REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 82 OF 2014

ALEX LUSAVA……..……..…….. APPELLANT

VERSUS

REPUBLIC…….……..….RESPONDENT

[Being an appeal from the original conviction and sentence in Criminal Case No. 2877 of 2013 Republic vs Alex Lusava in the Resident Magistrates' Court at Kapsabet by B. Kiptoo, Resident Magistrate dated 6th May 2014]

JUDGMENT

1. The appellant was convicted on a charge of *attempted defilement* contrary to section 9 of the Sexual Offences Act, No. 3 of 2006. He was sentenced to *twenty* years imprisonment.

2. The particulars of the charge were that on 4th October 2013 at *Index* area within *Nandi* County, he intentionally and unlawfully attempted to penetrate the vagina of *S. C. [name withheld]*, a child aged *eleven*.

3. The original petition of appeal was filed on 13th May 2014. On 17th December 2015, the Court granted the appellant leave under section 350 of the Criminal Procedure Code to amend the grounds of appeal.

4. The *amended petition* was lodged on 18th December 2015. It raises *eleven* grounds. They can be condensed into six. First, that the charge sheet was defective; secondly, that the State witnesses were inconsistent or contradicted each other; thirdly, that PW3's evidence was inadmissible as she did not visit the scene of crime; fourthly, that the description of the scene was contradictory; fifthly, that all the ingredients of the offence were not proved beyond reasonable doubt; and, sixthly, that the sentence meted out was harsh and excessive.

5. At the hearing of the petition, learned counsel for the appellant submitted that there was insufficient evidence to prove attempted defilement. She relied on the decision in *Pius Arap Maina v Republic*, Eldoret, High Court, Criminal Appeal 247 of 2011 [2013] eKLR. She submitted further that the *alibi* tendered by the appellant was not considered. In a synopsis, the appellant submitted that the charge was not proved beyond reasonable doubt. Regarding the sentence, counsel submitted that the minimum sentence is ten years. In her view, the jail term of twenty years was oppressive considering that the appellant was a first offender.

6. The appeal is contested by the Republic. The case for the State is that the prosecution proved all the key ingredients of the offence. Learned Prosecution Counsel submitted that the only reason defilement was not committed is that the appellant was interrupted by PW2. Counsel submitted that there was no

variance between the charge and the evidence. He contended that the sentence meted out was well within the law. Lastly, the Republic's case is that the appellant received a fair trial; and, that the defence tendered was hopeless. I was urged to dismiss the entire appeal.

7. This is a first appeal to the High Court. I have re-evaluated all the evidence on record and drawn my own conclusions. In doing so, I have been very careful because I have neither seen nor heard the witnesses. See *Pandya v Republic* [1957] E.A 336, *Ruwalla v Republic* [1957] E.A 570, *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] EA 32, *Kariuki Karanja v Republic* [1986] KLR 190. *Felix Kanda v Republic* Eldoret, High Court Criminal Appeal 177 of 2011 [2013] eKLR.

8. I will first deal with a preliminary matter. The complainant was a minor. The court conducted a brief *voire dire* examination. The court was satisfied about her intelligence; and, the value of telling the truth. The complainant gave sworn testimony. The true purpose of a *voire dire* examination is to establish whether a child of tender years understands two things: the nature of an oath; and, the need to tell the truth. See *Republic v Peter Kiriga Kiune* Criminal appeal 77 of 1982 (unreported), *Johnson Muiruri v Republic* [1983] KLR 445. The Children Act defines a child of tender years to be one of ten years or below. I am satisfied that the court complied *fully* with the procedure of taking the evidence of the minor.

9. The complainant said she was eleven years. She had a birth certificate showing she was born on 25th October 2000. She knew the appellant as *Baba Rembo*. On 4th October 2013 at about 4:00 p.m., she was returning home from the river. She was accompanied by her grandmother (PW2). The latter was walking ahead. The appellant called out the complainant by her name. He pulled her into his maize *shamba*. He demanded sex. The complainant screamed. He removed her underpants to knee level. The complainant was standing. The appellant was telling her *"let us sleep; I will give you maize"*. Her grandmother responded to her screams. The appellant ran away. The complainant said her grandmother was 10 metres away; and, that she saw the appellant pulling down the complainant's inner wear.

10. The complainant narrated the matter to her grandmother, her aunt and her elder brother. The matter was reported at Kapsabet Police Station by her brother (PW3) on 7th October 2013. Upon cross examination, she said the appellant dragged her for about 20 metres into the maize farm. PW3 knew the appellant as Alex or *Baba Rembo.* He said he had no grudge with him.

11. The grandmother (PW2) confirmed the narrative. She said she had seen *Baba Rembo* [as he is known in Index Estate] digging some trenches on the maize farm. It is his farm. When she heard the screams, she said she was 5 metres away. She said she saw the appellant holding the complainant's hand. He then let go. The child's panties were down to the knee level. Upon cross examination she said she had lived at Index Estate for eight months. The appellant was a neighbour. She alerted the village elder about the incident. The latter advised her to report the matter to the police.

12. PW4 was Police Sergeant Agripinah Lugonzo. A report was made to her at Kapsabet Police Station on 8th October 2016. The report was made by PW3. She said the complainant told her that the report could not be made earlier as her brother was away; and, because she feared the appellant. The accused was arrested on the same date.

13. When the appellant was placed on his defence, he protested his innocence. He raised an *alibi*. He said that on 4th October 2013 he went to *Tilalwa* to pick tea; and, that he did not return until late on 5th October 2013. On 5th October 2013, he went to his farm until lunchtime. He there after took his mobile phone for repairs. He was thus surprised to be arrested on 8th October 2013 by the police who were looking for *Baba Rembo*. He said the charges were instigated by PW3.

14. The appellant called one witness, Paul Ereng (DW2). He confirmed that on 4th October 2013, he was in the company of the appellant at Tilalwa where they picked tea until 6:00 p.m. He testified that at 4:00 p.m. the appellant was still on the tea farm.

15. A number of matters arise from that evidence. I will deal first with some *discrepancies*. Whereas PW1

stated that her grandmother was 10 metres away, the latter said she was only 5 metres away from where the attack occurred. There was also a discrepancy in the date the report was made to the police. Whereas PW2 and PW3 stated it was on 7th October 2013, the police officer (PW4) clarified that the report was made on 8th October 2013. That is the date the appellant was arrested. I do not think that the discrepancies are *material*. I am alive that in any trial there are bound to be discrepancies. See *Joseph Maina Mwangi vs. Republic*, Nairobi, Court of Appeal, Criminal Appeal 73 of 1993 (unreported).

16. The charge sheet was not defective either. The appellant was charged for *attempted defilement* contrary to section 9 of the Sexual Offences Act, No. 3 of 2006. The particulars sufficiently captured the elements of the offence, the dates and location. The evidence of PW1, PW2 and PW3 was *not* at variance with the charge or particulars. Furthermore, any such minor infraction was *curable* under section 382 of the Criminal Procedure Code. See *Martin Wanyonyi Nyongesa v Republic*, Eldoret, Court of Appeal, Criminal Appeal 661 of 2010 (unreported).

17. I will now turn to identification. From the evidence, the complainant and appellant were *not* strangers. She knew him as *Baba Rembo* in reference to his daughter called *Rembo*. The appellant did *not* deny that he was known as such at Index Estate. The appellant called out the complainant by name before dragging her into his maize farm. The complainant's grandmother (PW2) had known the appellant as a neighbour for *eight months*. The offence took place at 4:00 p.m. I thus find that the conditions of identification were *favourable*; and, that the appellant was positively identified.

18. The next key question is whether the appellant attempted to defile the complainant. The complainant was consistent in her sworn evidence. She did not waver under the cross. The appellant called out the complainant by her name. He pulled her into a maize *shamba*. He demanded *sex*. The complainant screamed. He *pulled down* her underpants to the *knee level*. The complainant was standing. The appellant was telling her *"let us sleep; I will give you maize"*. Her grandmother responded to her screams. The appellant ran away.

19. By demanding sex; and, pulling down the complainant's panties to the knee level, the appellant *manifested* a clear *intention* to defile the complainant. His scheme only aborted because of the interruption by the grandmother. All the material ingredients of the offence were disclosed by the evidence of PW1 and *corroborated* by PW2. See section 388 (1) of the Penal Code. See also *Pius Arap Maina v Republic*, Eldoret, High Court, Criminal Appeal 247 of 2011 [2013] eKLR. Section 9(1) of the Sexual Offences Act defines attempted defilement as follows;

> *"A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement."*

20. The appellant raised an *alibi* and called a witness to confirm it. True, the *alibi* was being set up well after the close of the prosecution's case. I agree with the learned trial magistrate that it was open to the trial court to weigh it against other evidence on record. See *Wang'ombe v Republic* [1976-80] KLR 1683, *Karanja v Republic* [1983] KLR 501. When juxtaposed against the evidence of PW1 and PW2, the *alibi* was a sham. The appellant was recognized by the two witnesses in broad daylight as the person who attempted to defile the complainant. Earlier, PW2 had seen the appellant digging in the maize farm using a hoe. I have reached the conclusion that the appellant was *not* picking tea at Tilalwa at the time the offence was committed.

21. I am also not satisfied that the charges were trumped up or prompted by the complainant's brother (PW3). The latter testified they were friends with the appellant. The appellant did not state the nature of a vendetta between them. When the offence occurred, PW3 was not even at home. There is then the clear evidence of the complainant and her grandmother that leaves no room for doubt of his culpability.

22. Lastly, the complainant was *twelve* years at the time of the offence. From the birth certificate, she was born on 25th October 2000. She was a minor and fell within the bracket of section 9 (1) of the Act. Granted all the evidence, I am satisfied that the Republic proved all the elements of the offence beyond reasonable doubt.

23. I will now turn to the sentence. Section 354 (3) of Criminal Procedure Code provides that at the hearing of an appeal-

> *"The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may…….(ii) alter the finding, maintain the sentence, or with or without altering the finding reduce or increase the sentence; or….. "*

24. In *Macharia v Republic* [2003] 2 E.A 559 the Court of Appeal had this to say on sentencing-

> *"The Court would not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence and it would not ordinarily interfere with that discretion exercised by a trial judge, unless it was evident that the judge acted upon some wrong principles or overlooked some material factors. …The sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and it was thus not proper exercise of discretion in sentencing for the Court to have failed to look at the facts and circumstances of the case in their entirely before settling for any given sentence."*

25. The learned trial Magistrate considered that the appellant was a first offender. But the court found that the offence was *prevalent* in the area; and, that a *deterrent* sentence was appropriate. The plea for mercy before this court must be looked at through those lenses.

26. The appellant was sentenced to twenty years jail term. Under section 9 (3), the penalty for the offence is imprisonment for a term *not* less than 10 years. The appellant was a first offender. In mitigation, he said:*"I have a family of two children; they are school going and I am the sole bread winner"*. The sentence handed down was *too harsh* in the circumstances. I am accordingly minded to disturb the sentence. I think in all the circumstances of this case, the *minimum* sentence of *ten years* was sufficient.

27. The upshot is that the appeal only succeeds in part. The appeal against conviction is devoid of merit and is *dismissed*. I set aside the sentence of twenty years imprisonment. I *substitute* it with a sentence of *ten years* imprisonment.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 19th day of January 2017.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

The appellant.

Mr. Birech holding brief for Ms. Tum for the appellant.

Ms. B. Oduor for the Republic.

Mr. J. Kemboi, Court Clerk.