



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CRIMINAL APPEAL NO. 10 OF 2015**

*(An appeal from original conviction and sentence of Kilgoris SRM's Criminal Case No. 720 of 2014 by Hon. MONICA MUNYENDO RM dated 6<sup>th</sup> February, 2015))*

**ISHMAEL LEDAMA NATHAN.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. The appellant herein **Ishmael Ledama Nathan** was initially charged before the Principal Magistrates Court at Kilgoris in Criminal Case Number 720 of 2014 with the offence of defilement contrary to **section 8(1)(3) of the Sexual Offences Act NO. 3 of 2006**. The particulars of the charge were that on the 22<sup>nd</sup> May 2014 at around 6.00am at [Particulars withheld] Village, Poroko Location in Transmara West District of Narok County he intentionally caused his penis to penetrate the vagina of E N N (name withheld) a child of 14 years.

2. The appellant also faced an alternative charge of indecent act with a child contrary **Section 11(1) of the Sexual Offences Act**. The particulars of the charge were that on the 22<sup>nd</sup> day of May 2014 at around 6.00am at [Particulars withheld] Village, Poroko Location in Transmara West District of Narok County intentionally touched the vagina of E N N a girl aged 14 years with his penis.

3. The appellant denied the charges after which a trial was conducted and at the close of the prosecution's case, the trial court found that a prima facie case had been made out against the appellant to warrant his being placed on his defence. The appellant gave an unsworn testimony and called two witnesses in his defence. In her judgment the trial magistrate found that the case against the appellant had been proved beyond reasonable doubt and convicted him for the offence of attempted defilement after which he was sentenced to 10 years imprisonment. It is this outcome of the lower court case that has triggered the instant appeal wherein the appellant has appealed against both the conviction and sentence and has set down the following grounds of appeal:

**1. That the Hon. Magistrate never gave me the opportunity and information to digest the evidence of the prosecution.**

**2. That the Hon. court of trial erred in both law and and fact by not allowing me to consult any law experts or advocate so as to make the right decision on the plea.**

**3. That the learned trial magistrate erred in the law and the fact by relying on hearsay evidence as a basis of conviction and sentence.**

**4. That I was originally charged with the offence of stock theft contrary to section 275 of the Penal code.**

**5. That the trial magistrate erred in law and facts by convicting and sentencing the appellant to serve seven years imprisonment without considering the age of the appellant.**

**6. That the trial magistrate erred in law and facts by not considering the appellant's mitigation.**

**7. That the conviction and the sentence is irregular in law.**

4. The appellant also filed his written submissions in which he states *inter alia* that his right to be accorded legal representation was breached. He also contends that his identification was not conclusive as the alleged crime took place at night and that the trial court did not consider his defence. Lastly he states that he was convicted and sentenced on a charge sheet that was defective.

5. The respondent on its part submitted that there was no breach of the appellants rights as envisaged under Article 50 of the Constitution, that the prosecution's evidence was watertight and that the charge sheet was properly amended in line with the relevant provisions of the Criminal Procedure Code since the evidence adduced was consistent with the charge.

6. When the above appeal came up before for hearing on 14<sup>th</sup> July 2016, the appellant further submitted that he was not furnished with the witness statements and that not all the prosecution witnesses were availed before the court especially one J, the Headmaster of the school where complainant allegedly went to school and the chief of the camp where the identification parade was conducted.

7. Mr. Otieno for the state submitted that all the witness statements were supplied to the appellant both before and at the trial and that is why the appellant was able to produce, as an exhibit, the statement of a witness who did not testify in the case, as D exhibit 1.

8. This being a first appeal, my duty is to analyze the evidence afresh and re-evaluate the same in order to draw my own independent conclusion bearing in mind the fact that I neither saw nor heard the witnesses testify. See **Okeno vs Rep. [1982-88] KLR 1136.**

9. In a more recent decision, the Court of Appeal in **Collins Akoyo Okemba & 2 others vs Republic [2014] eKLR** emphasized the first appellate court's duty on as follows:

**“It is a duty to re-evaluate, re-analyze and re-consider the whole evidence in a fresh and exhaustive way before arriving at its own independent decision.”**

10. The prosecution led evidence as follows:

PW1 E N N the complainant testified that she was 14 years old and was a Standard eight pupil at (Particulars withheld) school. She informed the court that on 22nd May, 2014 at about 5am, she set off for school when on reaching an open field with a few bushes, a person suddenly appeared, grabbed her by her neck and dragged her to a nearby bush. Upon realizing she was under attack, she screamed but her attacker in turn slapped her face, and pushed her onto the ground where she fell on her stomach after which the attacker pulled up her dress and tried to remove her pants, which move she resisted by pulling her pants up, but the assailant stepped on her hand as he simultaneously removed his trousers, proceeded to spread her legs and insert his penis into her vagina from behind.

11. PW2, S M, stated that at the material time of the attack on PW1, she was also on her way to school in the company of her school mates S and S when she heard screams from a girl and upon rushing towards the direction of the said screams she met appellant being chased by PW3. PW2 added that as the appellant ran past her, he cautioned her and her colleagues not to tell on him. She then proceeded to where PW1 was and found her crying. . PW6, B M a pupil from the same school as the complainant and PW2

corroborated the testimony of PW2.

12. PW3, **M L K**, testified that he heard the complainant scream and rushed to the scene of the attack where he found the appellant lying on top of the complainant and that when the appellant saw him, he immediately pulled up his trousers and ran away. PW3 ran after the appellant who managed to escape from the scene.

13. PW4 was the clinical officer, **Joel Langat** who examined the complainant's genitalia following the attack and noted that the external genitalia was normal as there was no trauma around her labia minora and majora. He further observed that there was no penetration since the complainant's hymen was intact. He produced the P3 form which was marked as Pexhibit 1.

14. On 2<sup>nd</sup> October 2014, the prosecution applied to amend the main count in charge sheet from the initial charge of Defilement to that of attempted defilement contrary to **Section 9 (1)** as read with **Section 9 (2) of the Sexual Offences Act No. 3 of 2006**.

15. The particulars of the amended charge was that on 22<sup>nd</sup> May 2014 at around 6 a.m. at [Particulars withheld] village Poroka Location in Transmara West District of Narok County did intentionally and unlawfully attempt to cause his penis to penetrate the vagina of ENN a child aged 14 years.

16. The alternative charge was that of committing an indecent act with a child contrary to **Section 11 (1) of the Sexual Offences Act No. 3 of 2006**. The particulars being that on 22<sup>nd</sup> May 2014 at 6 a.m. at [Particulars withheld] Village in Narok County intentionally touched the vagina of ENN a child aged 14 years with his penis.

17. The appellant did not object to the amendment and pleaded 'not guilty' afresh to the new charges after which the trial proceeded with the testimony of PW5, PW6 and PW7.

18. PW5 was **M N** the mother of PW1 who told the court that on the material day at about 7.00pm, PW1 came back home crying and she noticed soil at the back of her head. It was then that PW1 informed her that someone had attempted to defile her after which she then accompanied PW1 to her school where the head teacher informed her that he had already been informed of the attack and that the assailant had already been identified and arrested. PW5 then accompanied the complainant to Poroko where the complainant identified the appellant as the person who had attacked her that morning.

19. PW7, **PC Peter Maina**, was the investigating officer who rearrested the appellant at Poroko. He produced the complainant's pink pant and beige biker as Pexhibits 2 and 3. He also produced the complainant's age assessment report which confirmed she was aged 14 years. This marked the close of the prosecution's case.

20. In his unsworn testimony the appellant stated that on the material morning at 6.00a.m his neighbour one Jackson Tageu knocked at his door to inform him that he had someone who was interested in leasing land and that at around 8am, he set off for Nyangusu where he was informed that he was needed at Poroko Chiefs Camp on allegations that he had defiled a girl. He then proceeded to the Police Camp where the complainant stated that she knew him as the person who lived close to her school and used to graze cattle, but did not identify him as the person who attacked her after which he was released only to be arrested shortly thereafter upon being identified by other children. He produced a statement by one Jackson Tagen in support of his case.

21. DW2, **Nathan Leshan Nyukur**, was the father of the appellant. He testified that he saw the appellant at home on the morning that he is alleged to have committed the offence. His testimony was that later on the same day, a large group of people came to his home ostensibly to conduct a search for a track suit that had allegedly been worn by the appellant during the attack on the complainant but they did not find the said track suit.

22. DW3, **Edward Lekakany Leshan**, also confirmed that accused was in his home on the material

night, but could not tell if he left in the morning and came back.

**Analysis and determination.**

23. I have carefully evaluated the evidence tendered before the trial court by both the prosecution and the defence. I have also considered the rival submissions made on the appeal and noted that the following are the issues that require this court's determination.

- 1. Whether the appellant's lack of legal representation in the lower court constituted a breach of his constitutional rights under article 50 of the Constitution.**
- 2. Whether the appellant was convicted on a defective charge.**
- 3. Whether the appellant's identification by the complainant was conclusive.**
- 4. Whether failure by the prosecution avail all the witnesses was fatal to its case.**

24. With regard to the first issue, the appellant contended that lack of legal representation at the trial court was a breach of his constitutional rights under Article 50 of the Constitution. Article 50 of the Constitution provides as follows:

**"1. Every person has a right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent or impartial tribunal or body.**

**2. Every accused person has a right to a fair trial which includes the right:**

a) .....

b) .....

c) .....

d) .....

e) .....

f).....

g) .....

**h) To have an advocate assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of the right promptly."**

25. The Court of Appeal sitting in Malindi dealt with this issue of Legal representation in the case of **Karisa Chengo , Jefferson Kalama Kengha, Kitsao Charo Ngati vs Republic [2015] eKLR** when it quoted the case of **David Macharia Njoroge v Republic [2011] eKLR**, where it was held:

**"State funded legal representations is a right in certain instances Article 50(1) provides that an accused shall have an advocate assigned to him by the state, at state expense, if substantial injustice would otherwise result. Substantial injustice is not defined under the constitution, however, provisions of international conventions that Kenya is a signatory to are applicable by virtue of Article 2(6). Therefore, provisions of ICCPR and the commentaries by the Human Rights Committee may provide instances where legal aid is mandatory.**

**We are of the considered view that in addition to situations where 'substantial injustice would otherwise result' persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense. We would not go so far as to suggest that every accused person convicted of a capital offence since the coming into effect of the new constitution would automatically be entitled to a retrial where no such legal representation was provided. The reasons are that, firstly, the provisions of the new constitution will not apply retroactively, and secondly, every case must be decided on its own merit to determine if there was serious prejudice occasioned by reasons of such omission."**

26. In the case of **Karisa Chengo, Jefferson Kalama Kengha (supra)** the Court of Appeal added as follows:

**"substantial injustice only arises in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise."**

27. From the above quoted cases, it is clear that for an accused person to qualify for legal representation under Article 50, it must be evident that such a person charged with a capital offence cannot afford legal representation thereby compromising the trial in one way or another. In the instant case, the appellant was charged with the offence of attempted defilement that attracts a penalty of 10 years imprisonment upon conviction and not a death penalty. Under those circumstances, I find that the appellants argument that he was entitled to legal representation as envisaged under Article 50 of the constitution is not sustainable.

28. With regard to the second issue, the appellant contended that he was convicted and sentenced on a defective charge sheet. From the record of proceedings, this court notes that the appellant was initially charged with the offence of defilement. However, after the evidence of the Clinical officer who confirmed that there were no signs of penetration in the complainants genitalia, the prosecution applied for the charge sheet to be amended from defilement to attempted defilement.

29. **Section 214 of the Criminal Procedure Code** provides as follows:

**"214(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case.**

**Provided that:**

i) where the charge is so altered, the court shall thereupon call upon the accused to plead to the altered charge;

ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross- examined by the accused or his advocate, and in the last mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination."

30. In the present case, the record of proceedings shows that the charge sheet was amended before the close of the prosecution's case and that the appellant took fresh plea in accordance to **section 214(1)(i) of the Criminal Procedure Code**. Under the above circumstances, I find that the appellant's contention that the charge was defective cannot hold any water.

31. On the next issue of whether or not the prosecution availed sufficient witnesses to support its case, I will refer to the case of **Martin Nyongesa Wanyoyi v Republic [2015] eKLR** in which the appellant made a similar allegation that a vital witness had not been called and the court observed as follows:

**"We are also satisfied that no prejudice was visited upon the appellant by the failure to call**

**witnesses. In any event, section 143 of the Evidence Act provides that no particular number of witnesses is required to prove a particular fact, and we take the view that it was the prerogative of the prosecution to determine and call such witnesses as it deemed necessary to prove its case. As a consequence this ground fails."**

32. In the instant case the prosecution availed the evidence of the complainant and an eye witness, PW3, who corroborated the complainant's testimony among other witnesses who included the clinical officer. PW3, who found the appellant in the act of attempting to defile the complainant and who pursued and arrested the appellant testified as follows:

**"I ran to the place and found Ishmael Ladama on top of a girl. The girl was lying on her stomach, Ladama was lying on her back. He had stepped on one hand of the girl. When he saw me he pulled up his trouser and ran."**

33. It is my finding that the prosecution called sufficient evidence to prove the case against the appellant and that the failure to call all the witness lined up by the prosecution did not prejudice the appellant's case in any way.

34. With regard to the last issue of whether the appellant's identification by the complainant was conclusive, I find that the evidence of PW1 was clear, candid and consistent. She narrated how on the fateful day, the appellant, whom she knew very well and identified as a neighbour attacked her on her way to school. As already noted in this judgment, the complainant's evidence on identification of the appellant was corroborated by the testimony of PW3 who found the appellant in the act. The complainant stated the following on the identity of the person who attacked her:

**" the person who defiled me is Ledama, he is in court. I had seen him before near Corner Chuma. He is usually on the road. I have started seeing him since 2nd term last year.**

35. On cross examination by the accused the complainant stated:

**"I know you by your name and face. When you caught my neck, I saw your face as you dragged me.**

36. On cross examination by the court the complainant stated:

**"I was able to see the accused's face because there was moonlight. There was a full moon. When the person caught me by the neck, I was able to see the person's face. I looked at him for like five minutes."**

37. In the case of **Peter Musau Mwanzia v Republic [2008] eKLR** the Court of Appeal sitting in Nairobi differentiated between identification and recognition as follows:

**"We do agree that for the evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for sometime, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident."**

38. In the present case the appellant was well known to the complainant as she told the trial court that she had been seeing the appellant since second term of the previous year. Furthermore, the time of her attack was 6am and there was sufficient light from the moonlight enabling the complainant to recognise the appellant. PW3 stated that it was also dawning at the time of the incident. This was therefore a case of recognition and not identification as the appellant was well known to the complainant and PW3 who

caught the appellant red-handed in the and positively identified him.

39. Turning to the charge of attempted defilement, **Section 9 (1) of the Sexual Offences Act** defines attempted defilement as follows:

**“A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.”**

40. Under **Section 9 (3) of the Sexual Offences Act**, the penalty for the offence is imprisonment for a term of not less than 10 years. Penetration on the other hand is defined in **Section 2 of the Sexual Offences Act** as follows:

“Penetration means the partial or complete insertion of the genital organs of a person into the genital organs of another person.”

41. Section 388 of the Penal Code aptly defines “attempt” as follows:

**“388 (1) when a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some inert act, but does not fulfil his intention to such extent as to commit the offence, he is deemed to attempt to commit the offence.**

**(2) It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfillment of his intention is prevented by circumstances**

**independent of his will, or whether he desists of his own motion from the further prosecution of his intention.**

**(3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence.”**

42. Makau J. defined the offence of attempted defilement in the case of **David Ochieng Aketch Vs Republic [2015] eKLR** as follows:

**"The appellant was charged and convicted with an attempted defilement contrary to section 9(1) of the 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 the complainant's vagina and /or bruises or lacerations of culprits genital organ and finding male discharge such as semen or spermatozoa outside the complainants vagina or inner wear without there being penetration. There was absence of penetration or evidence linking the culprit with the offence of attempted defilement.”**

43. In a similar case of **Omar Mohamed Ibrahim vs Republic [2014] eKLR S.N. Mutuku J.** Observed as follows:

**“The very act of pulling PW1 into his house where he was alone, removing her clothes and demanding sex from her or he kills her, chasing her to PW2’s house and demanding for her leads me to conclude that the intention of the appellant was to have sexual intercourse with PW1. Since PW1 said that the appellant did not manage to have sex with her and this was confirmed by the clinical officer, the only logical conclusion was a charge of attempted defilement. I find so.”**

44. In the instant case the complainant told the trial court that the appellant defiled her. PW3, an eye

witness to the attack on the complainant testified that he found the appellant lying on top of the complainant's back with his trousers half way down. There was also evidence that the appellant had torn the complainant's inner wear and biker which were produced as P exhibit 2 and 3 respectively.

45. In my humble view, there was ample evidence linking the appellant with the offence of attempted defilement and the absence of any physical injury or discharge on the complainant's genitalia did not in any way diminish the weight of the prosecution's case. The prosecution tendered cogent and overwhelming evidence to prove that the appellant had removed the complainant's pants and his own trousers and was lying on top of the complainant in an open field. Under those circumstances the conclusion that any reasonable person can arrive at is that the appellant was either defiling the minor or was on the verge of doing so, had his heinous mission not been interrupted by the sudden appearance of PW3 at the scene.

46. The evidence of the appellant that he was not at the scene cannot be true. This defence was not credible and must be an afterthought. He was seen at the scene by PW3 who attempted to pursue him. PW2 and PW6 also testified that they saw PW3 chasing appellant from the scene of the crime. The appellant's witnesses claim that he was at home on the morning of the attack was not conclusive as none of the said witnesses could confirm whether the appellant left the home that morning or not. I reject the appellant's defence.

47. The appellant has not stated that he had a grudge with any of all the prosecution witnesses or that they had a conspiracy to implicate him.

The intention and attempt by the appellant to defile the complainant was clearly demonstrated when he waylaid the complainant on her way to school, grabbed her by the neck, dragged her to the nearby thicket, pushed her to the ground and forcefully undressed her before removing his trousers and inserting his penis into her vagina. The appellant was caught red handed by PW3 in the act while lying on top of the complainant.

48. On sentence I find that the same was legal and in line with the provisions of **Section 9(1)(2)** of the Sexual offences Act. An age assessment report produced by PW7 as P exhibit 4 revealed that the complainant was a child aged 14 years.

**49. Section 2 of the Act** defines a "child" as follows:-

**"Child has the meaning assigned thereto in the Children Act (Cap 141).**

**And in Section 2 of the Children Act, a "child" is defined as "a child means any human being under the age of 18 years."**

50. I hasten to add that the wording of **Section 9 of the Sexual Offences Act**, unlike in the offences of defilement and rape where the age of the victim must be proved considering the weight of the age when it comes to sentencing, in a charge of attempted defilement, all that the prosecution needs to prove is that the victim was aged below 18 years and not necessarily the specific age.

51. In the end, I find that the prosecution's case was proved beyond reasonable doubt. The appellant attacked the complainant with the intention of defiling her. I find that this appeal lacks merit and I hereby dismiss it.

52. It is so ordered.

**Dated, signed and delivered in open court this 13<sup>th</sup> day of September 2016**

**HON. W. A. OKWANY**

**JUDGE**

**In the presence of:**

- Mr. Otieno for the State
- Appellant in person
- Omwoyo: court clerk