**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NANYUKI**

**CRIMINAL APPEAL NO. 38 OF 2015**

**RICHARD MAINA KAMITI.....APPELLANT**

***versus***

**REPUBLIC.....RESPONDENT**

***(Being an appeal from the original conviction and sentence in Nanyuki Chief Magistrate's Court Criminal Case No. 789 of 2012 by Hon. V. K. KIPTOON, Senior Resident Magistrate on 11th June 2014).***

**JUDGMENT**

1. **RICHARD MAINA KIMITI** was charged before Nanyuki Chief Magistrate's Court with the **offence of attempted defilement contrary to section 9(1), (2) of the Sexual Offences Act, (the Act)** and in the alternative he was charged with the **offence of committing an indecent act contrary to section 11(1) of the Act.** After trial he was convicted on the main count and sentenced to serve 10 years imprisonment. He appealed against his conviction and sentence.

2. This court is required, as a the first appellant court, to re-evaluate the evidence tendered before the trial court, to draw its own conclusion, bearing in mind that this court does not have the advantage of having seen or heard the witnesses testify; See **OKENO-v-REPUBLIC (1972)E.A 32.**

3. The prosecution led evidence to the effect that the minor child was on her way to school when the appellant informed her that he wanted to give her a pencil. Both the minor and the appellant went to the appellant's house. The appellant searched for the pencil but could not find it. The minor in her testimony stated that the appellant removed her panty and bickers. He removed his trousers. He held her mouth with his hand. He put oil on his penis. He placed the minor on the bed and slept over her. The minor's mother who was outside the appellant's house called the minor. The appellant told the minor to dress-up. The minor went out of the house and her mother took her to school. The minor informed the class teacher what the appellant had done and it was then that her mother took her to the police where a complaint was lodged.

4. PW 4, a neighbour of the minor's parent, saw the minor enter into the appellant's home. It is this neighbour who informed the minor's mother, and following that information the minor's mother went to the appellant's home and called out her daughter from the appellant's home.

5. The minor's class teacher testified and stated that she questioned the minor on what had happened at the appellant's home. The minor narrated to her what the appellant had done which corresponded to her testimony before court.

6. The clinical officer, PW 3, on examining the minor some eight hours later found no injuries to the genitalia; the hymen was intact; and her H.I.V status was negative.

7. The investigating police officer also questioned the minor and following that questioning he filed the history on the P3 form.

8. The appellant did not offer defence; he elected to remain silent.

9. Appellant presented six grounds of appeal which in summary require this court to examine whether the charge of attempted defilement was proved to the required standards; whether the age of the minor was relevant to the charge; and whether there were witnesses who did not testify who ought to have been called as witnesses.

10. Appellant's learned counsel Mr. Kiget submitted that the charge was not proved by the evidence presented by the prosecution. That the evidence presented was inconsistent.

11. Appellant was charged with attempted defilement. Section 9(1) of the Act provides:

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

In the UK case A – G's reference (No. 3 of 1992) (as cited in the book Smith and Hogan's Criminal Law 14th edition) the Court of Appeal considering a case of attempted arson gave the following principles:-

> ***"A defendant, in order to be guilty of an attempt, must be in one of the states of mind required for the commission of the full offence, and did (sic) his best, so far as he could, to supply what was missing from the completion of the offence. It is the policy of the law that such people should be punished notwithstanding that in fact the intentions of such a defendant have not been fulfilled."***

12. Can it be said that the appellant was in the state of mind required for the commission of the offence of defilement. Perhaps it will assist to consider the definition of 'attempt'. In the Blacks Law dictionary 8th Edition attempt is defined as:-

> ***"The act or an instance of making an effort to accomplish something, esp. without success.***
>
> ***2.*** **Criminal Law.** ***An overt act that is done with the intent to commit a crime but that falls short of completing the crime.***
>
> - **Attempt** ***is an inchoate offence distinct from the attempted crime. Under the Model Penal Code, an attempt includes any act that is a substantial step toward commission of a crime, such as enticing, lying in wait for, or following the intended victim or unlawfully entering a building where a crime is expected to be committed."***

13. The prosecution's evidence is that the appellant enticed the minor into his house, on the pretext that he would give her a pencil, but instead he undressed her, by removing her underwear; and he undressed himself by removing his trouser, he put oil on his penis then lay on her. He did not complete the act of penetration because he was interrupted by the minor's mother.

14. The minor's evidence was not corroborated either by medical evidence or any other evidence. **Section 124** of the **Evidence Act Cap 80** provides the following on corroboration:-

> ***"Notwithstanding the provisions of*** **section 19** ***of the Oaths and Statutory Declarations Act (*****Cap 15*****), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in***

***support thereof implicating him:***

***Provided that where in a criminal case involving a sexual offence the only evidence is that of 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 reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."***

15. The above section requires a court, hearing a case under the sexual offences, to be satisfied that the victim of the sexual offence is truthful before receiving uncorroborated evidence. Indeed L. N. Mutende J. in the case **MATHINA MWANZIA –v- REPUBLIC (2013) eKLR** had this to say on that requirement:-

***"The learned trial magistrate failed to express his opinion in respect of how he assessed the complainant whether or not he believed she was telling the truth. His reliance on her evidence could only be safe if he found her to have been truthful."***

16. The learned trial magistrate in his considered judgment noted as follows:-

***"The victim was consistent in her evidence even during cross examination, there's (sic) nothing put forth to raise doubt on the same."***

17. In my re-evaluation of the trial court's evidence I too find that the minor was very consistent in her evidence. She was clear in what the appellant did to her in his house and she reiterated the same to her class teacher, to her neighbours PW 5 and to the police officer who filled the history on the P3 form. That narrative in all instance remained consistent. There were no inconsistencies as submitted by Mr. Kiget in the minor's evidence. The fact she stated in court that the appellant held her by the mouth while he attempted to defile her but did not say so to her teacher, her mother or the investigating officer does not reduce the weight of her overall evidence against the appellant. The standard of proof which the prosecution must meet is that of beyond reasonable doubt. That standard was discussed by **Denning J.** in the case **MILLER –V- MINISTER OF PENSION** and it was stated:-

***"It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable", the case is proved beyond reasonable doubt, but nothing short of that will suffice."***

18. Bearing the above in mind I too find that minor's evidence was consistent and that accordingly the minor was telling the truth.

19. It follows that the acts done by the appellant sufficed to meet the standard to prove attempted defilement. I do therefore find that the prosecution met the required standard by the evidence adduced.

20. On the issue of age, the minor said that she was 8 years old. Her mother also said the same thing. The Clinical Officer both in oral evidence before court and the P3 form stated the minor's age was 8 years. It is to be noted that the trial magistrate who observed the minor conducted a *voir dire* examination of the minor. It follows that the minor must have seemed to the trial court to be of tender years; for the court to have conducted such an exam. **Section 9(1)** of the Act talks of attempted defilement of a child. A child is defined under the Children's Act as:-

***"any human being under the age of eighteen years."***

The minor, by all indication, was a child. The minor's class teacher said the minor attended a primary school. The minor could not have attended primary school unless under exceptional circumstances if she was over 18 years old.

21. If follows that the issue raised by the appellant, regarding the minor's age is rejected.

22. The appellant faulted the prosecution for not calling the minor's father to testify. It was not clear to the court what value such evidence would have had because it was only the minor's mother, neighbours and the class teacher that were directly connected to the happenings of the day in question. The prosecution in conducting a criminal trial has the discretion on the number of witnesses he requires to call. Section 143 of Cap 80 is the basis of that discretion. It provides:-

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

23. The above discretion however is tempered by the principles set out in the case **BUKENYA & OTHER VS REPUBLIC (1972) EA 549** where the court said at Page 551:

> ***"While the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available, who were not called, the court is entitled under the general law of evidence of these witnesses, if called would have been tended to be adverse to the prosecution case."***

24. My find is that the prosecution called the required witnesses and there is no basis for adverse inference to be drawn to his conduct of his case.

26. The appellant also appealed against the ten years imprisonment handed down by the trial court. That appeal against sentence fails because ten years is the minimum sentence provided under section 9(2) of the Act.

27. In the end the appellant's appeal against conviction and sentence is dismissed. The trial court's conviction is confirmed and the sentence is upheld.

**DATED AND DELIVERED THIS 7TH DAY OF FEBRUARY 2017.**

**MARY KASANGO**

**JUDGE**

**CORAM**

Before Justice Mary Kasango

Court Assistant: Njue

Appellant: Richard Maina Kimiti ……..

For the State: ….....

**COURT**

Judgment delivered in open court.

**MARY KASANGO**

**JUDGE**