REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 92 OF 2012

P. K .S …..... APPELLANT

VERSUS

REPUBLIC …..... RESPONDENT

(Being an appeal arising from the Judgment of Hon. A. Alego (Principal Magistrate) in Eldoret Chief Magistrate's Court Criminal Case No. 5843 of 2010 delivered on 11th May, 2012)

JUDGMENT

In count 1, the Appellant was charged with attempted defilement contrary to |Section 9 (1) of the Sexual Offences Act No. 3 of 2006.

Particulars of the charge are that on the 4th day of December, 2010 in Eldoret West District within Rift Valley Province intentionally and unlawfully attempted to cause his penis to penetrate the vagina of P.A.E a child aged 15 years.

In count II, he was charged with escape from lawful custody contrary to section 123 of the Penal Code.

Particulars of the charge are that on the 5th day of December, 2010 in Eldoret West District within Bridge Uasin Gishu County being in lawful custody at [Particulars withheld] Station after arrest for the offence of attempted defilement contrary to Section 91 (2) of the Sexual Offences Act No. 3 of 2006 escaped from lawful custody.

Judgment was delivered on 9th December, 2012 by Hon. A. Alego, then a Senior Resident Magistrate. She found the Appellant guilty of both offences and convicted him accordingly. She proceeded to sentence the Appellant whom she ordered serves ten (10) years custodial sentence. She however failed to specify whether the sentence was in respect of one or both counts.

The Appellant has appealed to this court both against the conviction and sentence. He first filed a Petition of appeal on 25th May, 2012 in which he raised three (3) grounds of appeal. I will not duplicate those grounds of appeal because vide a Notice of Motion dated 22nd November, 2012 he applied to amend the grounds of appeal. On 25th April, 2013 when the appeal came up for hearing,

he told court that he wished to rely on the amended grounds of appeal. These are the grounds of appeal, filed alongside the Notice of Motion dated 25th November, 2012 that this court has considered in arriving at this Judgment. They are:-

1. That the trial court erred in both law and fact in convicting the Appellant based on prosecution's case which was not proved beyond reasonable doubts on ground that the evidence of PW2 and PW5 did not support the charge.

2. That the trial Magistrate erred in both law and fact in convicting the Appellant on strength of PW5 who testified that he arrested him while in actual fact did not arrest him.

3. That the trial Magistrate erred both in fact and law in convicting the Appellant based on evidence of PW1 and PW5 who said they heard distress call from PW2 and went to rescue her and failed to appreciate that there is a difference between murmuring and distress call.

During the hearing of the appeal the Appellant informed court that he wished to rely on his filed written submissions. The prosecuting Counsel Mr. Wainaina, on the other hand made oral submissions in response to the written submissions of the Appellant.

I will accordingly consider the grounds as set out in the amended memorandum of appeal. This being a first appeal, its duty is to look at the evidence adduced before the trial court afresh, re-evaluate and re-assess it and reach its own independent decisions on whether or not to uphold the conviction of the Appellant. The court has to bear in mind the fact that it did not see the witnesses as they testified and therefore it cannot be expected to make any findings as to the demeanour of the witness. The court is further mandated to consider the grounds of appeal put forward by the appellant – See **KOECH & ANOTHER -VS- REPUBLIC (2004) 2 KLR** and **KINYANJUI -VS- REPUBLIC (2004) 2 KLR, 365 – 366.**

With regard to ground of appeal No. 1, the Appellant submits that the evidence of PW2 and 5 did not support the charges facing him.

PW2 was the complainant. The court took her voire dire examination and formed the opinion that she understood the essence of taking an oath and directed that she gives a sworn statement of defence. Her testimony was that at about 8.00 p.m., she was going home from a church choir practice when she met a boy who started trailing her. That the boy then pulled her to an old building and attempted to defile her by pushing her skirt down. That she was resisting by pushing him away while shouting at him to leave her. That two police officers who were passing by heard her distress call. That they rescued her by arresting both of them. She testified that she did not know the Appellant before this date.

On cross-examination, PW2 said that she raised a distress call and that by the time the police officers arrived the Appellant was still holding PW2.

PW2 testified in his capacity as the arresting officer. He stated that himself and corporal Mulango were walking from [Particulars withheld] when they heard some murmuring in a thicket. That there, they found a girl and a boy whom they arrested and took to the Police Station. That upon interrogating the girl, she told them that she was coming from the church when the accused accosted her and attempted to defile her. That while in custody, the accused attempted to escape and was also charged with the respective offence.

On cross-examination, PW5 stated that they initially arrested both PW2 and the Appellant, but after PW2 proved that she was a minor, the Appellant was charged with the offence of attempted defilement.

From the foregoing it is clear that PW2's evidence was candid and elaborate and was not rebutted by the Appellant on cross-examination. It was well corroborated by that of PW5 contrary to the

assertion of the Appellant.

Moreover, the complainant, who proved her age at 15 years understood what she was saying. She never knew the Appellant before this date. This leaves no doubt in my mind that the Appellant was up to no good when he pulled the complainant to a place where no one else could witness what he was doing.

With respect to ground of appeal No. 2, the Appellant states that the trial court relied on the testimony of PW5 who was the arresting officer yet he did not testify in court.

This statement is in itself self conflicting. Already the Appellant has acknowledged the testimony PW5 gave. A person does also become a prosecution witness until and after he/she has testified. This fact is well documented in the record. It is also factual that PW5 testified that he and a corporal Mulango effected the arrest on him and PW2. It thus beats logic to contend that PW5 did not either arrest or participate in arresting him.

In his written submissions, the Appellant further argues that since PW5 stated that they heard the murmuring in a thicket as opposed to an old building as stated by PW2, this court must find in his favour due to the contradiction.

My very considered view is that the disparity in the specification of the place the Appellant was found with PW2 does not in any way negate the fact that the Appellant was found with PW2 and at the time was attempting to defile her.

On ground of appeal number 3, the Appellant argues that the trial magistrate failed to address herself on the difference between murmuring and a distress call. This is in view of the fact that PW2 testified that she sent out a distress call when the Appellant attempted to defile her, yet the testimony of PW5 was to the effect that he and his colleague were attracted to the scene by murmurs.

Although it is not clearly understood what the Appellant wanted the trial court to hold, I interpret his argument to mean that PW2 had consented to having sex and did not therefore scream for help; and that the murmuring may have resulted from a conversation he and PW2 were having.

PW5's evidence was **"..... we heard some murmuring in a nearby thicket ...**" and in reaction to this statement the trial court questioned, "**..... what would he have been doing in the bush with the minor ….**"

It is trite law that a minor cannot consent to sex. For avoidance of doubts as to PW2's age, she produced her birth immunization card as P. Exhibit 1 which shows that she was born on 1st October, 1995. The offence was committed on 4th December, 2010 which placed her age then at fifteen (15) years. She was therefore a minor and had no capacity to consent to having sex. Unless, by virtue of Section 8 (5) (a) and (b) as read with Section 9 (3) of the Sexual Offences Act, No. 3 of 2006, it is proved that such child deceived the accused person into believing that he or she was over the age of eighteen (18) years at the time of the alleged commission of the offence, and the accused reasonably believed that the child was over the age of eighteen (18) years, the court must find that a minor has no capacity to consent to having sex.

None of these facts were demonstrated by the accused on cross-examination of the complainant or in his defence. His defence, which he gave under oath was that the arresting officer had a grudge against him over a certain girl. This defence did not in any way rebut the strong prosecution's evidence, and I accordingly dismiss the third ground of appeal as well.

Before I address myself on sentence, it is important to correct the anomaly committed by the trial court in its judgment and during the sentencing.

Clearly, the Appellant was charged with two counts. At appears the court overly concentrated on the first count, possibly because of its seriousness and forgot to address itself on evidence tendered in respect of count II.

This count could only be proved by testimonies of police officers under whose custody the Appellant was when he allegedly escaped. PW1, police constable Mohamed Rashid Sogomba of [Particulars withheld] Station testified that on 5th December, 2010 at night, himself and a colleague were taking prisoners to the toilet when the Appellant attempted to escape. He stated that his colleague ran after him and apprehended him. That at the time the Appellant attempted to escape, he had been placed in custody on allegations of having committed the offence of defilement. PW1 testified that it is police constable Munaka who arrested him.

PW2, Police Constable Prisca Amojong also worked at [Particulars withheld] Station. She testified that on 5th December, 2010 while at the main door of the Police Station, she heard his colleague raise a distress call, asking her to arrest the Appellant who was running away. That she and a colleague ran after the Appellant and apprehended him. She also confirmed that the Appellant had been arrested on allegations of having attempted to defile a minor.

PW4 Corporal David Cheptarus only testified that the Appellant attempted to escape while in custody.

From the evidence of PW1 and 2, it is clear that the Appellant attempted to escape from lawful custody while he was under the police custody. He was apprehended before he could get out of the Police Station compound.

Therefore, although he was charged with escape from lawful custody, evidence adduced proves the offence of attempted escape from custody, for which the trial magistrate ought to have convicted him. I accordingly find him guilty of the offence of attempted escape from lawful custody.

To buttress the above, Section 389 of the Penal Code provides that "**Any person who attempts to commit a felony or a misdeamenour is guilty of an offence and is liable, if no other punishment is provided, to one half of such punishment as may be provided for the offence attempted."**

On sentence, the Appellant was charged under Section 9 (1) of the Sexual Offences Act which defines the offence of attempted defilement. The penalty is prescribed under sub-section (2) of the same section, which provides that a person convicted of the offence of attempted defilement "**is liable upon conviction for a term of not less than ten years**." While the word '**liable**' gives the court the discretion to determine the term of imprisonment, the succeeding words after the word '**liable**' gives no room to the court to vary the penalty prescribed. That sections sets the minimum sentence to ten years imprisonment.

Therefore, with respect to count I the legal sentence is as was imposed by the trial court.

In the result, I dismiss the appeal and confirm the sentence imposed in respect of count 1 which is ten (10) years imprisonment. With regard to count II, I sentence the Appellant to serve one (1) year imprisonment. The sentence shall run consecutively and from the date of judgment of the trial court.

It is so ordered.

DATED and **DELIVERED** at **ELDORET** this 8th day of July, 2013.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:

Appellant present in person

Mr. Wainaina for the State/Respondent