REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NANYUKI

HCCRA. NO. 24 OF 2015

AUGUSTINE MATHENGE ……..……APPELLANT

-VERSUS—

REPUBLIC …...…….. RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. J N Nyaga–Chief Magistrate dated 7th June 2012 in Nanyuki Chief Magistrate's Court Criminal Case No. 1092 of 2011)

JUDGMENT

1. **AUGUSTINE MATHENGE,** the appellant, was charged before Chief Magistrate's court Nanyuki with the offence of attempted defilement of a child aged 12 years old **CONTRARY TO SECTION 9(1)(2) OF THE SEXUAL OFFENCES ACT .** In the **alternative** he was charged with the offence of intentionally and unlawfully committing an indecent act to a child aged 12 years, **Contrary to Section 11 (1) of Cap 62 A.**

2. He was convicted on the main count and sentenced to 10 years.

3. His present appeal is against his said conviction and sentence.

4. This is the first appellate and as such the duty of this court is as was stated in the case **GEORGE MIRITIKALUNGE& another – v- republic [2013]eKLR**thus:

   "This being a first appellant court we are bound to follow the guidelines set by the court of appeal in Kinyanjui – v- Republic [2004] 2KLR 364, with respect to criminal appeals. It was said that the first appellant court must look at the evidence presented before the trial court afresh and re-evaluate and reexamine the same and thereafter reach its own conclusions .The first appellant court must bear in mind that it did not have the opportunity to see the witnesses as they testified. The court should also look at the grounds of appeal put forward by the appellant. We also remind ourselves of the point made in Buru- v- REPUBLIC [200] 2KLR 533 and Republic – v- Oyier [1985] KLR 353 that a first appellant court will not normally interfere with the finding of a lower court on the credibility of witnesses unless it is shown that no reasonable tribunal could make such finding."

5. Appellant has raised three grounds in his submissions.

6. On the first ground he has stated that the age of the complainant (**JK**) was not proved. That apart from JK's statement in evidence that she was 12 years old there was no documentary evidence

produced to prove her age.

7. The state through its written submissions stated that a distinction needed to be made between the provisions of Section 8 and Section 9 f Cap 62A. The state argued Section 9, unlike Section 8, age of the complainant was not a factor. The state relied on the case **OMAR MOHAMED IBRAHIM- V- REPUBLIC [2014] eKLR**. In that case the Learned Judge S N Mutuku in considering an appeal of a conviction under Section 9(1) (2) of Cap 62A stated thus when discussing the age of the complainant.

> "*On the issue of the age of the complainant, my reading of Section 9(1) and (2) of Sexual Offence Act shows that the age is not a factor for an offence under this Section other than requirement that the victim of the offence be a child. To my understanding the only requirement of age is that the victim be under eighteen years."*

Section (91) and (2) is in the following terms:

> ***9. (1) a person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.***
>
> ***(2) A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years***.

8. It is clear from that Section that the attempted offence is against a child. The learned trial Magistrate dealt with issue of age of JK thus;

> *"The complainant (JK) in this case told the court when she testified that she was 12 years…. The prosecution however did not produce any supporting document to show that … However all what the prosecution was required to prove in the case is that the complainant was a child as defined in the Children's Act i.e. [that is] she was below the age of 18 years…. Her apparent age was around 12 years. I believe her evidence that she was age 12 years at the time the offence was committed."*

9. I am in agreement with the Learned Magistrate's assessment of the requirement of Section 9 (1) and (2) Cap 62A. Further the Learned Magistrate had an opportunity to observe JK. By so observing her he was best suited to determine if she was a child as defined by the Children's Act. I have no reason presented before me to lead me to make an alternative finding. It follows that the ground on the age of JK is rejected.

10. The second ground is to the effect that the prosecution did not prove the offence.

11. The state in response submitted that the prosecution has to prove:

a. *The appellant had intention to defile JK;*
b. *appellant prepared to commit the offence; and*
c. *the appellant made some steps to commit the offence and it is only that he was not fully successful.*

12. Counsel advance his submissions on the above proposition by stating that appellant;

a. Tapped JK on her legs and she fell down;
b. lifted up JK's skirt up to the waist;
c. removed Jk's under pants;
d. tried to lie on JK; and
e. had dropped his trousers and inner wear.

13. Counsel for the state referred the court to the case:**Mussa s/o Saidi – versus- Republic [1962] E A 454** where in a case dealing with attempted larceny, Spry J (as he was then) stated at page 455:

'The principles of law involved are very simple but it is their application that is difficult. If the appellant intended to commit the offence of larceny and began to put his intention into effect and did some overt act which manifests that intention, he is guilty of attempted larceny (Penal Code S. 380). The burden on the prosecution is therefore first to prove the intention and secondly to prove an overt act sufficiently proximate to the intended offence. The intention will, in the majority of cases, only be capable of proof by inference and it follows in such cases that an act must be of such a character as to be incompatible with any other reasonable explanation. Secondly, even if the intention is established, the act itself must not be too remote from the alleged intended offence."

14. The counsel for the state was correct in his assessment of the obligations of the prosecution when proving inchoate offence. In a more recent decisions by Justice P Nyamweya in the case **KIOKONGUNZI V- REPUBLIC [2015]**eKLR the court similarly found that the prosecution has to prove the same elements. The court stated thus:

In **Francis MutukuNzangi – v- REPUBLIC , NRB CA CRIM. Appeal No. 358 of 2010 [2013] eKLR the Court of Appeal explained the** meaning of an attempt, as defined by Section 388 of the Penal Code (Chapter 63 of the Laws of Kenya) as follows:

"Our understanding of this provisions is that if a person conceives an idea or plan to commit an offence and sets out to effectuate the intention by asking definite steps or puts in motion a chain of events or state of things calculated to attain the objective as manifested by some open and discernible act or acts but fails to achieve his objective, he will be guilty only of an attempt to commit the offence. The attempt is proved whether or not that person did all the acts necessary to perfect the offences and quite irrespective of what interveningact or change of heart may have aborted the fulfillment. It also maters not that circumstances did in fact exist, unbeknown to the person, that would have rendered his success impossible."

15. JK on 22nd August, 2011 was grazing cattle and the same time collecting fire wood with her friend G. G had gone to collect firewood in a bush that was a head of where JK was.JK then stated:

"*I then heard (realized) somebody tapping me on the legs. I fell down…. on falling down the person (appellant) lifted up my skirt up to the waist, I started to scream. He removed my under pant and dropped it to my legs. He tried to lie on me. He knelt down and wanted to lie on me. By then he had dropped his trousers to the leg…. His inner pants was also on his lower leg. When I screamed G heard it."*

G who also was a child appeared on the scene. When she came she found appellants clothes on the side of him. JK continued to state:

"*G came. Mathenge (appellant) started to pull me. I was pulling myself away. He was holding me on the hand when he was pulling me away…. G was holding me on the hand when he was pulling me away… Both of us (JK and G) were screaming."*

16. It is the children's screams that attracted other children that were nearby and who went on the scene and assisted G to free JK from the appellant's hold. They all ran away for the scene.

17. P W 2 S K on hearing the children scream ran towards the scene. On the way she met JK and G running and calling their grandmother. P W 2's ten year old son was also with them. When P W 2 went on the scene she said:

"*I found him (appellant) putting on his pants and trousers. I asked Mathenge what he had done. He said he had not done anything."*

18. There is ample proof that appellant attempted to defile JK. Indeed if it was not for JK's and G's spirited fight appellant would have achieved his intentions.

19. Appellant's submissions, therefore, that the offence was not proved is rejected.

20. On the third ground appellant submitted that the evidence submitted by prosecution was contradictory. To advance this ground appellant submitted that JK's evidence about appellants manner of dressing, or the lack of it, at the scene when she returned with her gran mother contradicted what P W 2 stated.

21. The state submitted that there were no contradictions in the prosecution's evidence. And that the appellant had taken steps to defile JK.

22. Appellant in support of this ground lay emphasis on the evidence of JK and P W 2 which he submitted contradicted itself in respect the manner of undressing appellant was found when people came on the scene.

23. JK said that she had G ran to the gran-mothers home which the court estimated was 80 metres away from the scene. JK said:

> "*Others who came found you (appellant) naked."*

24. P W 2 said that she ran to the scene when she heard the children scream. P W 2 then said she found appellant dressing at the scene.

25. In my view the two accounts do not reveal any material contradiction. It may well be that JK and her grandmother arrive not long after P W 2 arrived at the scene. It may well have been that appellant was in the process of dressing when they all arrived. Whichever is the case as correctly submitted by the state manner of appellant's dressing does not detract the very clear evidence submitted on the attempted defilement by the appellant of JK. That ground is therefore rejected.

26. It is important to note that JK stated that appellant was drunk. She attributed that conclusion to the smell of alcohol (changaa) from appellant's breath. Similarly PW 2 said that appellant was acting drunk.

27. The question that needs to be considered is whether the appellant was so drunk that he did not know what he was doing as provided under Section 13 of the Penal Code Cap 63.

28. The court of appeal in the case: **RobaGalmaWario V Republic [2015]eKLR** considered the provisions of Section 13 cap 63 and stated.

> "in the case of **KANGORO s/o MRISHO V – R, [1956] 23 EACA 532** the predecessor to this Court, the Court of Appeal for East Africa referred to the case of **CHEMININGWA V R EACA CR NO. 450 OF 1955** (unreported), in which it was stated:
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> "***It is of course correct that if the accused seeks to set up a defence on insanity by reason of intoxication, the burden of establishing that defence rests upon him in that he must at least demonstrate the probability of what he seeks to prove. But if the plea is merely that the accused was by reason of intoxication incapable of forming the specific intention required to constitute the offence charged, it is a misdirection if the trial court lays the onus of establishing this upon the accused." see: Joshua MatataNdonye v R, [2001 eKLR, CR No. 122 of 1991 (Kwach, Shah &O'KubasuJJ.A)***
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> In the case of NYAKITE s/o OYUGI, [1959]EA 322 at page 325 it was stated by the predecessors to this court that

"***In the present case we think, with respect, that the Learned trial Judge erred in directing himself that the burden of raising a defence of intoxication so as to negative intent to kill or cause grievous harm was on the accused."***

29. There was nothing in the actions of the appellants that would lead this court to find that he was drunk that he was incapable of forming the specific intention to commit offence of defilement.

30. He undressed JK and also undressed himself. When G came on the scene he held on to JK as G was pulling JK and he continued to pull her even when other children came to the rescue. This does not paint a picture of one who is so intoxicated that he did not know what he was doing. If so he would not have been able dress himself when other people came to the scene.

31. Having considered and re-evaluated the prosecution's evidence I find that there is no merit in the appellant's appeal. It is dismissed. The trial court's conviction is upheld and the sentence is confirmed.

Dated and Delivered at Nanyuki this 7th APRIL , 2016

MARY KASANGO

JUDGE

Coram

Before Justice Mary Kasango

Court Assistant – Njue

For state ……

For Appellant …….

Appellant ……

COURT

Judgment delivered in open court

MARY KASANGO

JUDGE