REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 46 OF 2015

VINCENT KIPROTICH KOSGEI..APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(Being an appeal from the Judgment of Honourable H. M. Nyaga Chief Magistrate, delivered on 6th February, 2015 in Molo Chief Magistrate's Court Criminal Case No. 772 of 2014)

JUDGMENT

1. Vincent Kiprotich Kosgei, the Appellant was charged with defilement contrary to Section 8(1)(2) of the Sexual Offence Act. Particulars of the Offence being that:-

> ***"On the 24th day of March, 2014 in Kuresoi District of the Nakuru County, intentionally caused his penis to penetrate the vagina of J C a child aged five (5) years"***

2. In the Alternative he was charged with the offence of attempted defilement contrary to Section 9 of the Act. The particulars of the Offence being

> ***"On the 24th day of March 2014 in Nakuru County in Kuresoi District, intentionally touched the vagina of J C a child aged five (5) years with his penis".***

3. He was tried, convicted and sentenced to seventeen (17) years imprisonment on the alternative charge.

4. Aggrieved by the conviction and sentence, he now appeals on grounds that the learned trial magistrate erred in both law and fact: By convicting and imposing a harsh and excessive sentence; allegations raised were not proved and the defence he put up was dismissed regardless of the fact that it was truthful and cogent.

5. The State/Respondent on its part filed a Notice for enhancement of sentence pursuant to Section 354(2)(a)(ii) and (3) (b) of the Criminal Procedure code seeking extension of the sentence passed to life imprisonment. The Appellant was granted time to reflect on it and he opted to proceed with the appeal against both the conviction and sentence.

6. Facts before the trial court were that on the 24.3.2014 PW2, G K the mother of the complainant left her at home under the care of neighbours. She returned home at 6.00pm only to be informed that the child had been violated sexually. She examined her and noticed some discharge. The child mentioned the Appellant as her assailant. The matter was reported to the police. The child was examined at the Kiptagich Model Health Centre and a P3 form was filed. Investigations carried out culminated into the arrest of the appellant who was subsequently charged.

7. When put on his defence the Appellant denied the charge. He related how he was arrested without being told the reason why.

8. The Appellant canvassed the appeal by way of written submissions. He urged that it was not established if injuries that were noted at the pubic region were caused by him. That the trial magistrate reached an erroneous conclusion by finding him guilty of attempted defilement contrary to Section 9 of the Sexual Offences Act. That the child did not express herself as to what happened and only stated that **'Kimwachet'** did **'bad things'** to her and pointed at her vagina and there was no seminal fluids seen.

9. Further, he submitted that no document was availed to prove the age of the child. That the investigating officer did not testify which was fatal to the prosecution's case. He concluded by arguing that the minimum sentence provided for the offence of attempted defilement was ten (10) years which the trial magistrate should have imposed.

10. In response, the State through learned Prosecution Counsel Mr. Kemo opposed the Appeal. He urged that evidence adduced indicated that the child was 4½ years old at the time of the offence. That the mother of the child examined her and observed her private parts were swollen. The child identified the Appellant as her assailant and although her hymen was intact there was penetration. He concluded by urging the court to consider enhancing the sentence meted out as it did not reflect the seriousness of the offence that was committed.

11. This being the first appellate court I am duty bound to re-evaluate and re-consider all evidence adduced at the trial bearing in mind that I had no opportunity of either seeing or hearing witnesses who testified. I must therefore come to my conclusions with that in mind. **(see Okeno Vs Republic (1973) E. A 32).**

12. The main charge the appellant faced was of defilement. In the case of **Charles Wamukoya Karani Vs Republic, Criminal Appeal No. 72 of 2013** it was stated that:

> ***"The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant".***

13. In her testimony the complainant on being taken through *voire dire* examination stated that she did not know her age. PW2 G K her mother however told the court that she was born in October, 2009. Due to inadvertence on the part of the prosecution, no document like a birth notification, baptism card, and birth certificate was adduced in evidence to prove the age of the complainant.

14. Section 2 of the Sexual Offences Act defines **'age'** as meaning apparent age in cases where actual age is not known. It has been held that the age of a victim can be determined by medical evidence or other cogent evidence. Although medical evidence is paramount, the age can also be proved by way of victim's parent, guardian or by observation and common sense. **(see Francis Omuroni Vs Uganda, Court of Appeal Criminal Appeal No. 2 of 2000).**

15. PW4 Cynthia Chepchir the Nursing Officer who examined the complainant opined that she was five (5) years old, the learned trial magistrate had the opportunity to observing the complainant and he was satisfied that she was of an apparent age of between 4-5 years. In the case of **Tumaini Maasai Mwanya Vs Republic, Mombasa Criminal Appeal No. 356 of 2010 (unreported)** the Court of Appeal stated as follows

> ***"Proof of age for purpose of establishing the offence of defilement which is committed when the victim is under the age of 18 years should not be confused with proof of age for purpose of appropriate punishment for the offence in respect of victims of defilement of various statutory categories of age".***

16. From the foregoing I find that the prosecution did prove that the complainant was a child under 18 years and of an apparent age of 4-5 years.

17. Regarding the second ingredient of penetration, Section 2 of the Act defines penetration as:

> ***"The partial or complete insertion of the genital organs of a person into the genital organs of another person".***

18. The child was subjected to medical examination a day after the incident. On examination there was tenderness on the supra pubic region. There was whitish discharge and feacal matter on her inner clothes. PW4 opined that there was no actual penetration. The hymen was intact. In her finding the learned magistrate found that there was no clear evidence if there was an act of penetration therefore found that what did happen was an attempted defilement.

19. There was no eye witness to what transpired. In her testimony the complainant states that:

> ***"…. Kimnachet did bad things to me here."***

It is recorded that as she stated she touched her pubic region then went quiet.

20. PW2 stated that the Appellant lived on the same plot and block with them. They occupied house No. 2 while the Appellant occupied House No. 5. The complainant was familiar with him. The name they knew was Kimnachet. PW3 J B their neighbour stated that the complainant a minor mentioned the Appellant as her assailant. The court did believe the child as provided by the proviso to Section 124 of the Evidence Act which 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"***

21. It reached a finding that the Appellant was the perpetrator of the act of attempted defilement. In his defence the appellant denied the allegations.

22. The Appellant faulted the learned magistrate for not reaching a finding that failure to avail the investigation officer to testify whose evidence was crucial was fatal.

23. In the case of Alfred Bumbo and Others Vs Uganda. Criminal Appeal No. 28 of 1994, the Supreme Court stated as follows:

"While it is desirable that evidence of a police investigating officer and of arrest of an accused person by the police, should always be given, where necessary, we think that where other evidence is available and proves the prosecution case to the required standard, the absence of such evidence would not, as a rule, be fatal to the conviction of the accused. All must depend on the circumstances of each case whether police evidence is essential, in addition to prove the charge".

24. This was a matter where on the 29th day of September, 2014 the court granted the Prosecution a last adjournment. After it was informed that the investigating officer had been transferred to Machakos. When the matter came up for hearing on the 30th day of October, 2014, the Prosecution was granted another chance of availing remaining witnesses. On the next hearing date, the 21st day of November, 2014 the Prosecuting Officer notified the court that the Investigating Officer had not turned up and proceeded to close the case. What was not indicated was whether he had been bonded to appear in court since he was no longer within the jurisdiction of the court. it can therefore not be stated that he deliberately refused to appear in court. In the case of **Bukenya Vs Uganda (1971) E.A 549 at Page 550** the Court of Appeal stated that:-

"…. While the Director is not required to call a superfluity of witnesses, if evidence which is barely adequate and it appears that there were not called, the court is entitled, under the general law of evidence, to draw an inference that evidence of those witnesses, if called, would have tended to be adverse to the prosecution's case".

25. Considering circumstances that prevailed, it cannot be said that he failed to testify because his evidence could have been adverse to the prosecution's case. Therefore his non-appearance and failure to testify was not fatal to the prosecution's case.

26. The only evidence, as to the act against the Appellant was of a child aged 4-5 years. As provided by the law prior to the child testifying the trial court conducted a *voire dire* examination and opined that she appeared intelligent enough to tell the truth. The learned magistrate directed her to testify without being sworn or affirmed. The questions put to her and her answers were recorded verbatim as follows:

"Q – What is your name?

A – J C

Q – How old are you?

A – I do not know

Q – Do you go to school?

A – Yes, I am in Nursery School

Q- Do you go to Church?

A – Yes, with my mum.

Q - Will you tell us the truth?

A – Yes"

27. The court did not establish whether the child understood the importance of telling the truth and the consequences in case she was not truthful. When called upon to testify she only stated that Kimwachet did bad things to her and touched her pubic region. Having remained silent she was stood down. The child did not identify the said Kimwachet. In her testimony PW2 stated that the Appellant was called Kimwachet at home.

28. In his judgment, the learned trial magistrate stated thus:

"I have examined this piece of evidence of the complainant and I find it credible. It is unlikely that the girl could implicate someone else. She knew Kimwachet, who is a neighbour, I find that J has identified the accused as the Kimwachet who did 'bad things' to her. In reference to bad things while touching her pubic region, the girl was definitely referring to an act of defilement".

29. The Appellant was stated to have been the complainant's neighbour. In his statement of defence he gave his three (3) names as Vincent Kiprotich Koskei but he was silent on whether or not he was Kinwachet. Having been the complainant's neighbour it is unlikely that the complainant may have been mistaken as to his identity.

30. The issue the court should have however grappled with is what was **'bad things'** since the complainant did not give a description of what he actually did.

31. To establish the **‘bad thing’** that was done to the pubic region the complainant was taken to hospital. On examination PW4, the Nursing Officer in charge of the Health Centre noted no bruises but there was tenderness of supra – pubic region. A high vaginal swab did not reveal anything abnormal. The pubic region is the lower part of the abdomen just above the external genital organs. The supra pubic region is a region of the abdomen located below the umbilical region. This being the case it was imperative for the trial magistrate to establish what exactly the Appellant did. Whether he touched the region and with what? The learned magistrate fell into error by interpreting the alleged **‘bad things’** to mean an act of defilement because the alleged attempted defilement was not demonstrated.

32. It is indicated that the child’s inner clothes had discharge and feacal matter. Whitish discharge may be as a result of an infection. This should have been interrogated but it wasn’t done.

33. Having carefully evaluated the evidence that was presented before the trial court, I find that the offence of attempted defilement was not proved. In the result I allow the appeal by quashing the conviction and setting aside the sentence meted out. The Appellant shall be released forthwith unless otherwise lawfully held.

Dated and delivered in Nakuru this 8th day of November, 2018

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L. Mutende

Judge