REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NUMBER 113 OF 2014

CORAM: JUSTICE S.M GITHINJI

(From original conviction and sentence in criminal case number 732 of 2013 of the Principal Magistrate's Court at Sirisia)

C S M.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant herein, one C S M was convicted and sentenced to serve 10 years imprisonment for an offence of **Attempted Defilement** of a girl, **Contrary to Section 9(1) as read with Section 9(2) of the Sexual Offences Act number 3 of 2006.**

The particulars of the offence are that on the 29th day of October, 2013 at [particulars withheld] Village Bumula Division, within Bungoma County, the appellant intentionally and unlawfully attempted to cause penetration by inserting his male genital organ namely penis into the female genital organ namely vagina on L. N a girl child aged 11 years.

The evidence adduced by the prosecution witnesses is that the appellant is a husband to J N (PW-1) and the complainant (PW-2) is their daughter. Prior to the night the offence was allegedly committed, on 29.10.2013, the appellant and PW-1 had domestic quarrels which made them stop sharing bed and the bedroom. The appellant was left in the bedroom while PW-1, together with the complainant and another child moved to the living room. On 29.10.2013 during the day, the appellant talked to the complainant. He told her that he will join her in bed at night and if she make any noise he'll stab her together with her mother.

On the material night PW-1, the complainant and another child were sharing a bed in the living room. PW-1 and the complainant slept on the sides of the bed while the other child slept between them. The appellant moved from the bedroom and joined them at around midnight. The complainant had slept on her left side. The appellant turned her over to face upward. PW-1 then woke up prompting the appellant to retreat back to the bedroom. The complainant further narrated that the appellant did bad manners to her. She was in a pant, skirt and blouse. He pulled the skirt upwards, pushed the pant on the side and started to penetrate her using his penis. He inserted it inside her private parts.

PW-1 stated she woke up when she heard the child struggling sideways. She light the house and saw the appellant on top of the girl. The appellant ran into the bedroom and chased her from the house. The girl had worn a brown pant which had been removed. It stained the beddings. PW-1's black blouse had been

laid on. It also got stained. PW-1 and the complainant left the house and went to the village elder called Juma Kimwinyawe to seek help. PW-1 was expectant. The village elder gave them accommodation till the following morning when they went to report at Malakisi Police. Complainant was escorted to Malakisi General Hospital.

The complainant was attended to by PW-3. PW-1 had carried clothes. The underwear had a discharge suspected to be semen. A blouse belonging to PW-1 also had discharge of which was semen. PW-3 confirmed the discharge was semen on examination. It was sticky and both in the underwear and blouse. The semen was on the outer side of the pant. The complainant was examined on her private part and the hymen or virginity was intact. The genitalia had faces matter stains. HIV test was negative and she had no sexually transmitted disease. The vagina condition was okay. There were no bruises and no other abnormal discharge from vagina.

PW-3 visualized the stain semen on the pant. She concluded that there were no obvious signs of penetration. She thus filled the P-3 form.

The complainant was subjected to age assessment, dental formular was used which was 28 teeth. The age was assessed approximately to be 11 years.

The complainant alleged it was not the first time for the appellant to defile her as he had done it one more time before when he was caught by her aunt.

PW-4 investigated the matter and charged the appellant. Initially the preferred charge was of defilement but in the cause of hearing it was substituted with the one of attempted defilement.

The appellant gave unsworn testimony in his defence and called no witness. His case is that on 29.10.2013 his wife (PW-1) fled from matrimonial home and went to her paternal home with the children after she sold his cattle worth 13,000/- without his consent. On 6.11.2013 he was arrested and taken to Malakisi Police Station. On 7.11.2013 he was arraigned in court and charged with an offence he did not commit. He denied it. He did not commit the offence.

Though in his petition of appeal he indicates that he is appealing against the imposed sentence of 10 years imprisonment, the grounds of appeal shows he was as well dissatisfied and aggrieved by the conviction. The grounds of appeal are briefly that:-

1. The proceedings were conducted in a manner that violated his rights as per provisions of the constitution and are therefore null and void.

2. Extraneous matters were considered in the trial leading to the wrong verdict.

3. The evidence was not well analyzed, exhibits well evaluated and mitigation weighed.

4. Life imprisonment was excessive and harsh given the circumstances.

The foregoing grounds do not well fit facts of this case. This is so as the appellant was sentenced to 10 years imprisonment, effective from date of plea, and not life imprisonment. As was also admitted by the appellant during the hearing of the appeal he was issued with witness statements. Most likely the grounds were copied from another appeal and don't therefore fit well to the facts of this case.

The state opposed the appeal on the grounds that the offence was proved beyond reasonable doubt and the appellant was rightly convicted and sentenced.

I have re-evaluated the entire evidence and I do find that the appellant right to a fair trial were not observed by the trial court in two areas. The first one is when the initial charge was substituted when PW-4 was giving evidence. It was substituted from defilement to attempted defilement. The court failed to accord the appellant an opportunity to recall any of the prosecution witnesses who had already testified

to give fresh evidence or to be further cross-examined by him in regard to the new charge of which he was now facing. The provisions of ***Section 214(1) (ii) of the Criminal Procedure Code (Cap 75),*** was not complied with. It states that:-

> ***"Where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last mentioned event, the prosecution shall have the right to re-examine the witness and matters arising out of further cross-examination."***

In the case of ***Harrison Mirungu Njuguna – versus – Republic [2010] eKLR***, the court of Appeal held that,

> ***"the right to hear the witnesses give evidence afresh on the amended charge or to cross examine the witnesses further is a basic right going to the root of a fair trial…."***

The second one is during re-examination of PW-2 where the prosecution made an application to have the witness identify exhibits that she had not identified during her evidence-in-chief, of which the court allowed. The appellant was not thereafter given a chance to cross-examine on the new evidence which was given during re-examination. The adopted procedure violated the provision of ***section 146(3) of the Evidence Act (Cap 80),*** which provides that:-

> ***(3) The re-examination shall be directed to the explanation of matters referred to in cross-examination; and if a new matter is, by permission of the court introduced in re-examination, the adverse party may further cross examine upon that matter.***

As was rightly held in the case of ***Harrison Mirungu Njuguna – versus – Republic,*** the failure of the court to inform an accused of his rights given to him by law, is not a procedural technicality which could be cured under the provisions of ***section 382 of the Penal Code***. To add on this, I would say it is neither curable under ***Article 159(1) (d).*** This is so, as no one knows what would have come out of the further cross-examination if the chance was granted, and its effect on the entire evidence and the ultimate decision of the court.

Having observed the foregoing, I now turn to the evidence which led to conviction of the appellant. A careful evaluation of the same shows that it is riddled with contradictions, illogical and unbelievable.

PW-1 in her evidence in chief said,

> "**On that night I saw the accused was on top of the girl. I woke up when I heard the child struggling sideways. When I woke up I light the house, the accused ran away to the bedroom and he chased me from the house."**

The witness did not say the kind of light she put on. She did not explain on when she noted of the stains on the pant and the black blouse, and when she picked them as exhibits, given that the appellant chased her out of the house. Her evidence that PW-2 had worn the pant which had already been removed does not agree to the evidence of PW-2 who said her pant was pushed to the side by the appellant. PW-2 said on 29.10.2013 was not her first time to be defiled by the appellant as he had done it before when he was caught by her aunt. However on re-examination she said, **"I had not had intercourse prior to this."** By saying so she meant prior to 29.10.2013, of which is contradiction. In her evidence in Chief she made it clear that she was penetrated. She stated,

> **"He then started to penetrate me using his penis. He inserted it inside my private parts."**

If she was correct on this, it contradicts the evidence of PW-3 who examined her and saw no trace of penetration. She could not have been defiled two times by an adult, without a trace of it on and in her sexual organ (vagina). PW-1 said when she observed the girl (PW-2) she saw a mucus like substance on her private part. This evidence together with the evidence of PW-3 that the underwear had a discharge

suspected to be semen, and that a blouse of PW-1 had a discharge of which was semen, suggests that the accused ejaculated on her. However PW-2 did not say he did. PW-3 did not also subject the said stains to laboratory test to confirm it was semen, and examined the appellant to confirm whether he was the source. She said she only did a visual examination. The semen on the pant was on its outer side. If the pant was worn during the incident and was only drawn to the side, and PW-1 noted of the mucus like substance on the sexual organ of PW-2, it's then doubtful how the semen never got to the inner side. It had been removed as PW-1 claimed, then one would wonder how it got stained.

On the alleged night of the incident the appellant was not in good terms with his wife who is PW-1 in this case. After she was chased away she allegedly went with PW-2 to the house of the village elder who housed them till morning. This village elder was not disclosed or rather his name was not given. He was not called as a witness. PW-1 had cause to fix the appellant as they had disagreed and were not in good terms. She had spent part of the night in a man's house and did not give details of where exactly they slept. Semens to fix the appellant could have been obtained from the said house and any other substance which resembles semen like mucus used to fix the appellant. PW-2 could have been couched n what to say to fix the appellant. This could be the reason why the evidence is contradictory, illogical and unbelievable. It is unlikely that the appellant got out of his bed in the bedroom, went to where his wife was asleep with the two children, on the same bed, with intentions of defiling PW-2, and expecting the wife not to notice of it. It is most unlikely.

If the evidence was well weighed by the trial court, it would have been noted that there exists reasonable doubts as to whether the offence really took place. Such doubts should have been resolved in favour of the appellant. This weighed together with the fact that the trial was not properly conducted in compliance with the law, of which deprived the appellant the right to a fair trial, merits the appeal. It is therefore allowed. The conviction and sentence are accordingly quashed. The appellant is to be set free unless otherwise lawfully held.

Judgment read in the presence of the state counsel, court assistant and the appellant this 17th day of July 2017.

S. M. GITHINJI

JUDGE