REPUBLIC OF KENNYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL NO.64 OF 2014

(From original conviction and sentence in Criminal Case No.1129 of 2010 of the

SPM'S Court at Ogembo delivered on 17th July, 2014 by Hon. N. WAIRIMU – Ag. PM)

DANIEL OMBASA OMWOYO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant herein **DANIEL OMBASA OMWOYO** was charged with one count of defilement contrary to **Section 8(1)** as read with **8(3)** of **Sexual offences Act No.3 of 2006**.

The particulars of the offence were that on 26th august 2010 in South Gucha District within Nyanza Province, unlawfully and intentionally committed an act which caused penetration of your (sic) penis, to the vagina of **N.M** a child aged 9 years.

2. The Appellant pleaded not guilty to the charge whereupon the case proceeded to trial and the prosecution called a total of 5 witnesses as follows:

PW1 N.M. the Complainant testified that on 26th August 2010, she left her home in the company of her sister **PW2** to buy oranges at [particulars withheld] stage but enroute to the stage, the Appellant called her to his shop. She stated that when she entered the shop the Appellant closed the door and told her to go and sleep with him but she refused. The Appellant told her to remove her clothes, but she also refused.

The Appellant then gave her Kshs.60/= which she kept and he took her to his sleeping room where he started to undress her but members of the public came upon hearing the alarm raised by PW2 who was all this while standing outside the shop. The Complainant added that the Appellant threw empty soda bottles at the members of the public who wanted to lynch him but police officers came to the scene and arrested the Appellant.

On being cross-examined by the Appellant, PW1 stated that the Appellant did not do anything to her apart from trying to undress her.

3. **PW2 G.N** who was with the Complainant on the fateful day narrated how the Appellant called PW1 to

his house before locking the door. She heard PW1 screaming and she also screamed thereby alerting and attracting members of the public and police to the scene.

4. **PW3 Wilfred G O** was the father of PW1. He stated that he was on the material day, at [particulars withheld] market when at about 7.00 p.m., PW2 came to call him and report to him that PW1 had been locked in the Appellant's shop. He went to the scene and found many people already there. He testified that both the Appellant and PW1 had been tied with ropes and members of the public wanted to lynch the Appellant. He saw PW1 with Kshs.60/= in her hands. He said the Appellant threw soda bottles at the people gathered at the scene who fled thereby giving him an opportunity to flee into his room which he locked.

4. **PW4 D.O.N's** testimony was that on the evening of 26th August 2010 he was at [particulars withheld] market when he heard a commotion and people saying that the Appellant should be buried because he was found with a small child. The crowd wanted to lynch the Appellant and police came to the scene to arrest the Appellant.

5. **PW5 Wycliffe Atambo**, a Clinical Officer at Gucha Level 4 Hospital produced a P3 form in respect to PW2 whose contents showed that the Complainant had injuries on her genitalia with a torn hymen and lacerations on the labia majora. He stated that the findings were of defilement of a 9 year old Complainant.

7. At the close of the prosecution's case, the trial magistrate ruled that the Appellant had a case to answer and was put on his defence.

8. The Appellant gave a sworn statement and called one witness in his defence. The Appellant generally denied knowledge of the reason why he was arraigned in court but attributed his woes to his child's shoes that the Complainant had allegedly stolen. He claimed that he was arrested on 26th August 2010 at 8.00 p.m., while listening to the radio in his house and he did not know the reasons behind his arrest.

He claimed that the charge against him was false and was caused by the vendetta that he had with the family of the Complainant over land and the shoes that the Complainant stole.

9. **DW2 Barongo Mokubo** testified that he saw police officers at the house of the Appellant on 26th August 2010 but did not know why he had been arrested. His testimony was that he did not see any child at the Appellant's house.

10. After considering the evidence that was tendered before her, the trial magistrate was not satisfied that the charge of defilement contrary to **Section 8(1)** as read with **8(2)** of the **Sexual Offences Act** had not been established against the Appellant. She consequently acquitted the Appellant of the said charge, but invoked **Section 180** of the **Criminal Procedure Code** as empowering her to convict the Appellant of having attempted to commit the offence of defilement although he was not charged with the attempt.

11. The trial magistrate consequently found that the Appellant was guilty of attempt to commit the offence of defilement, convicted him of the said **attempted defilement** contrary to **Section 9(1**) as read **with 9(2)** of the **Sexual Offences Act No.3 of 2006** and sentenced him to 10 years imprisonment.

The Appellant, being aggrieved by both the conviction and sentence brought this appeal through his advocates M/S B. N. Ogari & Co. Advocates and put forth the following grounds of appeal:-

> 1. **THAT the learned trial magistrate erred in law and fact in convicting the Appellant on insufficient evidence.**
>
> 2. **THAT the learned trial magistrate erred in law and fact in convicting the appellant on an offence whose particulars are at variance and not in support of the offence of attempted defilement.**

3. **THAT the learned trial magistrate erred in law and fact by failing to consider the evidence of the appellant, consider his written submissions, nor give any reasons for disregarding his evidence.**

4. **THAT the learned trial magistrate erred in law and fact by failing to consider that the prosecution had not proved their case beyond any reasonable doubt.**

5. **THAT the learned trial magistrate erred in law and fact by failing to consider the probation report submitted, the mitigation of the appellant and nor assign any reason for disregarding them.**

6. **THAT the learned trial magistrate erred in convicting the appellant without considering the evidence of the appellant on his physical strength in response to the commission of the offence.**

7. **THAT the conviction and sentence by the learned trial magistrate was unfair and unjust to the appellant nor did she afford the appellant a fair trial.**

8. **THAT the learned trial magistrate erred in law and fact by importing her own imaginations to the proceedings and this necessitated to arriving to a wrong conclusion**.

12. The Appellant seeks the quashing of the conviction and the setting aside of the 10 years sentence.

At the hearing of the appeal, Mr. Ogari appeared for the Appellant while Mr. Otieno, State counsel appeared for the Respondent. Mr. Ogari submitted that the prosecution witnesses did not mention how the Appellant attempted to defile the complainant and that the evidence on record did not disclose any element of the intention to penetrate the minor which was a key ingredient of the offence. He relied on the case of Gilbert **Miriti Kanampiu –vs- Republic [2013] eKLR**.

13. Mr. Ogari also submitted that the age of the victim who was alleged to be 9 years old, was not proved and neither did the magistrate make a finding on the victim's age which was a crucial aspect of the charge.

Mr. Ogari further submitted that the particulars of the charge sheet were at variance with the charge and did not support the offence of attempted defilement. He added that the trial magistrate did not evaluate the evidence on record thereby arriving at an erroneous finding.

14. Mr. Ogari argued that failure to call the investigating officer to testify in the case was a fatal omission on the part of the prosecution as it is the said officer who was alleged to have kicked the Appellant's door open after he (*the Appellant*) had locked himself inside his house with the victim.

Mr. Ogari argued that failure to call such an important witness could have entitled the trial court to conclude that his evidence could have been adverse to the prosecution's case. He referred to the case of **John Wachira Wandia & Another –vs- Republic [2006] eKLR**.

15. The Appellant's counsel took issue with the trial magistrate's failure to consider the evidence of the Appellant and his witness together with his written submissions in his judgment. He stated that the trial magistrate did not give weight to the Appellant's defence or give reasons for not believing his side of the story as regards the sequence of events that led to his being implicated in the case.

16. According to the Appellant, there were glaring discrepancies in the prosecution's case especially as regards the testimonies of PW1 and PW2 which contradictions according to the Appellant, watered down the entire prosecution's case.

17. Mr. Otieno for the State opposed the appeal and submitted that the Complainant gave consistent testimony on how the Appellant locked her up in her shop and started to remove her clothes with the

intention of sleeping with her. On the aspect of age, he stated that PW1 testified that she was 9 years old and therefore, age was not in dispute before the lower court.

18. Mr. Otieno further submitted that the testimony of PW1 was corroborated by that of PW2 and that the trial magistrate rightly invoked the provisions of **Section 180 of the Criminal Procedure Code** substituted the offence of defilement with that of attempted defilement, and that the mere fact that **Section 186 of the Criminal Procedure Code** was not cited did not render the verdict a nullity.

Mr. Otieno contended that since attempted defilement is not defined under the **Sexual Offences Act**, the fact that the Appellant was in the process of undressing the Complainant in a bid to sleep with her clearly pointed to the offence of attempted defilement.

19. Mr. Otieno submitted that the mere fact that crucial witnesses did not testify should not be construed to mean that their evidence could have been adverse to the prosecution's case because the prosecution was forced by the court, to close its case prematurely due to the challenges they had in securing the attendance of the investigating officer in court after his transfer to another station. In this regard, Mr. Otieno argued that failure of a witness to attend court is not fatal per se, but should be considered in line with the circumstances that led to that failure.

20. Mr. Otieno concluded his submissions by stating that the evidence on record was sufficient to prove that the Appellant attempted to defile a child and therefore the court should uphold the Appellant's conviction and sentence.

21. The Appellant's grounds of appeal and submissions during the hearing of the appeal raises several issues requiring this court's determination which issues can be summarized as follows:-

1. ***Whether the offence of attempted defilement was proved t the required standards.***

2. ***Whether the age of the minor was proved.***

3. ***Whether failure by the prosecution to call the investigating officer was fatal to their case.***

4. ***Whether the trial court gave due consideration to the appellant's case and his submissions.***

22. On proof of the offence of the attempted defilement, the Appellant first and foremost took issue with the manner in which the trial magistrate in her judgment invoked the provision of the offence of defilement with that of attempted defilement.

Section 186 of the Criminal Procedure Code is specific to sexual offence while **Section 180 of the Criminal Procedure Code** is for substitution in general for attempt if the actual offence is not proved.

23. **Section 180 of the Criminal Procedure Code** states as follows:-

> ***"When a person is charged with an offence, he may be convicted of having attempted to commit that offence although he was not charged with the attempt."***

Section 186 of the Criminal Procedure Code on the other had states: -

> ***"When a person is charged with the defilement of a girl under the age of fourteen years and the court is of the opinion that he is not guilty of that offence but that he is guilty of an offence under the Sexual Offences Act, he may be convicted of that offence although he was not charged with it."***

24. In view of the above provisions, I find that the trial magistrate was justified to invoke **Section 180 of the Criminal Procedure Code** as the said section empowers the court to make the said substitution in deserving cases.

Age of the Complainant:

25. The Appellant took issue with the age of the Complainant which even though was stated during the trial to be 9 years, the same was not proved by any documentary or expert evidence.

26. The Court of Appeal had the following to say regarding the proof age for purposes of **Sexual Offences Act** in the case of **Moses Nato Raphael –vs- Republic NRB CA.CRA. No.169 of 2014 [2015] eKLR**:-

> ***"On the challenge posed by the uncertainty in the Complainant's age, this court had occasion to deal with a similar issue in Tumaini Maasai Mwanga –vs- R. Mombasa CRA. No.364 of 2010 where it was held that proof of age for the purposes of establishing the offence of defilement which is committed when the victim is under the age of 18 should not be confused with proof of age for purposes of appropriate punishment for the offence in respect of victim's of defilement of various statutory categories of age. As long as there is evidence that the victim is below 18 years, the offence of defilement will be established.***
>
> ***The age which is actually the apparent age, only comes into play when it comes to sentencing. The contradictions in respect of the child's age cannot therefore assist the Appellant to avoid criminal culpability."***

27. In the instant case, the Appellant did not contend that PW1 was not below the age of 12 years. The trial court conducted a *voir dire* before taking the evidence of PW1 who stated that she was aged 9 years. At the end of the *voir dire*, the court made a finding as follows:-

> **"The witness is a child of tender years who does not know the meaning of an oath and the importance of speaking the truth. The witness will give unsworn testimony."**

The above finding on the age of PW1 was not contested by the Appellant who was duly represented by a legal counsel at the trial.

28. PW5, the Clinical Officer who produced the P3 form stated that the age of the Complainant was 9 years.

I find that there was sufficient proof of age. Under **Section 2** of the **Children Act**, age means apparent age where the exact age is not known. In this case, there was sufficient proof that PW1 was aged 9 years.

29. In the case of **Francis Omuroni –vs- Uganda Court of Appeal in Criminal Appeal No.2 of 2000** observed as follows:-

> **"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense….."**

30. On the issue of age of Complainant, my reading of **Section 9(1)** and **(2)** of the **Sexual Offences Act** show that age is not a factor for an offence under this Section other than the requirement that the victim of the offence be a child. To my mind, the only requirement of age is that the victim be under 18 years this being the definition of a child under the Kenyan Law.

Failure to call the investigating officer.

31. On the issue of whether failure to call the investigating/arresting officer to give evidence was fatal to the prosecution's case, I find that even though it is desirable to call such an officer in certain instances, and especially in instances where the identification of an accused person is in doubt, in the instant case, there was no doubt on the identity of the Appellant who was caught red handed by members of the public

with the minor in question.

32. During the hearing of the appeal, Mr. Ogari for the Appellant submitted that given the circumstances under which the Appellant was arrested, the arresting officer together with the Investigating Officer ought to have been called to testify and that failure to call them was fatal to the prosecution case.

33. In the case of **Bukenya & Others –vs- 1972 EA 349**, it was held that:

> **"The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent. Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution."**

34. In the instant case, I find that the critical ingredients of the charge of defilement that the prosecution needed to prove was penetration and the minority age of the complainant. If those two ingredients are proved then, to my mind, the requirement of the investigations officer would not be mandatory. It is therefore my finding therefore that failure to call the investigating officer was not fatal in the circumstances.

35. My finding is fortified by the decision in the case of **Jeremiah Gathiku vs Republic *(*Criminal Appeal No.73 of 2008*)*** in which it was held:

> **"... the effect of failure to call police officers in a Criminal trial, including the investigating officer, is not fatal to the prosecution unless the circumstances of each particular case so demonstrate."**

Proof of attempted defilement

36. Lastly, I will now turn to the critical issue in this appeal which is whether the offence of attempted defilement was proved by the prosecution in the trial court. As already highlighted above, the appellant was initially charged with the offence of **Defilement Contrary to section 8(1)** as read with 8 (3) **of Sexual Offences Act No. 3 of 2006**. The complainant in her evidence upon cross examination stated as follows:

> **"I have never slept with a man up to now. I don't know how it feels like to sleep with a man. The accused called me and tried to remove her clothes. Other than that he didn't do anything to me."**

37. The complainant's evidence was however at variance with that of PW5 the clinical officer when he produced the P3 form which showed the condition of the complainants genitalia upon examination as follows:

> **"External genitalia hymen was torn there were lacerations along the labia majora. Whitish pervaginal discharge appreciated. Nothing abnormal noted on the male complainant. The findings were of defilement of a 9 year old complainant."**

38. The trial magistrate on her part noted the contradictory evidence and hence invoked **Section 180 of the Criminal Procedure Code** and substituted the charge of defilement to attempted defilement. **Section 191 of the Criminal Procedure Code** states as follows;

> **"The provisions of sections 179 to 190, both inclusive, shall be construed as in addition to, and not in derogation of, the provisions of any other Act and the other provisions of this Code, and the provisions of sections 180 t0 190, both inclusive, shall be construed as being without prejudice to the generality of the provisions of section 179."**

39. Commenting on the above section Ngenye-Macharia J, held:

"It is essentially important to note that the provisions under Section 179 to 191 of the Criminal Procedure Code fall under a title '*Convictions for Offences other that those charged*." Before I go further, by dint of the said title, it is quite clear that the courts may convict a person on an offence not charged with. This leads to the question, how and when does this happen?"

The provisions of the law cited above have explained the circumstances under which such a conviction may occur. However the case law discussed here below demonstrates how the courts have applied the said provisions of the law.

In **BWANA KOMBO MUHATI –VS- REPUBLIC [2000] e KLR, COURT OF APPEAL AT MOMBASA, CRIMINAL APPEAL NO. 83 OF 2000**, the learned Judges Omolo, Akiwumi and O'kubasu, JJA, reiterated as follows;

"This being a second appeal, only matters of law arise for our consideration. The Appellant was originally charged with attempted defilement of a girl contrary to section 145 (2) of the Penal Code but in the end the Magistrate found him guilty of indecent assault of the girl under Section 144 (1) of the Penal Code. The Magistrate said he was doing so under Section 179 of the Criminal Procedure Code, but that was of course not correct because, as Mr. Ouma for the Appellant correctly points out, the two offences are not minor to each other. But the two offences are clearly cognate and Section 186 of the Criminal Procedure Code provides for the situation the Magistrate was dealing with. The facts put before him clearly proved the offence of indecent assault and he was right to convict the Appellant of that charge.

The superior court confirmed that conviction and there is really no point of law worth our consideration. The appeal is ordered to be and is hereby dismissed."

40. In as much as the trial court quoted **Section 180** as opposed to **Section 186** to substitute the charge of Defilement to Attempted defilement as demonstrated above the said substitution though under section 180 as opposed to section 186 was still legal. However, this matter of substitution does not stop there as the appellant has challenged his conviction and sentence of the trial court on attempted defilement. The question that now this court needs to answer is what amounts to attempted defilement.

41. In **David Aketch Ochieng [2015] eKLR** Makau J observed as follows on attempted defilement:

"The appellant was charged and convicted with an attempted defilement contrary to Section 9 (1) of Sexual Offences Act No. 3 of 2006. What is attempted defilement? It can safely be stated to be the unsuccessful defilement. For a successful prosecution of an offence of attempted defilement, the prosecution must adduce sufficient evidence to the required standard to prove an attempted penetration. This may in my view include bruises or lacerations from complainant's vagina and/or bruises or lacerations of culprits genital organ and finding male discharge such as semen or spermatozoa outside the complainant's vagina or innerwear without there being penetration. There was absence of penetration or evidence linking the culprit with the offence of attempted defilement."

42. In the instant case, can the encounter between the appellant and the complainant be defined as attempted defilement? I do not think so. I say so because from the evidence adduced by the complainant stated that the appellant merely tried to remove her clothes, she screamed and members of the public came to her rescue. The mere action of attempting to remove clothes by the appellant in my humble view does not qualify to be attempted defilement and neither does the and neither does the same even qualify to be deemed as indecent assault as the complainant, who was the only eye witness in this case did not state in her testimony that the complainant touched her breasts or buttocks as he attempted to remove her clothes. The complainant was categorical that other than attempting to remove her clothes, the appellant did not do anything else to her. She did not say how far the attempt to remove the clothes went.

43. It was a misdirection, in my humble view, on the part of the trial magistrate to convict the appellant on attempted defilement without evidence to support the said charge. I must state however that the above appeal is rather peculiar in the sense that the evidence of the minor is a complete opposite of what is contained in the p3 from. In my observation, I wish to state that suspicion no matter how strong cannot form a basis to convict an accused person. The conviction of an accused person in a criminal case will only be purely based on evidence presented at the trial. There is doubt created in my mind on whether the appellant committed the act of attempted defilement in view of the conflict in the evidence of PW1 and that of PW5. This doubt works to the benefit of the appellant.

44. In the circumstances I find that it was unsafe to convict the appellant I hereby quash the conviction and set aside the sentence by the trial court. The appellant shall be set free unless otherwise lawfully held.

45. It is so ordered.

Dated, signed and delivered in open court this 9TH day of MARCH, 2016

HON. W. OKWANY

JUDGE

In the presence of:

- Miss Mochama for the State
- Nyambati for Ogari for the Appellant
- Omwoyo court clerk