REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 41 OF 2015

(An Appeal arising out of the conviction and Sentence of HON. A. ALEGO (PM)

delivered on 9th March 2015 in Eldoret CM CR. Case No. 5341 of 2012)

EKUAM EREGAE.....APPELLANT

VERSUS

REPUBLIC.....REPUBLIC

JUDGMENT

The Appellant, Ekuam Eregae was charged with the offence of **attempted defilement** contrary to **Section 9(1)** as read with **Section 9(2)** of the **Sexual Offences Act.** The particulars of the offence were that on 16th December, 2012 at Uasin Gishu County, the Appellant intentionally and unlawfully attempted to cause his genital organ (penis) to penetrate the genital organ (vagina) of MJ (the complainant), a child aged twelve (12) years. In the alternative, the Appellant was charged with **committing an indecent act with a child** contrary to **Section 11(1)** of the **Sexual Offences Act.** The particulars of the offence were that on the same day and in the same place, the Appellant intentionally caused his genital organ (penis) to come into contact with the genital organ (vagina) of the complainant. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, he was convicted as charged of the main count. He was sentenced to serve nine (9) years imprisonment. He was aggrieved by his conviction and sentence. He filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he was convicted on the basis of irrelevant facts and prosecution evidence that did not establish his guilt to the required standard of proof. He took issue with the fact that the trial court convicted him yet the age of the complainant was not established to the required standard. In particular, he stated that he was not properly identified by the complainant to justify the trial court to convict him of the charge. He was of the view that the trial court relied on circumstantial evidence to convict him yet there existed other circumstances that militated against the trial court reaching the verdict that he was guilty as charged. He was aggrieved that he had been convicted on the basis of a defective charge that did not meet the required standard. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed upon him.

During the hearing of the appeal, the Appellant presented to court written submission in support of his appeal. In summary, it was the Appellant's appeal that the charge sheet that formed the basis of his conviction was defective. He stated that the charge did not set out the penal section and therefore he could not have been sentenced to serve the custodial sentence. The Appellant further stated that the evidence that was adduced by the complainant did not meet the threshold of establishing the charge to the required standard of proof. In particular, he submitted that the circumstances set out in the testimony of the complainant did not establish that he had made an attempt to defile the complainant. He pointed out that a crucial witness, the grandmother of the complainant, was not called to testify in the case. This rendered the complainant's testimony uncorroborated and incredible. The Appellant explained that the evidence adduced by the prosecution witnesses was full of contradictions, discrepancies, and was doubtful. He questioned the evidence adduced in regard to the age of the complainant which in his view did not tally. He further took issue with the complainant's narration of events that allegedly took place on the material day. In his view, taken in totality, the evidence is not worth of credit. He was finally aggrieved that the trial court failed to reach the finding that the police failed to properly investigate the case and therefore brought a case before court which was unsupported by credible evidence. He took issue with the decision of the trial court which, in his view, was reached before his defence was properly evaluated. In the premises therefore, the Appellant urged the court to allow his appeal.

Ms. Oduor for the State opposed the appeal. She submitted that the prosecution had adduced sufficient culpatory evidence which established the Appellant's guilt on the charge of **attempted defilement** to the required standard of proof beyond any reasonable doubt. The Appellant

was properly identified by the complainant during the sexual assault. He was known to the complainant prior to the sexual assault. The evidence of the complainant regarding the circumstances in which the attempt was made was corroborated in all material respects. She urged the Appellant's appeal be disallowed.

This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced so as to arrive at its own independent determination whether or not to uphold the conviction of the Appellant. In reaching its verdict, this court is required to always bear in mind that it neither saw nor heard the witnesses as they testified and therefore give due allowance in that regard. (See **Okeno –vs- Republic [1972] EA 32).** In the present appeal, the issue for determination by this court is whether the prosecution adduced evidence that established the Appellant's guilt on the charge of **attempted defilement** contrary to **Section 9(1)** as read with **Section 9(2)** of the **Sexual Offences Act** to the required standard of proof beyond any reasonable doubt.

This court has carefully re-evaluated the evidence adduced before the trial magistrate's court. It has also benefitted from the submission made by the parties to this appeal. The Appellant was charged with **attempted defilement**. **Attempted defilement** is an inchoate offence. **Black's Law Dictionary, 8th Edition** defines **"inchoate"** thus:

> **"Partially completed or imperfectly formed: Just begun Cf choate – inchoateness. "The word "inchoate" not much used in ordinary discourse, means "just begun", "undeveloped". The common law has given birth to three general offences which are usually termed "inchoate" or "preliminary" crimes – attempt, conspiracy, and incitement. A principle feature of these crimes is that they are committed even though the substantive offence is not successfully consummated. An attempt fails, a conspiracy comes to nothing, words of incitement are ignored – in all these instances, they may be liability for the inchoate crime." Andrew Ashworth, Principles of Criminal Law 395 (1991)."**

Section 388 of the **Penal Code** defines **"attempt"** as follows:

> **"(1) When a person, intending to commit an offence, begins to put his intention in to execution by means adapted to its fulfillment, and manifests his intentions by some overt act, but does not fulfill his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.**
>
> **(2) It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfillment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention."**

In the present appeal, the prosecution was required to establish that the Appellant put in motion steps towards realizing the objective that he had set to achieve *i.e.* to have unlawfully sexual intercourse with the complainant.

What was the evidence that the prosecution put forth? The complainant in this case testified as PW1. She told the court that she was twelve (12) years at the time of the offence. She recalled that on 16th December 2012, she was at her home with her friend PW3 SC. PW3 was the agemate of the complainant. They decided to visit her uncle's place to get some *Kei-apple* plants. Her uncle is known by the name K. When they reached the uncle's homestead, they did not find him. They found the Appellant sleeping in the house. The Appellant was known to the complainant. In fact, during her testimony, the complainant referred to the Appellant by the name **'William'**. She told the court that the Appellant called her into the house, then held her hand and pulled her to the ground. He removed his trousers, before removing her dress and forcefully attempting to remove her panties. In the process, he tore her panties.

The complainant screamed. PW3 came to her rescue. PW3 pelted the Appellant using maize cobs. The Appellant let go of the complainant. The complainant managed to make good her escape and reported the incident to her grandmother. Later on the same day, she informed her mother PW4, NK who took her to Moiben District Hospital and later made a report to Moiben Police Station. The police assisted by PW5 Stephen Kimutai Kimaiyo, the complainant's uncle, arrested the Appellant and took him to the police station. PW5 took the complainant to Moi Teaching Referral Hospital where the complainant was examined by Dr. Kibet. The P3 form duly filled by Dr. Kibet was produced in court on her behalf by PW1 Dr. Joseph Imbenzi. The examination showed nothing remarkable. The complainant's torn panties and bikers were produced into evidence. The case was investigated by PW6 PC Samuel Gathutha who formed an opinion that a case had been made for the Appellant to be charged with the offence for which he was convicted.

When the Appellant was put on his defence, he denied any knowledge of the incident as narrated by the complainant. He denied ever meeting with the complainant and her friend. In essence, the Appellant defence was a total denial of the alleged events that took place on the material day of the offence.

As stated earlier in this judgment, for the prosecution to establish the charge of **attempted defilement**, it is required to establish that the Appellant put in motion steps, which if completed, would have resulted in the defilement of the complainant. The prosecution is required to establish that the Appellant did an overt act to actualize the intention to unlawfully have sexual intercourse with the complainant. In the present appeal, the complainant testified that the Appellant held her hand, pulled her to the ground, removed his trousers and then removed her dress before attempting to remove her panties and bikers which resulted in the two pieces of clothes being torn. The two pieces of clothes were produced by the prosecution as exhibits.

According to PW3, the complainant's friend, when the complainant raised alarm, she entered the house and found the Appellant struggling with the complainant. She pelted him with maize cobs. This forced the Appellant to disengage thus enabling the complainant to make good her escape. The identity of the Appellant was not in doubt. The Appellant was known to both the complainant and PW3 prior to the incident. The Appellant denied the claim that he made attempt to defile the complainant.

On re-evaluation of the evidence, it was clear to this court that the prosecution did establish, to the required standard of proof beyond any

reasonable doubt, that the Appellant indeed attempted to defile the complainant. There is no other conclusion that can be gleaned from the Appellant's action other than the fact that he intended to actualize the penetration of the complainant but was prevented from doing so by the joint action of the complainant and PW3. There is no other conclusion that this court can reach other than that the Appellant intended to penetrate the complainant by his action of removing his trousers, undressing the complainant and attempting to remove her bikers and panties. It was clear that the Appellant's intention was to access the complainant's private parts so that he could penetrate her. The Appellant had no other interest in tearing the panties of the complainant other than to penetrate her.

In the premises therefore, the Appellant's denial that he attempted to unlawfully have sexual intercourse with the complainant was displaced by the strong culpatory evidence that was adduced by the prosecution witnesses. Although both the complainant and PW3 were children, the trial court, upon conducting *voire dire* reached the conclusion that the two were sufficiently intelligent to give evidence on oath. Further, this court applies the **Proviso** of **Section 124** of the **Evidence Act** which mandates the court to convict an accused person in a sexual offence if it is convinced that the complainant was telling the truth. In this case, this court is persuaded to the required standard of proof that the complainant and PW3 were telling the truth when they testified that it was the Appellant who attempted to defile the complainant.

As regard the Appellant's complaint that he was convicted on the basis of a defective charge, upon perusal of the charge, this court is not persuaded that the charge is defective. The charge sets out the **Section** of the **Sexual Offences Act** which the Appellant understood. It also sets out the particulars of the charge that the Appellant was supposed to respond to. The Appellant had no difficulty in cross-examining the witnesses who were brought forth by the prosecution to establish the charge against him. This court is of the considered view that nothing turns on that ground of appeal.

The upshot of the above reasons is that the Appellant's appeal against conviction lacks merit and is hereby dismissed. The sentence that was meted on the Appellant is legal. This court shall not interfere with it. Although there is some doubt regarding the age of the complainant, the issue of the age of the complainant would have been material if the Appellant had been charged with the more serious offence of **defilement**. **Section 9(2)** of the **Sexual Offences Act** does not provide age as a factor when it comes to punishment. The punishment set out is one that is irrespective of the age of the child. The Appellant's appeal against sentence is similarly dismissed. The Appellant's conviction and sentence by the trial court is hereby upheld. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 26TH DAY OF SEPTEMBER 2018

L. KIMARU

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 4TH DAY OF OCTOBER 2018

HELLEN OMONDI

JUDGE