REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL APPEAL NO. 35 OF 2015

(Being an appeal from original Conviction and Sentence in the Chief Magistrate's Court at Narok Criminal Case No. 453 of 2014 by Z. Abdul - RM)

PATRICK MWAI MWANGI………..………………...APPELLANT

VERSUS

REPUBLIC…………………………………………RESPONDENT

J U D G M E N T

1. The Appellant was tried before the Chief Magistrate's Court Narok, for the offence of attempted Defilement Contrary to Section 9 (1) and (2) of the Sexual Offences Act. In that on the 19th March, 2014 in Narok North District, within Narok County he intentionally attempted to cause his penis to penetrate the vagina of **A.N.** a girl aged 10 years.

2. At the close of the trial, he was found guilty, convicted and sentenced to serve 10 years imprisonment. Aggrieved with the decision, he has now lodged an appeal before this court. His amended grounds of appeal contain 5 grounds as follows:-

   1. THAT the trial magistrate erred in both law and facts when she convicted me in the present case yet failed to find that my rights provided by the Constitution were violated as I was held in police custody for more than 24 hours as provided for.

   2. THAT the learned trial magistrate erred in both law and facts when she convicted me in the present case yet failed to find that allegations raised by the prosecution were never proven beyond doubt.

   3. THAT pundit trial magistrate erred in both law and facts when she convicted me in the present case yet failed to find that the Charge sheet was defective.

   4. THAT the learned trial magistrate erred in both law and facts when she convicted me in the present case yet failed to find that the prosecution witnesses were hostile.

   5. THAT the learned trial magistrate erred in both law and facts when she dismissed my truthful and plausible defence."

3. He also filed home-made submissions on which he placed reliance at the hearing of the appeal. Regarding the first ground, the Appellant complains of delayed arraignment, after arrest, which he

asserts to be a violation of his constitutional rights. Ground 3 challenges the charge sheet which the Appellant contends was defective for omitting details, the time and place of the offence. Concerning the 2nd and the 4th ground, the Appellant submitted that the age of the Complainant was not proved. Equally, that the evidence of the alleged attempted defilement in a forest was not credible. His position was that he gave a good defence which tied up with the arrest evidence by PW1.

4. Mr. Kibelion appearing on behalf of the Director of Public Prosecutions opposed the appeal. Restating the prosecution evidence he asserted that every element of the offence was proved. He stated that the defence was properly dismissed. Regarding the alleged delay in arraignment, Mr. Kibelion stated that it was not a matter for the appellate court, however explaining that the Appellant was taken to court after a weekend.

5. As the first appellate court, this court is required to re-examine afresh the evidence at the trial, and to draw its own conclusions, but always bearing in mind that the trial court had the opportunity to hear and see the witnesses testify. Equally, the appellate court will be slow to upset findings of the trial court based on the credibility of witnesses, unless the findings are clearly wrong and no tribunal properly applying itself could have made them. **(See Okeno -Vs- Republic [1973] EA 32).**

6. The sum total of the prosecution evidence in the trial was as follows. The Complainant **A. N.** was 8 years old in 2014 and a student at ***[particulars withheld]*** Primary School. She resided at ***[particulars withheld]*** with her mother and father **R. K. N.** (PW3). She knew the Appellant as a neighbour who at times did odd jobs at her father's farm. On the morning of 19/3/2014 the Complainant went to the local shops where she had been sent for some provisions. She met the Appellant who greeted her. On her way back home, she met the Appellant who having bought some milk asked her to carry it. The two walked together homewards.

7. After a distance, she gave him his milk and he pretended to go his way only to grab the Complaint and pull her into a thicket. He threatened to strangle her when she raised an alarm and proceeded to strip her of her skirt and trouser and pant. But as he stepped aside to undress the Complainant dashed off. Tying a sweater around her waist to hide her nakedness she ran home.

8. Her father, PW3, was called home and he and other members of public followed the Complainant to the scene in the bush. There her skirt and trouser (Exhibit 1 and 2) were found. With other men, PW3 continued searching for the Appellant. He was eventually found hiding in a forest later in the night. He was arrested. The matter was reported to Narok Police who referred the Complainant for examination, which revealed that no penetration had occurred.

9. In his unsworn defence statement the Appellant stated that he was a farmer at Olkinyei. On the material date he was hired to do some work in the area when PW3 came by. He questioned him concerning the work – removing posts – he was engaged in. A disagreement arose between him, the Appellant and the farm owner resulting in PW3 being barred from working there. PW3 threatened to get even and that night PW3 came to his house with other men. They arrested him on claims that he was spoiling PW's child. He denied the offence.
10. I have considered the submissions in light of the evidence adduced at the trial. Grounds 1 and 3 can be dealt with straight off. As the Director of Public Prosecutions observed, issues relating to delayed arraignment of suspects have no relevance in an appeal and can be pursued in a Civil Suit. (**See Julius Kamau Mbugua –Vs- Republic [2012] eKLR**). On the correctness of the charge, Section 134 of the Criminal Procedure Code prescribes the particulars required to be supplied in relation to a charge. The charge against the Appellant complies with the requirements. The place of the offence is stated to be ***[particulars withheld]*** area and it was not necessary to give the time of the offence. The charge sheet was properly laid before the court.

11. Grounds 2, 4 and 6 are related in that they deal with the prosecution and defence evidence at the trial. A consideration of the trial evidence must be prefaced by a look at Section 9 (1) of the

Sexual Offences Act. The attempt refers to "an act which would cause penetration with a child." An attempt is defined in Section 388 of the Penal Code as follows:

> "**When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfillment, and manifests his intention by some overt act, but does not fulfill his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence."**

12. The Court of Appeal has further elaborated on the above section in the case of **Francis Mutuku Nzangi -Vs- Republic [2013] eKLR**, by stating that:

> "**Our understanding of this provision 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 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 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."**

13. The evidence in the lower court was straight forward. The Appellant followed the Complainant as she left the shopping centre on the pretext that he was taking his milk home, but linked her to himself by asking her to carry his milk. On reaching a deserted place he pounced on her and undressed her – removing her skirt and trouser. While he stood aside to undress, the girl slipped off and ran away, leaving her clothes behind.

14. The clothes were found at the scene by her father when he arrived at the scene in the company of the minor. The minor identified the clothes. The minor's father (PW3), despite erroneously referring to the clothes as the Appellant's clothes also said that :-

> **"The girl got home naked and her mother got surprised. I inquired from the girl who the person was and she said he is called Mwai and has no tooth. He had taken her to the bush removed all her clothes. When he was removing his, the girl managed to escape. Members of the public accompanied me to the bush and we found Accused's clothes." sic**

15. PW1 was well placed to identify her clothes – the blue jeans skirt (Exhibit 1) and trouser (Exhibit 2) which she said were found when she took her "father and other people where I had been taken by Accused." Her underpant however was not found.

16. That the minor and her father were known to the Appellant was not disputed. The incident in question occurred in the day time. The Appellant's alleged dispute with PW3 over some logs was not put to PW3 during cross-examination. Besides, PW1 was not party thereto from the Appellant's evidence.

17. The minor's age assessment report was irregularly tendered from the bar by the prosecutor. While it is more reliable than the oral evidence by PW1 and PW3, it could not properly be relied on as it was not tendered as an exhibit through a witness. While PW1 could not tell her age, PW3 said she was 8 years old. The treatment notes and P3 form Exhibit 3 completed by **Benjamin Kipwatum** the Clinical Officer Narok Hospital PW2 indicate the minor's age to be 10 years.

18. The offence of attempted defilement is proved so long as the victim is proved to be a child, and a child under the Sexual Offence Act has the meaning assigned to the Children Act. A child thereunder is any human being under the age of eighteen years. Whether 8 or 10 the Complainant was a child within that definition. The trial court clearly accepted the evidence of PW1 and gave

reasons. The court cannot be faulted as it gave full consideration of the evidence before it and dismissed the Appellant's defence as a mere denial.

19. The intentions of the Appellant are clear from his proven actions. First he struck up a conversation with the minor at the shopping centre and asked her to carry his milk, possibly to assuage any fear on her part as they walked together. In a bushy area, he pretended to part with her, only to pounce on her and remove her skirt and trouser and evidently the underpant. It was while he undressed that the Complainant fled, the scene, naked waist down.

20. There can be no doubt that the Appellant was taking steps to actualise his demonstrated intention to defile the minor. In accordance with Section 388 (2) of the Penal Code it is immaterial that he had not done all that was necessary on his part for completing the commission of the offence. His proven overt acts sufficiently manifest his intention as does his choice of the scene of the acts – a deserted place in a bush. But for quick thinking by the Complainant, the offence would have been completed. The Appellant was convicted on sound evidence and his appeal has no merit whatsoever. The appeal is hereby dismissed.

Delivered and signed at Naivasha, this **14th day of July, 2016.**

In the presence of:-

For the DPP Mr. Koima

For the Appellant N/A

C/C Barasa

Appellant present

C. MEOLI

JUDGE