REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

Criminal Appeal No 6 Of 2017

S M…….…………..…………………………..APPELLANT

VERSUS

REPUBLIC…………………………………… RESPONDENT

(**From original conviction and sentence in Criminal Case Number 728 of 2014 in the Senior Principal Magistrate's Court at Voi delivered by Hon E.M. Kadima (RM) on 2nd November 2015)**

JUDGMENT

INTRODUCTION

1. The Appellant herein, S M, was tried and convicted by Hon E.M. Kadima, Resident Magistrate for the offence of attempted defilement contrary to 9(1)(2) of the Sexual Offences Act No 3 of 2006. He was sentenced to serve ten (10) years' imprisonment.

2. The particulars of the charges were as follows :-

> **"On the 6th day of September 2014 at [particulars withheld] Village within Taita Taveta County intentionally attempted to cause his penis to penetrate the v of C N aged 8 years."**

ALTERNATIVE CHARGE

> **"On the 6th day of September 2014 at [particulars withheld] Village within Taita Taveta County intentionally touched the vagina of C N aged 8 years with his penis."**

3. Being dissatisfied with the said judgment, on 16th January 2017, the Appellant filed a Notice of Motion application seeking leave to file his appeal out of time, which application was allowed and the Petition of Appeal deemed as having been duly filed and served. His Grounds of Appeal were as follows:-

> **1. THAT the learned trial magistrate erred in law and fact by finding that the prosecution had established the appellant's guilt beyond reasonable doubt.**
>
> **2. THAT the learned trial magistrate erred in law and fact by believing the alleged evidence relating to a white discharge from her genitalia**(sic)**.**
>
> **3. THAT the learned trial magistrate erred in law and fact by relying on the evidence of PW 1 as the key witness.**

4. THAT the learned trial magistrate erred in law and fact by not considering his defence submission as the truth.

4. On 2nd March 2017, this court directed the Appellant to file his Written Submissions. On 4th April 2017, he filed his Written Submissions along with Amended Grounds of Appeal. The Amended Grounds of Appeal were as follows:-

1. THAT the learned hon. trial magistrate erred in law and fact in basing his conviction and sentence on the drafted charge sheet against him without humbly considering that the same was not supported by the evidence given in court.

2. THAT the learned hon. trial magistrate erred in law and fact in convicting and sentencing him without humbly considering that the prosecution witness (sic) **evidence was not honest and truthful.**

3. THAT the learned hon. trial magistrate erred in law and fact in convicting and sentencing him without considering that he was a layman in law and thus there was a need to be assigned an advocate to represent him during the trial.

4. THAT the learned hon. trial magistrate erred in law and fact in convicting and sentencing him on a framed case against him without considering that he was an old man therefore not active in sex and his health status were not bearable (sic).

5. THAT the learned hon. trial magistrate erred in law and fact in not considering that his defence evidence which he gave under oath and that it created a reasonable doubt to the prosecution case where the benefit ought to be given to him(sic)**.**

5. This court also directed the State to file its Written Submissions. However, when the matter came up on 27th April 2017, its counsel informed this court that it would not be filing its Written Submissions for the reason that it was conceding to the Appeal herein.

6. In view of the fact that this court was proceeding on its annual leave, it allowed the Appellant's Appeal and directed that he be set free forthwith unless he be held for any other lawful cause. It, however, reserved its reasons for allowing the Appeal to 4th July 2017.

7. It averred that the credibility of the Complainant, C N (hereinafter referred to as "PW 1") was put to test because the *voire dire* examination was not conducted properly and that no witnesses were called to corroborate her evidence. It pointed out that despite her mother having been vital witnesses as it was her account and that of her brother, P M who she said witnessed the defilement leading to the Appellant's arrest, they were not called as witnesses in the case herein.

8. It further submitted that although the P3 Form that Dr Stephen Kalana (hereinafter referred to as "PW 2") adduced as evidence indicated that PW 1 had been defiled, the Appellant was charged with the offence of attempted defilement.

LEGAL ANALYSIS

I. VOIRE DIRE EXAMINATION

9. A perusal of the proceedings showed that the *voire dire* examination was conducted by the Prosecutor instead of the Learned Trial Magistrate. Further, although PW 1 was never asked if she knew the meaning of taking an oath, the Learned Trial Magistrate nonetheless directed that she adduce evidence under oath.

10. Appreciably, a trial court ought not to assume that a child witness understands the meaning of an oath. This is because an accused person can be found to be liable based on the sworn evidence of such child witness. This was an issue that was dealt with in the case of **Johnson Muiruri vs Republic [2013]**

eKLRwhere the Court of Appeal rendered itself as follows:-

> **"Where in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a *voire dire* examination, whether the child understands the nature of an oath in which even his sworn evidence may be received…In the latter event an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him (sec.19, Oaths and Statutory Declarations Act, cap 15.**.

11. Where evidence is only that of a child witness, failure to conduct a proper *voire dire* examination can persuade a court to order a re-trial of a case. Having said so, this court noted that the Appellant was given an opportunity to Cross-examine PW 1. It was therefore the considered view of this court that there was no miscarriage of justice and that the Appellant did not suffer any prejudice warranting this court to direct that a re-trial of the case herein be held.

II. EVIDENCE OF THE PROSECUTION WITNESSES

12. This court noted that PW 1 testified that she had gone to greet the Appellant, who was her grandfather when he pulled her into the house, put her in the bed, removed his shirt and trouser and touched her on her vagina. Her further evidence was that she screamed and her brother, P M, came whereupon the Appellant let her go. She said that she told her mother what the Appellant had done and her mother took her to hospital for medical examination.

13. During her Cross-examination, she stated that when she screamed, only her brother, P M came but her mother did not do so. She was, however, emphatic that the Appellant touched her with his penis.

14. On his part, PW 2 tendered in evidence the P3 Form on behalf of Dr Nashal. He indicated that PW 1's clothes were neat and had no blood stains. He testified that PW 1 had been defiled as her hymen was not intact and there was a smelly whitish discharge. During his Cross-examination, he admitted that it would have been proper for the Appellant to have been examined.

15. No 219938 Corporal Nzane (hereinafter referred to as "PW 3") stated that she was at Tauso AP Camp when Area Chief of Ngeti, accompanied by PW 1 and her mother, came and reported that the Appellant had defiled PW 1. The Appellant was arrested the following day. No 2008117437 Corporal Mburu Gitau and No 81669 Sergeant Linet Ombogo (hereinafter referred to as "PW 4" and "PW 5") reiterated PW 3's evidence.

16. In his sworn evidence, the Appellant told the Trial Court that he was at his home on 6th September 2015 when the Chief accompanied by two (2) Administration Police (AP) Officers came and arrested him after informing him that he had committed an act. He, however, denied ever having done anything.

17. As PW 1 was the only one who was present when the Appellant allegedly touched her with his penis, the proviso of Section 124 of the Evidence Act Cap 80 (Laws of Kenya) therefore came into play. The said proviso stipulated as follows:-

> **"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."**

18. It was the considered view of this case that PW 1's evidence could not come within the ambit of the aforesaid proviso of Section 124 of the Evidence Act. Indeed, an analysis of PW 1's evidence showed that it was not sufficient to convict the Appellant without corroboration. Firstly, she adduced evidence on oath when she had not indicated that she knew the meaning of adducing evidence under oath and consequently, the Appellant could not be found liable based on her evidence alone.

19. Secondly, as was rightly conceded by the State, PW 1 had only alluded to the Appellant having touched her with his penis and not penetration. PW 2 testified of defilement having occurred. Appreciably, PW 2 never testified of having found any spermatozoa or fresh bruises that would have pointed to a recent penetration. In fact, the P3 Form was clear that there were no vaginal tears that were observed.

20. It was therefore not clear under what circumstances PW 1's hymen was broken and what had caused the smelly discharge considering that she was examined on the same day she was alleged to have been touched by the Appellant. In the absence of concrete evidence of what the smelly discharge was, this court was hesitant to conclusively find that the Appellant was the cause of the said smelly discharge. PW 1's and PW 2's evidence were so diametrically opposite to each other that it led this court to entertain doubt as to what were the real circumstances herein.

21. Going further, although on 9th April 2015 the Prosecution indicated that PW 1's mother had a small child and was unable to raise fare to enable P M **(sic)** who was in school to come and testify, nothing more was said of him. In view of the seriousness of the offence by her father, it was expected that PW 1 would have done all in her power to facilitate P M attendance in court even if it was at a later date. She did not do so and the said P M never attended court to testify against the Appellant herein.

22. In addition, PW 1's mother was also a crucial witness considering that she was at the home at the time of the alleged incident and that she is the one who went to report the matter at the AP's camp leading to the Appellant's arrest. Consequently, as was pointed out by the State, failure to call the said P M and PW 1's mother as witnessed in this matter was fatal to the Prosecution's case as they would have been expected to corroborate PW 1's evidence.

23. Notably, PW 1's evidence pointed to a case of attempted defilement, a difficult situation to prove as there is normally no physical evidence to prove. A case of attempted defilement is normally compounded by the fact that it is a victim's word against that of the perpetrator. The importance of corroboration in cases of attempted defilement, which in this case was absent, cannot therefore be overlooked.

24. Accordingly, having considered the evidence that was adduced by the Prosecution witnesses, the Appellant's Written Submissions and the State's concession of the Appeal herein, this court came to the firm conclusion that the Prosecution had not proved its case to the required standard, that is, proof beyond reasonable doubt. This court was not satisfied that this was a case that came within the ambit of the proviso of Section 124 of the Evidence Act.

DISPOSITION

25. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 16th January 2017was successful and there was merit in the State conceding to the said Appeal. The same is hereby allowed.

26. Although this court directed that the Appellant be set free forthwith unless he be detained for any other lawful cause, for record purposes, this court hereby quashes the conviction and sets aside the sentence that was meted upon him by the Trial Court as it would be clearly unsafe to confirm the same, notwithstanding that the State had conceded to the same.

27. It is so ordered.

DATED and **DELIVERED** at **VOI** this **18th** day of **July** 2017

J. KAMAU

JUDGE