REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 152 OF 2013

PHILIP KITUMBI MWENDWA……APPELLANT

VERSUS

REPUBLIC…….RESPONDENT

(Appeal against the conviction and sentence by Hon. D.G. Karani (PM) delivered on 11th July, 2011 in Kithimani Principal Magistrates Court S.O.A. No. 27 of 2012)

JUDGEMENT

1. The Appellant faced the offence of attempted defilement contrary to section 9(1) (2) of the Sexual Offences Act No. 3 of 2006. The particulars were that the Appellant on 11th September, 2012 at Masinga District Machakos County intentionally attempted to cause his penis to penetrate the vagina of M.M. a child aged 11 years. He also faced an alternative charge of committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006. The particulars being that the Appellant on the 11th September, 2012 at Masinga District within Machakos County, intentionally touched the vagina of M.M. a child aged 11 years with his penis.

2. The Appellant entered a plea of not guilty and was put to trial. M.M. (PW1) recounted that she had on 11th September, 2012 gone to the river at around 5.00 pm when he found the Appellant with Penina. Penina fetched water and M.M. was left with the Appellant. He proposed to M.M. that they become friends and offered her KShs. 500/- to pay for her education tour. She turned down his advances. He tried to trick her to join him to go untether his cow but she refused. The Appellant held her and led her to a tree a distance from the stream. He removed her underwear and unzipped his trouser. He then inserted his penis into her vagina. M.M. was standing while the Appellant held her by her back and buttocks as he penetrated her. She was in pain and cried. The Appellant inquired why she was crying. He attempted to penetrate her a second time but she cried out loudly. She bled from her vagina and the Appellant released her. She then took her container and went home. There she found her grandmother who inquired why she took long at the river and informed her about what happened. Her grandmother accompanied her to Veronicah's home where the Appellant was employed. The Appellant however denied that he defiled M.M. She was taken to a hospital at Kivaa where she was examined. On 12th September, 2012, M.M. was taken to Matuu General Hospital where she was further examined. Penina Mueni (PW2) stated that she was at the river with M.M. at around 5.00 pm when the Appellant found them there. He asked M.M. her name and she told him. PW2 requested the Appellant to assist M.M. fill her container but the Appellant indicated that M.M. was not in a hurry. PW2 then left the two at the river.

3. A M M (PW3) who had sent M.M. to the river inquired from her why she had taken too long and she informed her that the Appellant detained her and defiled her. She examined her private parts and saw blood. She stated that her pants too had blood stains. They proceeded to a neighbour's home where the Appellant was an employee. He was interrogated but denied having defiled M.M. PW3 then took M.M. for medical examination. The Appellant was arrested by the village elder. PW3 stated that M.M. was aged 11 years of age and produced a birth notification and infant certificate of dedication to that effect as P. Exhibit 5 and 6.

4. Joseph Kithome (PW4) who is a village elder recounted that he received a call from someone by the name Stephen on 18th September, 2012 who informed him to proceed to Muthiani's home. There he found M.M., PW2 and PW3. He was then informed that the Appellant had defiled M.M. He ordered that he be tied up. That M.M.'s private parts were examined and it was confirmed that she had been defiled. PW4 escorted the Appellant to Kivaa administration mobile camp and M.M. was escorted to hospital.

5. Mule Khalif (PW5) a Clinical Officer at Matuu District Hospital examined M.M. and found that she had not been penetrated. That she had a mild tear between the labia majora and labia minora and had tenderness on her genitalia. He stated that M.M. had some discharge but no active bleeding. That a pregnancy test was negative and no spermatozoa was seen. He made an inference that there was attempted penetration using force. He produced a p3 form as P. Exhibit 4, Age assessment form as P. Exhibit 1 and Laboratory request as P. Exhibit 7.

6. Corporal Mohammed Abdi Hallim (PW6) of Kivaa administration police post received the Appellant and took him to hospital along with M.M. He stated that M.M.'s pair of shorts which had blood stains was brought to the police post and he handed it over to the police.

7. Corporal David Sang (PW 7) of Kamburu Police Post received a call from Chief Inspector Adenyo on 11th September, 2012 at around

6.00 pm informing him that a report had been made from Kivaa that a suspect of attempted defilement had been arrested. He proceeded there and took custody of the Appellant. They were given a bloodstained pant (P. Exhibit 8) said to be M.M.'s. It was handed over to Corporal Pamela and the Appellant was escorted to Matuu District Hospital for medical examination. He stated that Corporal Pamela took over the investigations.

8. The Appellant was found to have a prima facie case to answer and was put on his defence. The Appellant stated that he used to work at Kivaa area and had been employed as a milkman when the previous employee was sacked. That she was not happy that he had taken up her position. He had only worked for four days when it was said that he defiled M.M. He denied that he knew anything about the defilement and that M.M. is known to him. He stated that the charges were framed against him.

9. The Appellant was convicted of the second count and sentenced to ten (10) years imprisonment. Aggrieved by the said conviction and sentence, the Appellant has filed this appeal. His grounds of appeal were more of a mitigation. His submissions were that M.M. and PW2 who were aged 11 years were not subjected to voire dire examination and cited **J.G.K. v. Republic [2015] eKLR** to illustrate the effect of such failure. He contended that PW4's evidence did corroborate M.M.'s evidence that she was not penetrated. The Appellant took issue with the fact that PW8 who was termed as a key witness was not called to testify. He however in conclusion stated that he was a first-time offender and remorseful. He urged this court to treat the entire period he has been in custody as punishment already and asked that the sentence period be reviewed.

10. In response thereto, the Respondent argued that sentencing is an exercise of judicial discretion and must be exercised judiciously and not capriciously. That this court would be entitled to interfere only if it has been demonstrated that the sentence is not legal or is harsh and excessive as to amount to miscarriage of justice or that the court acted upon wrong principles. The Respondent in this regard cited **Shadrack Kipchoge Kogo v. Republic Eldoret Criminal Appeal No. 253 of 2003**. It was argued that while exercising its discretion in sentencing, the court should bear in mind the principles of proportionality, deterrence and rehabilitation and as part of the proportionality analysis, mitigating and aggravating factors should also be considered. That section 11 (1) of the Sexual Offences Act provide for a minimum sentence that a person should be jailed when convicted with the offence under this Act and that takes away the court's discretion to sentence the Appellant to a lesser sentence than the one prescribed.

I have given due consideration to this appeal bearing in mind this court's duty as a first appellate court. Although the Appellant argued that the prosecution failed to called a key witness, it must be noted that the prosecution is under no obligation to call a certain number of witnesses but rather witnesses to give substantive evidence. The said failure cannot be faulted as long as the prosecutions' case was proved beyond reasonable doubt by the witnesses availed. See **Keter v. Republic [2007] 1 EA 135** where the court held thus:

> ***"The prosecution is not obliged to call a superfluity of witnesses but only such witnesses who are sufficient to establish the charge beyond any reasonable doubt."***

On failure to conduct voire dire examination, I am guided by the Court of Appeal decision in **Samuel Warui Karimi v. Republic [2016] eKLR** thus:

> "[14] In the leading case of; ***Kibangeny Arap Korir v Republic, [1959] EA 92***; the Court of Appeal for Eastern Africa while dealing with a determination of the issue, held that tender years means a child under the age of 14 years. In a more recent decision of the Court of Appeal sitting in Malindi in the case of; ***M K v Republic [2015] eKLR*;** the court termed as *"unnecessary" voire dire* examination conducted on a child aged 15 years by the trial court. It was held that *voire dire* examination is done where a witness is a child of tender years. This postulation of the law on *voire dire* is not reflected across the board by all courts as our research has led us to numerous decisions of the High Court where the interpretation of *"**a child of tender years''*** is different. For example, in the case of; **J G K v Republic [2015] e KLR**; the trial court had received evidence of a girl aged 17 years without conducting *voire dire* examination. On Appeal, the High Court at Nyeri (differently constituted) disagreed with the trial magistrate and held:-
>
> > ***"So long as the witness was below 18 years as in the present case, she was a child and a voire dire examination was necessary"."***

It follows therefore that the trial magistrate erred in failing to conduct voire dire examination. I however note that in this appeal, the Appellant's ground is more of a mitigation or rather an appeal on the sentence and I am of the view that he was not prejudiced by the failure to conduct voire dire. The Appellant here admits to having committed the offence.

11. Section 11(1) of the S.O.A. provides that any person who commits an indecent act with a child and is guilty of committing an indecent act with a child is liable upon conviction to imprisonment for a term of not less than ten (10) years. The Appellant was sentenced to serve 10 years imprisonment from the 11th July 2013. I find the sentence imposed by the trial court was the minimum possible in law and I am unable to interfere with the same.

12. In the result it is the finding of this court that the Appellant's Appeal lacks merit. The same is dismissed. The conviction and sentence by the trial court is hereby upheld.

Dated, signed and delivered in Machakos this 15th day of October, 2018.

D.K.KEMEI

JUDGE