REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL NO. 46 OF 2015

BETWEEN

C O M …….……...……...……..... APPELLANT

AND

REPUBLIC …..……RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 261 of 2014 at Senior Resident Magistrates Court at Ndhiwa, Hon. B.R. Kipyegon, RM dated 19th November 2015)

JUDGMENT

1. The appellant, **C O M**, was charged with the offence of attempted defilement contrary to **section 9(1)** and **(2)** of the ***Sexual Offences Act, 2006*** in the subordinate court. The particulars of the charge were that on 2nd June 2014 at [Particulars Withheld] within Homa Bay County he intentionally and unlawfully attempted to cause penetration with penis into the vagina of JAO, a child aged 4 years. Based on the same facts he faced an alternative count of committing an indecent act with a child contrary to **section 11(1)** of the ***Sexual Offences Act, 2006***.

2. The appellant was also charged with attempting transmission of a disease contrary to **section 26(1)** of the ***Sexual Offence Act, 2006***. The particulars were that on 2nd June 2014 at [Particulars Withheld] , the appellant having knowledge that he was infected with the HIV, he intentionally and knowingly attempted to cause penetration with his penis to the vagina of JAO, an act which could have caused transmission of HIV to her.

3. The appellant was convicted on the principal count and second count and sentenced to 10 years and 15 years imprisonment respectively. Both sentences were ordered to run concurrently. The appellant now appeals against conviction and sentence based on the petition of appeal filed on 17th December 2015.

4. In the written submissions in support of the appeal adopted by his counsel, Mr Ogutu, the appellant contended that the court erred in finding that the prosecution proved the case beyond reasonable doubt. He further submitted that the testimonies of the witnesses were contradictory and that the person referred to in the charge sheet was not the person who testified hence the appellant was wrongly convicted. He contended that the trial court erred in relying on the uncorroborated testimony of the complainant without complying with the provisions of **section 124** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)***.

5. Counsel for the respondent, Mr Oluoch, conceded the appeal on two grounds. Firstly, the charge

sheet showed that the complainant was JAO, a child aged 4 years while the person who testified was SA, a child aged 6 to 7 years. He submitted that no attempt was made by the court, prosecution or defence to clarify this anomaly. Secondly, counsel submitted that the prosecution did not lay a basis for the production by PW 7 of a medical report prepared by another doctor hence the medical report was improperly admitted and could not be relied upon. Counsel urged the court to order a re-trial as the evidence against the appellant was overwhelming.

6. Notwithstanding the concession by learned counsel for the respondent, it remains the duty of this court to satisfy itself that the concession is well taken and supported by the evidence and proceedings. I am therefore required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see ***Okeno v Republic*** **[1973] EA 32**).

7. The learned magistrate directed the complainant (PW 1) to give unsworn testimony as he was satisfied that she understood the duty to tell the truth but could not appreciate the nature of the oath after a *voire dire*. PW 1 stated that her name was SA and that she was attending Baby class at the local primary school. She narrated what happened to her as follows;

> *I know the man in the dock. He is Mrefu. He did bad things to me. He met me at my grandmother's place and asked me to hug him. He later did inhuman things to me….. Mrefu led me into the bush and removed my clothes. After he removed my clothes he promised to buy me bread. He also removed his trouser. Mrefu did something to me. He touched my stomach. A neigbour heard me cry and he came with a torch. This was Georgie and Mrefu ran away.*

8. When recalled for cross-examination by counsel for the accused she stated as follows;

> *Mrefu removed my clothes in the bush. I wore a green pant. He did things to me. He slept on me and promised to buy me soda and bread. He removed my clothes and did something …..… Mrefu removed his trouser…..*

9. PW 1 further testified *Georgie* arrived, the appellant ran away. Thereafter people came and she was taken for treatment. The complainant's uncle, PW 2, recalled that on 2nd June 2014, he was in his house when he heard some noise coming from his grandmother's place. He went there and found PW 1 surrounded by people asking her what was wrong. PW 1 told him that *Mrefu* had taken her to the bush and had done bad things to her. He went to make a report to the village elder who caused the appellant to be arrested. He later took PW 1 to the police and then to hospital.

10. A local fisherman, PW 3, recalled that on the same night at about 9.00pm, he heard noise outside. He found a group of people who reported to him that *Mrefu* had been found trying to defile a child. He joined the group that went to *Mrefu's* house. As they did not find him, they went to report to the Assistant Chief. On the next day he arrested the appellant whom he knew as *Mrefu* at his home.

11. The Assistant Chief of Kiabuya Sub-location (PW 4) testified that on the material night she was awoken by PW 3 who informed her that a child had been defiled by a known person. She saw the PW 1 who was crying and was frightened. PW 1 mentioned *Mrefu* as her assailant. She advised PW 3 and the people who came with him to look for *Mrefu* in the morning. On the next day she was informed that the appellant had been arrested. PW 1 pointed him out and she took him and the complainant to Magunga Police Station.

12. PW 4, a fisherman, testified that on 2nd June 2014 at about 8.30pm, he heard a child cry in a bush. He took his torch and moved towards the bushes. When he switched it on, he saw a child and tall man whom he recognized as *Mrefu*. The child told him that the man had done bad things to her. He immediately called for help and the people who gathered began searching for the appellant.

Since they did not find him at his house, they went to report to PW 3.

13. PW 6, a nurse, testified that the she knew the appellant as he was a patient at GB Health Center where he had been tested and found HIV+ in 2013. She produced his patient file to confirm that he was attending the clinic. PW 7, the Medical Superitendant of Ndhiwa District Hospital, testified that he had worked with Dr K. for 3 years and was conversant with his signature and handwriting. He stated that Dr K. was not available on that day. He produced the P3 form made by the doctor who examined PW 1. The findings were that when PW 1 was examined on 3rd June 2013, her hymen was intact and there were no lacerations, blood or other discharge noted. He also conducted an age assessment and confirmed that the child was between 6-7 years. A clinical card for PW 1 produced confirmed that she was born on 30th December 2008 hence she was aged 5 years.

14. The investigating officer, PW 8, testified that on 3rd June 2014, while at Magunga Police Station, he received a report from PW 2 that PW 1 had been defiled. He also stated that the appellant was brought to the station by members of the public. He issued P3 forms for both the PW 1 and the appellant and after conducting investigations caused the appellant to be charged. He found that PW 1 was living with her grandmother as her father had died.

15. When called upon to make his defence, the appellant elected to give sworn testimony. He stated that on 2nd June 2014, he had gone fishing with other people at 7.00pm. They fished until 4.00am and he went back home at 6.00 am. While at home he was taken by villagers to the Assistant Chief on the allegation that he was defiled PW 1 which he denied. In cross-examination the appellant admitted that people in the village referred to him as *Mrefu*. He also admitted that he was HIV+ and had been undergoing treatment.

16. After hearing the evidence, the learned magistrate was convinced that the prosecution had made out its case and proceeded to convict the appellant. The first issue raised by the appellant and respondent is the identity of the child. According to the charge sheet, the name of the child was JAO and she was said to be 4 years old. When she was called to testify she stated that she was SA. She stated that her father was called JO. PW 2, her uncle testified that PW 1's father, who was called JO, had died and he referred to her as JAO. Both the testimony of PW 1 and PW 2 had the name A in common while the Child Health and Nutrition Card (Exhibit 8) referred to her as SA. I find that the surname on the charge sheet was her father's name and that the witnesses referred to her by her middle name "A". PW 1 referred to herself as S which is also the name reflected in Exhibit 8 which also has her middle name. Taking this evidence together with the consistency of the evidence, the span of time taken from the time the incident took place to the time the accused was arrested between the night of 2nd June 2014 to the morning of 3rd June 2014, leave no doubt as to the identity of the complainant. From the evidence there is no possibility that the complainant could have been any other child other than PW 1.

17. I therefore find that the error, if any, in the name of the complainant on the charge sheet was not prejudicial to the appellant. It was a curable one under **section 382** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*** which provides;

> *382. Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:*
>
> *Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.*

18. In the same vein, I also find that conflict between the age of the child stated in the charge sheet and the age that was proved was not fatal to the charge as the exact age of the child under **section 9** of the ***Sexual Offences Act*** is not material so long as it is proved the complainant is a child. In this case there is no dispute that PW 1 was a child as confirmed not only by the age assessment conducted by the Dr. K. but also by the Child Health and Nutrition Card which confirmed that she was born on 30th December 2008 meaning that she was 6 years at the material time.

19. **Section 9** of the ***Sexual Offences Act*** refers to an attempted defilement as follows;

> *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.*

20. In ***Francis Mutuku Nzangi v Republic*** **NRB CA Crim. Appeal No. 358 of 2010 [2013]eKLR**, the Court of Appeal elucidated 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 taking definite steps or puts in motion a chain of events or state of things calculated to attain that 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 offence and quite irrespective of what intervening act or change of heart may have aborted the fulfillment. It also matters not that circumstances did in fact exist, unbeknown to the person, that would have rendered his success impossible.*

21. In other words an attempted defilement is a failed defilement and that is why the intention to penetrate is a key ingredient (see ***Pius arap Maina v Republic*** **ELD HCCRA No. 247 of 2011 [2013]eKLR**). I find the evidence was sufficient to prove that the appellant intended to defile PW 1 as he had taken sufficient steps to achieve penetration. The evidence is clear that he removed her panties, removed his trousers, touched her on the private part and lay on her. Had her cries not attracted other villagers and his intended course not been interrupted by PW 5, he would have achieved penetration.

22. Counsel for the appellant submitted that the appellant could not be convicted on the basis on uncorroborated testimony of PW 1. The proviso to **section 124** of the ***Evidence Act (Chapter 63 of the Laws of Kenya)*** permits the court to act on such evidence of a child if it is satisfied that that the child is telling the truth. The learned magistrate found that PW 1 was telling the truth in the manner she narrated the events. She knew the appellant as *Mrefu* and consistently mentioned his name to every person she spoke to until he was arrested the very next morning after the event. Her testimony was also not shaken in cross-examination. Moreover, if any corroboration was required, it is found in the testimony of PW 5 who caught the appellant in the act. I therefore find that quite apart from the fact that the she was truthful; PW 1's testimony was well corroborated to found a conviction.

23. As regards the testimony of PW 7, I reject the respondent's submission that the proper foundation for the admission of the P3 form prepare by Dr K. was not laid. **Section 77** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** allows a person other than the one who prepared a report such as the P3 forms in issue to produce them provided the presumption of authenticity is met. The section provides as follows:

> *77. (1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.*
>
> *(2) The court may presume that the signature to any such document is genuine and*

that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.

(3)When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof.

24. My understanding of this provision thus gives way to any challenge being raised by the accused person on the presumption. In the absence of any such challenge the presumption of authenticity stands. The trial court may, *suo moto* or upon request by the accused person, call for the maker of such document to appear in court for cross-examination on the form and content of the report. In ***Joshua Otieno Oguga v Republic*** **KSM CA Criminal Appeal No. 183 of 2009 [2009]eKLR** the Court of Appeal considered the same issue and that

> *That in short means that if the appellant wanted the medical report to be produced by a doctor, he had to apply to the court to summon the doctor who prepared the report, otherwise there was nothing wrong in law in the P3 form being produced by PC. Ann Wambui as she did.*

In this case a proper basis for admission was laid and the medical reports admitted. However, in light of the nature of the case, the matter being one of an attempt, the conviction did not turn on the medical evidence.

25. The appellant's defence, when taken in light of the entire prosecution evidence, cannot lead to any other conclusion other than he committed the offence. After re-appraisal of all the evidence, I am satisfied that the prosecution proved that the appellant, who admitted that being referred to as *Mrefu*, attempted to defile PW 1.

26. I now turn to the argument by the appellant that the offence under **section 26(1)** of the ***Sexual Offences Act*** was not proved as there was no likelihood that PW 1 would be infected. The appellant also argues that since there was not penetration, there was no risk that PW 1 would be infected. The fact that the appellant was HIV+ was confirmed by PW 6. The appellant, in cross-examination, admitted that what PW 6 stated was true.

27. **Section 26 (1) (b)** of the ***Sexual Offences Act*** criminalizes conduct that "*is likely to lead to another person being infected with HIV or any other life threatening sexually transmitted disease"*. So long as the appellant knew he was positive, his reckless sexual conduct amounted to deliberate transmission of HIV irrespective of whether the other person got infected. The mischief that the ***Act*** intended to cure is self-evident. I find that the appellant knew he was HIV+ and he did an act which would have likely led to PW 1 being infected.

28. I affirm the respective convictions. I also affirm the respective sentences as the same were the minimum sentences provided for under the ***Sexual Offences Act***.

29. The appeal is dismissed.

DATED and DELIVERED at HOMA BAY this 5th day of April 2016

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Oluoch, Senior Assistant Director of Public Prosecutions, instructed by the Office of the Director of Public Prosecutions for the respondent.