REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.220 OF 2011

(An Appeal arising out of the conviction and sentence of HON. T. NGUGI PM delivered on 24th August 2011 in Makadara CM. CR. Case No.2688 of 2010)

G A K…...APPELLANT

VERSUS

REPUBLIC…………………………………………………………..RESPONDENT

JUDGMENT

The Appellant, G A K was charged with the offence of **attempted defilement** contrary to **Section 9(1)** and **(2)** of the **Sexual Offences Act**. The particulars of the offence were that on 14th July 2010 at ***[particulars withheld]*** Estate in Nairobi, the Appellant attempted to cause his penis to penetrate the vagina of D A (the complainant), a child aged three (3) years. The Appellant was alternatively charged with the offence of **committing an indecent act with a child** contrary to **Section 11(1)** as read with **Section 11(b)** of the **Sexual Offences Act**. The particulars of the offence were that in the same place and at the same time and on the same date, the Appellant intentionally and unlawfully committed an indecent act with a child D A aged (3) years by touching her private parts namely vagina. When the Appellant was arraigned before the trial court, he pleaded not guilty to the charge. After full trial, he was convicted as charged on the main charge of **attempted defilement**. He was sentenced serve twenty (20) years imprisonment. The Appellant was aggrieved by his conviction and sentence and has duly filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of the evidence of the mother of the complainant who had a grudge with him. He faulted the trial court for failing to take into consideration the totality of the evidence adduced before reaching the erroneous finding that he was guilty. He took issue with the fact that the trial magistrate had failed to take into consideration that crucial witnesses were not called to testify before the court. He was aggrieved that the trial court had not taken into consideration his defence before reaching the determination that the case against him on the charge of defilement had been established to the required standard of proof. He urged the court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, the Appellant gave to the court his written submission in support of the appeal. He urged the court to allow the appeal. Ms. Ng'etich for the State opposed the Appeal. She submitted that the prosecution had established its case on the charge of attempted defilement to the required standard of proof beyond any reasonable doubt. She urged the court to dismiss the appeal.

What are the facts of this case? The Appellant is a Sudanese national. At the material time, the Appellant lived with his uncle and members of his family. PW2 L N M was at the material time employed as a house help for the family. She recalled that on 14th July 2010 at about 9.00 p.m. she went upstairs to collect milk for the children. The children had gone to sleep. Among the children was the complainant in this case who was three (3) years old at the time. She opened the door and entered the bedroom of her employers. She saw the Appellant lying on top of the baby. The Appellant had removed his trousers. She raised alarm. The Appellant jumped out of the bed holding his trousers. PW3 Y A, the mother of the complainant was seated at the sitting room at the time with her older children. She heard commotion emanating from upstairs of their house. PW2 went to the sitting room and to her that she had found the Appellant sleeping on the baby. PW3 rushed upstairs and saw that the child was lying on her stomach. Her pants had been pulled upto her ankles. The Appellant entered the room and inquired what the problem was. A fight ensued between the Appellant and PW3's son.

The appellant was arrested and taken to Caltex Police Post. A report of the attempted defilement was made to the police. The child was taken to be medically examined by PW4 on 14th July 2010. On physical examination, PW4 established that indeed the complainant had been defiled. He noted that there was a tear from the vulva to the perianal. The area was bleeding. The vaginal walls were bruised and tender. The hymen was lacerated. The medical treatment notes were produced into evidence as Prosecution's Exhibit No.1(a). The Report on the test done was produced as Prosecution's Exhibit No. 1(b). The complainant was also examined by Dr. Zephania Kamau on 15th July 2010. The P3 form which he filled gave a contrary position to the one taken by PW4 Dr. Moses Kinuthia. He stated that the complainant had no physical injuries. There were no injuries on the vulva, vagina or perianal. The hymen was intact. There was no discharge from her private parts. The P3 form was produced as Prosecution's Exhibit No.5.

When the report was made to the police, the case was investigated by PW5 PC George Ouo. He testified that when the report was made to the police he was assigned to investigate the case. He recorded the statements from all the witnesses after which he formed the opinion that a case had been made for the Appellant to be charged with the offence of attempted defilement. The blood and saliva samples of the Appellant together with the pant of the complainant were taken to the Government Chemist for analysis. PW6 Wairimu Kang'ethe testified that the analysis did not reveal any connection between the said samples with the crime committed. When the Appellant was put on his defence, he chose to keep quiet.

This being a first appeal, it is the duty of this court to re-evaluate and to reconsider the evidence adduced before the trial court before reaching its own independent determination whether or not to uphold the decision of the said court. In doing so, this court is required to always keep in mind the fact that it neither saw nor heard the witnesses as they testified and therefore give due regard in that respect (see **<u>Njoroge – vs- Republic [1987] KLR 19).</u>** The issue for determination by this court is whether the prosecution proved its case on the charge brought against the Appellant of **attempted defilement** contrary to **Section 9(1)** of the **Sexual Offences Act** to the required standard of proof beyond any reasonable doubt.

Upon re-evaluating the evidence adduced by the prosecution witnesses, it was clear to this court that indeed the prosecution established to the required standard of proof that indeed the Appellant attempted to defile the complainant. Evidence was adduced by PW2 to the effect that she found the Appellant on top of the complainant, a child then aged three (3) years. The Appellant was in his uncle's bedroom. He had removed his trousers. The child's pants had been lowered to her ankles. It was evident that the Appellant did not expect that anyone would come to the room. PW2 raised alarm and alerted PW3. PW3 the mother of the complainant went to the bedroom and saw the child lying on her abdomen. She noted that her pants had been removed. They were on her ankles. PW2 told her that she had found the Appellant lying on top of the complainant. PW2 reiterated this in her testimony before court. The Appellant was arrested and taken to the police station. The medical reports produced by the prosecution were contradictory. Whereas

the initial medical treatment papers filled by PW4 indicated that the child had been defiled, the P3 form filled by PW7 indicated that the child had suffered no injury.

On re-evaluation of the medical evidence in this regard, this court formed the opinion that the contradiction in the medical report did not absolve the Appellant from criminal culpability on the charge of **attempted defilement** contrary to **Section 9(1)** of the **Sexual Offences Act**. The evidence of PW2 was clear. She found the Appellant lying on top of the child. The Appellant was half naked. He had removed his trousers. He had also removed the pants of the child. It was evident that if PW2 had not fortuitously entered the bedroom, the Appellant would have completed the heinous act of defiling the complainant. There is no other reasonable explanation that this court can reach in regard to what the Appellant intended to do. The Appellant chose to keep silent when he was put on his defence. That is his constitutional right. This court has reached the determination that the prosecution proved its case on the charge of defilement to the required standard of proof beyond any reasonable doubt. The Appellant's appeal against conviction is hereby dismissed.

As regards the sentence, **Section 9(2**) of the **Sexual Offences Act** sets the sentence for a person convicted of **attempted defilement** to a term of imprisonment of not less than ten (10) years. The Appellant was sentenced to serve twenty (20) years imprisonment. The trial court did not give reasons why it sentenced the Appellant to serve a term of twenty (20) years imprisonment taking into consideration that the Appellant was a first offender. There were no aggravating circumstances to warrant the Appellant to be sentenced to serve a term twice the minimum sentence. The Appellant's appeal on sentence therefore has merit and hereby allowed. The sentence of twenty (20) years imprisonment is set aside and substituted by a sentence of this court of ten (10) years imprisonment. The sentence shall take effect from the date the Appellant was sentenced by the trial court. It is so ordered.

DATED AT NAIROBI THIS 4TH DAY OF FEBRUARY 2015

L. KIMARU

JUDGE