to draw from those circumstances was that the Appellant was attempting to defile FC. It would have been incumbent upon the Appellant to demonstrate that he was doing something else other than attempting to defile the child in those circumstances.

23. Third, the question of identity of the perpetrator was not seriously in doubt. The offence happened during the day and the Appellant was

known to the victim's mother – as he admitted in his defence.

24. There are many surrounding factors which point to the fact that the Prosecution was believable and that, in the same vein, the defence narrative was implausible and had no inherent possibility that it was true. First, the post-incident conduct of the Appellant is telling. Why did he take off if, indeed, he had not committed the offence? Second, it is noteworthy that the victim's mother raised alarm immediately and members of the public came to her aid. Among those who learnt of the incident was PW5 – who later helped arrest the Appellant.

25. Third, it is equally noteworthy and it significantly strengthens the identification evidence that the victim's mother immediately reported to the Kipsirchet APC Post – and, even more noteworthy, identified the Appellant as the perpetrator by name.

26. Fourth, the Appellant did not as much as discharge the burden of production of evidence that the victim's mother had a motive – namely existing land dispute – to frame him for an offence he did not commit. In order for the Prosecution to bear the burden of disproving this allegation or demonstrating that it does not raise reasonable doubt on the element of identity of the perpetrator, it was incumbent upon the Appellant to at least present sufficient evidence to trigger the Prosecution's burden of persuasion to disprove the defence. As it is, the Appellant's say-so does not satisfy this burden of production in this case. This is because, if true, the Appellant would have been able to provide more details about the alleged dispute – including details about the parcel of land allegedly under dispute; the name of the alleged mediators who had sat in an attempted resolution of the dispute; and so forth. As it is, all the Appellant alleged was that the victim's mother had a motive to frame him because of the alleged dispute. It was correct for the Learned Trial Magistrate to dismiss such a bland claim as so implausible as to have no inherent possibility that it could be true.

27. Fifth, it is imperative to point out that the Appellant asked no question at all when given an opportunity to cross-examine the victim's mother. This would have been, at the very least, an opportunity for him to ask questions about the alleged motive to frame him.

28. In the end, therefore, it is readily obvious that there was sufficient evidence to sustain a conviction on the main charge. Consequently, the appeal against conviction is without merit and it is hereby dismissed.

29. The same applies to the appeal against sentence. The Appellant was sentenced to imprisonment for twenty years. The minimum sentence for the offence is ten years imprisonment. The Learned Trial Magistrate explained, however, that she was imposing a sentence which is higher than the minimum because of the circumstances: the age of the victim i.e. two years.

30. The circumstances upon which a reviewing court will interfere with a sentence lawfully imposed by a trial Court are circumscribed. It will only do so if it is evident that the trial Court acted on wrong principles or overlooked some material factor or the sentence is illegal or is manifestly excessive or lenient as to amount to a miscarriage of justice. Lastly, a reviewing Court can interfere with sentence a Trial Court has *imposed a sentence that is demonstrably unfit in the given circumstances.* It is not enough that the reviewing Court would have imposed a different sentence if it was sentencing in the first place. S*ee: **Ogalo s / o Owora vs. R [1954] 24 EACA 70.***

31. In this case, it cannot be said that the Learned Trial Magistrate failed to address herself to all relevant factors and it cannot be said that she acted on any wrong principles. The Learned Magistrate explicitly stated that she was imposing a sentence higher than the minimum sentence allowable because of the very young age of the victim. This is a legitimate consideration. I am, therefore, unable to say that the sentence was in any way disproportionate or excessively harsh. It is also clear that the Learned Magistrate took into consideration all the factors before sentencing and did not consider any extraneous factors.

32. Consequently, the appeal against the sentence is equally dismissed.

33. The upshot is that the entire appeal is without merit and it is hereby dismissed. Both the conviction and the sentence are hereby affirmed.

34. Orders accordingly.

Delivered at Nakuru this 20th Day September, 2018.

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JOEL NGUGI

JUDGE