REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 38 OF 2018

PATRICK JOSHUA KYALO MUTISYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the judgement and sentence by Hon. L. Simiyu (SRM) in Machakos Cm's Court in CMCR. No. 966 of 2013 on 18th February, 2015)

JUDGEMENT

1. The appellant was charged in the Chief Magistrate's Court at Machakos with attempted defilement contrary to Section 9 (1) as read with Section 9 (2) of the Sexual Offences Act No.3 of 2006. The particulars of the offence were that on 23rd August, 2013 in Kathiani District within Machakos County unlawfully and intentionally attempted to cause his penis to penetrate vagina of CNK a girl aged 13 years.

2. In the alternative he was charged with committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act.

3. He denied both counts. After full trial, he was convicted of the main count of attempted defilement, and was sentenced to serve 10 years imprisonment.

4. Aggrieved by the decision of the trial court, he has come to this court on appeal on the following grounds:

a. The trial magistrate erred in law and facts by convicting the appellant while relying on fabricated evidence that had no truth in it.

b. The trial magistrate erred in law and fact by convicting the appellant without considering that proper investigations were never contacted (sic) by the prosecution.

c. The learned trial magistrate erred in both law and facts by failing to consider that proper identification was not done.

d. The learned magistrate erred in law and fact by failing to observe that no offence was committed by the appellant herein but he was framed

e. The learned magistrate erred in law and fact by failing to consider the appellant's defence

f. The learned magistrate erred in law and fact by failing to observe that the charge sheet was defective.

5. Parties filed written submissions. I have perused and considered the said written submissions. The appellant submitted in effect requesting for revision, reduction or substitution of the sentence. He stated that he was sentenced on 17th February, 2015 and was in custody since 2013 thus has served 5 of the 10 years.

6. The learned Principal Prosecuting Counsel, Mr. Machogu, in response submitted that sentencing being at the discretion of the trial court, the appellate court would only be entitled to interfere with the sentence imposed if it was not legal or so harsh as to amount to miscarriage of justice and or if the court acted on the wrong principle or if the court exercised its discretion capriciously. He relied on the case of **Shadrack Kipchoge Kogo v R (2015)eKLR**

7. Learned counsel submitted that in considering the age of the victim, seriousness of the offence, there is no reason for this court to interfere

with the sentence imposed by the trial court hence the appeal should be dismissed and the court should uphold both the conviction and sentence of the trial court.

8. This is a first appeal. As a first appellate court, I am required to evaluate the evidence on record afresh and come to my own independent conclusions and inferences. In doing so, I have to bear in mind that I did not have the opportunity to see any of the witnesses testify to determine their demeanor and to give due allowance to that fact. This was stated in the case of **Okeno –Vs- Republic (1972) EA 32.**

9. I have re-evaluated the evidence on record, this is necessitated by the fact that in the grounds of appeal, the appellant challenged the conviction and sentence though in his submissions he concentrated solely on the sentence. The prosecution called a total of six (6) witnesses. The appellant tendered a sworn defence and did not call any other witness.

10. In brief the evidence of the prosecution is that on the material day, the appellant took the complainant from the road as she was walking towards a water kiosk that was out of use, where he attempted to defile her. The prosecution witnesses stated that due to the cries of the complainant, people came to the scene and the appellant was arrested and taken to the police.

11. It was the prosecution evidence that the complainant was medically examined shortly after the incident and a P3 form filled by Dr Korir a Medical Officer who found that seminal fluid was found on the victim's thighs.

12. In response to the prosecution evidence, the appellant tendered sworn testimony denying the offence and said it was a frame up.

13. I note that the complainant gave evidence on oath. She was a minor of 14 years at the time of incident. In accordance with the provisions of Section 124 of the Evidence Act Cap.80), the evidence of a minor complainant in sexual offences, even if without corroboration, when it is believable and is believed by a trial court, can be the basis of founding a conviction.

14. Having re-evaluated the evidence on record, I find that indeed the complainant was a child aged between 13 and 14 years, there was a birth certificate on record. That said, I am certain that the magistrate must have noted the approximate age of the complainant, by the said certificate, which was not challenged by the appellant. I find that the prosecution proved to the required standards that the complainant was 14 years of age at the time of the incident in 2013.

15. In sexual offences, the proof of the physical act is an important requirement. The appellant was convicted of attempted defilement, not indecent act. In my view, the evidence on record as contained in the P3 Form could only possibly prove an offence of attempted defilement. Though the complainant stated that the appellant removed her underpant and came kneeling down, there is medical evidence to support the allegation that there was an attempt to cause penetration. As such, in my view, the prosecution proved that the allegations were true, of the appellant attempting to touch the vagina of the complainant with his penis. Therefore, the offence of attempted defilement was proved. Indeed the doctor examined the complainant and established presence of seminal fluid on the complainant's thighs.

16. I now turn to the identity of the appellant as the culprit. The incident occurred during at night between 7.30 pm and 8.00 pm. The complainant appears not to have known the appellant, however the persons who heard her scream (PW2) identified him for he chased him and at trial stated that he identified the accused as the person he saw with the girl at the water kiosk. PW3, heard the scream and also heard communication to the effect of someone on a motor bike who was running away from something. In my view the witnesses positively identified the appellant as the culprit. The Appellant was apprehended at the scene of the crime and handed over to the police. He was pointed out immediately by the complainant. The complainant upon being examined was found with seminal fluid on her thighs.

17. It is important to note also that the persons who heard the complainant scream and rushed to the scene and assisted in chasing the appellant as well as the person to whom the appellant was handed over to after being caught by members of the public were called by the prosecution in court to testify. In my view, I find the prosecution proved its case against the appellant beyond reasonable doubt. The trial court properly convicted the Appellant.

18. I shall now address the sentencing aspect that the appellant has extensively submitted on. The appellant was charged with the offence of attempted defilement contrary to **section 9(1) (2) of the sexual offences Act**. The section provides

> **9(1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.**
>
> **(2) A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years"**

19. The minimum sentence for the offence of attempted defilement as set out in ***section 9*** of the Sexual Offences Act is 10 years and the appellant in this case was sentenced to serve 10 years imprisonment.

20. In **Shadrack Kipchoge Kogo vs Republic, Eldoret Criminal Appeal No.253 of 2003** (quoted in ***Arthur Muya Muriuki vs ~Republic*** (2015) eKLR), the Court of Appeal stated the following on principles of sentencing:-

> **"Sentencing is essentially an exercise of the trial court and for the court to interfere, it must be shown that in passing sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of these the sentence was so harsh and excessive that an error in principle must be inferred."**

21. In my view, the trial court took into account the relevant factors in giving the minimum sentence of 10 years, hence the said sentence was the minimum provided in law and there is no need to interfere with it.

22. I thus find that the appeal is devoid of merit. The conviction and sentence by the trial court is upheld.

It is so ordered.

Dated, Signed and delivered at **Machakos** this **10th** day of **December, 2018.**

D.K. KEMEI

JUDGE