



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO. 164 OF 2016**

**GIDEON BETT KIPLANGAT.....APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

**(Being an appeal from the Judgment of Honourable R. Amwayi Resident Magistrate, delivered on 18<sup>th</sup> October, 2016 in Molo Chief Magistrate's Court Criminal Case No. 3666 of 2015)**

**JUDGMENT**

1. Gideon Bett Kiplangat, the Appellant, with another were charged with the Offence of attempted defilement contrary to Section 9(1)(2) of the Sexual Offences Act. Particulars of the offence being that:-

**“On the 24<sup>th</sup> day of November, 2015 at [particulates withheld] in Kuresoi North sub-county jointly attempted to cause your penis to penetrate the vagina of G C a girl aged 9 years”**

2. In the alternative they faced a charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. Particulars being that:

**“On the 24<sup>th</sup> day of November, 2015 at [particulars withheld] in Kuresoi North sub-county did intentionally and unlawfully cause their penis to come into contact with the vagina of G C a girl aged 9 years”**

3. Facts of the case were that on the 24<sup>th</sup> day of November, 2015, PW1 G C, the complainant had gone to fetch firewood with C when they encountered the Appellant who told her that her mother was calling her. They disregarded him and he allegedly showed them a panga. Consequently the Appellant chased her while Geoffrey, the Appellant's co-accused who was acquitted chased after C. As he pursued her, the complainant tripped and fell down. He caught up with her, pulled up her skirt unzipped his pair of trousers and tore her pant and attempted to penetrate her genitalia, as act that made her scream. A herdsman answered her cry for help hence interrupting the Appellant who was lying on top of her. He fled without completing his intention. People who gathered rang PW3 No. xxxxx APC Robert Otiento Oketch. He went to the scene of the incident immediately and found the complainant and another child. He recovered a jacket, a shoe and a panty that the complainant identified as hers. Subsequently the two (2) suspects were arrested. He took them to Sirikwa Police Post where they were re-arrested by PW4 No. xxxxx Senior Sergeant Dickson Otieno Aduda who investigated the case and caused them to be charged.

4. When put on his defence the Appellant stated that on the 24<sup>th</sup> November, 2015 he woke up at 6.00am and went to look for his colleague. While on his way he heard a whistle being blown and on turning back he saw a person stopping him. He complied only to be arrested. He was taken to the Administration Police Camp and placed in cells. Thereafter he was shown a piece of wood that belonged to him and asked to give Ksh 7,000/= when he declined he was taken to the police station and subsequently charged in court.

5. The trial court considered evidence adduced and found that it was materially logical and consistent. The learned trial magistrate formed the opinion that from the demeanour of the complainant she was credible and truthful. She dismissed and discredited evidence tendered by the Appellant, convicted and sentenced him to fifteen (15) years imprisonment.

6. Aggrieved by the conviction and sentence the Appellant appeals on grounds that: The charge was defective; evidence adduced was conflicting and inconsistent, the learned trial magistrate failed to invoke the provisions of Section 150 of the Criminal Procedure Code (CPC) by calling crucial witnesses, the onus of proof was shifted to the defence and the case was not proved beyond any reasonable doubt.

7. The Appellant canvassed the appeal by way of written submissions. He stated that the charge sheet was defective pursuant to the

provisions of Section 214 of the Criminal Procedure Code (CPC) as the offence was not disclosed and evidence adduced varied from the particulars of the offence. He cited the case of **Paul Mwangi Murunga Vs Republic (2006) eKLR** where it was stated that two or three men could not jointly rape a woman. That each one of them should have been charged separately.

8. Regarding the age of the complainant he submitted that it was not proved as the prosecution closed the case before the age assessment report sought was produced. Citing the case of **Peter Maina Njeri Vs Republic (2016) eKLR** where it was stated that the court could not presume age of the complainant, he argued that proof of age should have been conclusive.

9. On the state of her genital organs the evidence adduced by the complainant was that there was actual penetration of her genitalia but this was contradicted by the doctor who examined her who found her genitalia in a normal state without any lacerations, and the hymen was intact.

10. That there was variance in the items recovered by PW3 and those provided by PW4. He faulted the prosecution by failing to call C as a witness and the Good Samaritan who rescued the complainant. To establish the fact he relied upon the case of **Bukenya and Others Vs Uganda (1972) E.A 549 at Page 550**

11. He faulted the trial magistrate for accepting the prosecution's case and casting on the defence the onus of rebutting the prosecution's case.

12. The State through the learned Prosecuting Counsel, Mr. Omutelema opposed the appeal against both the conviction and sentence. He urged that evidence adduced proved the offence of attempted defilement having been committed in broad daylight and the appellant having been known to the complainant. That medical evidence does not arise since it was a case of attempted defilement. That the Appellants intention of wanting to defile the complainant was thwarted when her friends screamed and he fled. That the age of the complainant was proved to be nine (9) years old, therefore the sentence imposed pursuant to the provisions of Section 9(2) of the Sexual Offence Act was not manifestly harsh.

13. This being the first appellate court, I am expected to re-analyze and re-evaluate a fresh all the evidence adduced before the lower court and draw my own conclusions bearing in mind that I neither saw nor heard witnesses who testified (**see Okeno Vs Republic) E.A 32**).

14. I have considered rival submissions of the appellant and State/Respondent.

15. The case of **Yosefa & Another Vs Uganda (1960) E.A 236** the Court of Appeal of East Africa Considered what a defective charge is and stated thus:

**“The charge is defective in that it did not allege an essential ingredient of the offence”**

16. The case of **Sigilani Vs Republic (2004) 2KLR 480**, delved further into the issue of a defective charge where it was stated thus;

**“The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should disclose and state in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence”.**

17. The Appellant in arguing that the charge was defective cited the case of **Paul Mwangi Murunga Vs Republic (2006) eKLR** where the Court of Appeal confronted with a matter where two (2) individuals were alleged to have ‘jointly’ raped a woman found that the charge was fatally defective, the court expressed itself thus:

**“This court has repeatedly said that two (2) or three (3) men or whatever may be their number cannot jointly at the same time rape one woman. Each one of the men commits the act of rape individually and is followed by the next man. We are unable to appreciate how two or three men can at the same time ‘jointly’ enter or try to enter the genital organ. The act is committed by each one of them alone and if there be two, three or four of them each must be charged on a separate count of rape”.**

18. The Court of Appeal has however since departed from that decision as it is no longer a sound decision. The court did consider whether the charge as framed was prejudicial to the appellant. What matters is whether the appellant did understand the allegations against him. This was enunciated in **Isaac Nyoro Kinuta & Another Vs Republic (2014) eKLR** the Court of Appeal stated as follows:

**“In this case, we have no doubt in our minds that the appellant knew that it was practically impossible for him and others to have ‘jointly’ defiled the complainant. He therefore understood the charge against him to have been that on the material date, while together with others, engaged in an illegal enterprise, they successively defiled the complainant. This is confirmed by the fact that in the trial, the appellant extensively cross examined prosecution witness and defended himself. In the circumstances, we find that the defects in the charge were minor and did not prejudice the appellant. They did not occasion any miscarriage of justice or violate the appellants. Constitutional right to a fair trial”.**

19. In the instant case the allegation against both the appellant and his co-accused who was acquitted was that each one of them attempted to cause his penis to penetrate the vagina of the complainant. There was indeed a minor defect but the appellant understood what he was being accused of. He participated in the trial, cross examined witnesses who were availed by the prosecution and defended himself. In the premises the appellant was not prejudiced. Therefore the defect was not fatal.

20. PW1 the complainant was a child of tender years. She told the court that she was ten (10) years old. She was subjected to *voire dire* examination. The questions and answers recorded that form part of the record clearly show that she was a child who understood what it entailed to state the truth and the consequences of lying. The learned trial magistrate who examined her opined that she understood the nature of an oath and caused her to be sworn.

21. In her testimony the complainant stated that the Appellant was well known to her. This fact was not disputed by the Appellant. She explained how the appellant caught up with her when she tripped and fell down. He tore her pant that was adduced in evidence. He lay on her and attempted to insert his genital organ into her genitalia but his intention to penetrate her was thwarted following an interruption by a herdsman. At that point in time the Appellant fled.

22. An attempt is defined by the Cambridge dictionary as ‘**an effort to achieve or complete something**’ Section 388(1) of the Penal Code defines attempt as follows

**“When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfillment, and manifests his intention 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”.**

23. The evidence adduced by the complainant demonstrated what the Appellant did. He acted by making a substantial but unsuccessful effort to commit the offence of defilement. He was about to insert his male genitalia into her female genitalia but failed to fulfil his intention having been prevented by the person who responded to the complainant’s screams. This was an attempt to defile.

24. It is contended that crucial witnesses, namely the child who was in company of the complainant and the individual who went to her aid and interrupted the Appellant were not availed to corroborate the allegations of the complainant. Section 143 of the Evidence Act provides thus:

**“No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact”.**

25. In the case of **Bukenya & Others Vs Uganda (1972) E.A 549** it was sated thus

**(i) The prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent.**

**(ii) The court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case.**

**(iii) Where the evidence called barely is adequate the court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution.”**

26. On adverse inference can only be drawn if the evidence adduced is not sufficient to support the charge. This being a Sexual Offence Section 124 of the Evidence Act comes to play. It provides thus:

**“Where a criminal case involves a sexual offence the only evidence is that the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reason to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth”**

27. The learned trial magistrate noted that he observed the demeanor of the complainant as she testified and formed the opinion that she was credible and truthful. She considered the defence put up by the Appellant and found that it was a mere denial. I have reconsidered what the appellant stated in his defence. The trial magistrate did not misdirect herself at all for it was a mere denial. The Appellant was known to the complainant and her mother. He did not insinuate that they could have harbored some ill motive against him so as to come up with false accusations.

28. Regarding the age of the complainant her mother confirmed that she was a child of tender age and the trial court having observed her used common sense and found that she was below the age of eighteen (18) years therefore a minor. From the foregoing the conviction of the Appellant was upon sound basis and is affirmed.

29. Regarding the sentence, Section 9(2) of the Sexual Offences Act provides that

**“A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment of a term of not less than ten years”**

30. In the case of **Shadrack Kipchoge Kogo Vs Republic Criminal Appeal No. 253 of 2003** the Court of Appeal stated that;

**“ Sentence is essentially an exercise of the trial court and for this court to interfere with it must be shown that in passing the sentence, the court took into account an irreverent factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred”.**

31. In sentencing the learned trial magistrate was of the view that offences of defilement were rampant in the jurisdiction of the court which called for a sentence that would deter other likeminded people in the society. The question to be posed is whether this meets ends of justice. The Appellant was a first offender, no antecedents were given in his regard. It was not demonstrated that he was incapable of reforming. In the premises, I allow the appeal on sentence by setting aside the term imposed and substitute it with the minimum prescribed sentence of ten (10) years imprisonment.

32. It is so ordered.

**Dated and delivered at Nakuru this 8<sup>th</sup> day of November, 2018**

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**L. Mutende**

**Judge**