IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E.M. GITHINJI, H. OKWENGU & J. MOHAMMED, JJ.A)

CRIMINAL APPEAL NO. 128 OF 2017

BETWEEN

STEPHEN CHERUIYOT MELLY.....APPELLANT

AND

REPUBLIC .....RESPONDENT

(An appeal from the Conviction/Judgment/Decree/Order of the High Court of Kenya at Eldoret (**Mativo, J**.) delivered on 13th, July 2015 in ***H.C. Cr. A. NO. 102 OF 2014)***

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JUDGMENT OF THE COURT

[**1**] The appellant was convicted by the Senior Resident Magistrate, Kapsabet for two offences namely, in count 1 – **Defilement in violation of section 8(1) as read with section 8(3)** of the **Sexual Offences Act** and in count 2 – attempted **defilement** contrary to **section 9(1) (2)** of the **Sexual Offences Act**. He was sentenced to 30 years imprisonment and 20 years imprisonment respectively. He appealed to the High Court at Eldoret against the conviction and sentence. The appeal against conviction was dismissed in both counts. However, his appeal against sentence partially succeeded. The sentence of 30 years imprisonment in count 1 was reduced to 20 years imprisonment. The sentence of 20 years imprisonment in count 2 was also reduced to 10 years imprisonment. The sentences were ordered to run concurrently. He now appeals against the judgment of the High Court against the conviction and sentence.

[**2**] The particulars of the offence in count 1 stated in essence that on 6th October 2009 at **[Particulars Withheld] Primary school** the appellant defiled **RJ** (name shortened) a child aged 12 years. In count 2, the particulars of the offence were that on the same day and at the same school, "**he intentionally attempted to cause his penis to penetrate the vagina of JC (named shortened) a child aged 15 years**.

[**3.1**] The prosecution called seven witnesses at the trial. The prosecution evidence was in summary as follows:

The appellant was a mathematics teacher at [Particulars Withheld] primary school in Nandi county. ***DKK (PW2), (K)*** was also a teacher in the same school and was also a volunteer children's officer. The Headmaster was ***TT*** and the Deputy Headmistress was ***EB (PW7).*** The complainant in count 1, (PW1), was a pupil and the appellant used to teach her mathematics. The complainant in count 2, (PW5), was also a pupil in the same school. Both were in class 5.

[**3.2**] On 6th October, 2009 at about 4 p.m. ***MJR (PW6) (M***), a class monitor took mathematics exercise books to the office of the appellant. The appellant asked her to call RJ the complainant in the first count. The complainant in count one testified that when she went to the appellant's office at 2.pm.:

> "**the accused locked the door. There were ropes on the table that were used to wrap exam papers. He tied my hands at the back. He then removed my panty and began unzipping his trouser. He made me stand at a corner. He then inserted his penis into my vagina. He clasped my mouth with his hands so that I could not scream. He told me 'who are you crying for, you think this is your mother's place? He was alone shortly and I put on my pantie and opened the door. As I left outside, I found SJ outside. She was my classmate in std 6. I was crying. She asked what was wrong and I told her the teacher raped me. She told me to go home. On the way, I met a teacher called AJ. She asked me why I was crying. I told her that the accused had raped me. She asked to get my mother. She then referred me to a Mr K. I met my mother but did not tell her what had happened except to ask her to go and see Mr. Keter".**

[**3.3**] On the same day at 4 p.m., the complainant in count 2 (J.P.) was in the company of the complainant in count 1, ***M*** and ***JJ***. It was

games time. The bell rang for the assembly and she went for the assembly. A pupil, ***RJ*** called her and told her that the appellant wanted to see her. She went to the appellant's office and he beckoned her in. She testified partly thus:

> **"…he was having githeri. He then pulled a seat and asked me to sit. I refused. He asked me why I was in shock. I did not speak. He told me he wanted to be my lover. I refused. He was drunk. He rushed to the door to lock it from inside. I also decided to struggle for the door. I pushed him and he fell. I had been standing next to a table near the door. I managed to push him. He did not grab me because I pushed him by the shoulders and he fell. When he fell, I opened the door and went to the assembly. As we went home after, I informed Mr. K….. He asked me to inform my parents and to come with them the next day."**

In her evidence in cross-examination, she stated:

> **"He did not touch me anywhere"** …

She further stated:

> **"Melly did not fond (sic) me. He only talked to me and I pushed him as he tried to lock the door."**

[**3.4**] Keter narrated the events of the part of the day and on the following day in his evidence as follows:

On 6th November 2009 (sic) at around 3.30 p.m. he called the children for assembly as it was time for the children to go home. As he was addressing the assembly, ***SJ***, the mother of the complainant in count 1 came to the school. After the assembly, he went to speak to her in his office. She reported to him that RJ had run home and she had alleged that the appellant had tried to rape her. He advised her to come with the child on the following day. Immediately after the pupils were released the pupils who included ***BC; SC; MJ*** and the complainant in count 2 reported that JC had also been called to the office of the appellant and that the appellant had tried to defile her. He told them to go home. Later he sent a text message to the Children's Officer and the District Officer reporting the incident which had occurred in the school. On the following day, ***K*** reported to the headmaster and headmistress. The complainant came to the school. ***K*** reported to the District Officer who advised that the appellant be arrested**.** ***K*** and others reported at [Particulars Withheld] Administration Police Offices and the appellant was arrested. The headmaster obtained a motorbike and ***K*** took RJ to Chepterwai Sub-District hospital for examination. The OCS Kabiyet police station arrived at the hospital and took the examination chit from the doctor and RJ was taken to Kapsabet District Hospital for examination.

[**3.5**] On 7th October, 2009 at 10.30 a.m. ***PC W.O. Electine Kabaka (PW4***) of Kipkaren police post was instructed by the OCS Kabiyet police station to go to [Particulars Withheld] Primary School and investigate the allegations of defilement at the school. She went to the school and recorded statements and then proceeded to Chepterwai Sub-District Hospital where she found RJ already examined. She issued her with a P3 form and took her to Kapsabet District Hospital for examination after which she picked the appellant from [Particulars Withheld] AP's camp. As she was recording statements, JC complained that the appellant had attempted to defile her.

[**3.6**] On 7th October, 2009 ***Julius Melly***, a clinical officer at Kapsabet District Hospital examined RJ. At the trial he produced the P3 form and the treatment chit from Chepterwai Sub-District Hospital. He was re-called by the court after he gave evidence.

[**3.7**] The appellant in his sworn testimony denied committing the two offences. He testified, among other things, that, the two complainants were both in class 5; that on the material day, he was marking mathematics for class 5; that he called the two complainants because they had a mathematics problem; that when he called the two complainants the rest of the pupils were in the games; that his office had a big transparent window; that it was possible for pupils playing outside in the open field to see inside his office; that his office was on the route to the toilets and was visible from the kitchen; that his house is next to the school and the first complainant's uncles are neighbours and did not go to his house to complain; that he left the office when everything was in order; that the case was "cooked" by K who is his neighbour and with whom his family had a disagreement over the land bought by K.

[**4**] The trial magistrate considered the evidence of the first complainant and made a finding that it was corroborated by the evidence of Keter and the medical evidence and stated in part:

> **"The medical evidence confirm R was defiled. The mother and teacher K were unaware she had been defiled, as the report from R (***first complainant***) initially stated an attempt had been made. It is only after the lapse of a day that she confided in the Deputy Head teacher she had actually been defiled that urgent and quick action was taken".**

As regards the second count the trial magistrate stated that he believed the evidence of JC. The trial magistrate made a finding that from the progression of activities, the only clear intention of the appellant was to defile the second complainant.

[**5**] On the aspect of proof of penetration the High Court in making a finding stated in part:

> **"from PW1's evidence which was corroborated by PW3 who testified that the hymen was bruised, it is clear that there was penetration. Indeed, PW1 in cross-examination stated that the appellant inserted his penis once and ejaculated. To me this evidence is cogent and was not rebutted and is sufficient to show that there was penetration".**

[**6**] Regarding the medical evidence, the High Court stated, quite correctly, that even without medical evidence, the offence can be proved by oral evidence of a victim or by circumstantial evidence. Nevertheless, the court went on to find that:

> **"The evidence of PW1 and in particular her assertion that the appellant inserted his penis and ejaculated is in my view sufficient especially when we consider the rest of the evidence by the children who remained outside the room, saw her come out crying and the evidence of the teacher who met PW1 crying."**

In respect of the charge of attempted defilement, the High Court said,

> **"..the appellant's intents were stopped after the witness pushed him and he fell and she managed to run away. I find that count two was sufficiently proved to required standards"**

Lastly, the High Court said:

> **"A close examination of the defence offered clearly shows that it does not create doubts on the strength of the prosecution case. In my view, the defence did not rebut the serious allegations made in support of the charges against the appellant."**

[**7**] The appellant in the grounds of appeal filed in person faults the decision of the High Court for failing to note; that prosecution case did not prove its case beyond reasonable doubt; that the trial court did not consider the consequences of failure to call crucial witnesses particularly the teachers who were in school on the material day; the trial court failed to find that the prosecution witnesses were not credible; that the prosecution testimony was full of contradictions; and that the trial court did not consider his defence.

[**8**] ***Mr. Rotich,*** the appellant's counsel, has filed supplementary grounds of appeal including the ground that the appellant was denied the right to a fair and impartial trial; that the High Court erred in sustaining a conviction of the appellant based on incredible prosecution witnesses and that the appellate court failed to note that the appellant was convicted without the learned magistrate considering the appellant's testimony.

The appellant's counsel made lengthy written submissions supplemented by oral submissions in support of the appeal. On her part, ***Ms. Karanja*** the prosecuting counsel filed written submissions opposing the appeal which she highlighted at the hearing.

[**9**] We start by quoting the proviso to **section 124** of the **Evidence Act** which states:

> **"provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth"**

In this case, although substantial factual evidence was given in relation to the charge of defilement in the first count, RJ was the only witness to the fact of defilement. Similarly, in respect to the second count of attempted defilement, JC was the only eye witness. It was permissible for the trial court to convict the appellant on each count provided that the court was satisfied for reasons to be recorded in the proceedings that each complainant was telling the truth. The essence nature of the appeal is that the two complainants did not tell the truth and that the whole prosecution case was not credible and was in fact fabricated by ***K*** against the appellant. We have recited the factual evidence in some detail because the appeal is dependent on the credibility of the prosecution case.

[**10**] As regards the offence of defilement in the first count, the appellant has questioned the integrity of the evidence of RJ; the integrity of ***K*** and the credibility of the medical evidence. It is submitted that the testimony of the first complainant relating to the manner in which she was defiled raises eyebrows; that she did not explain who untied her hands; that the medical evidence revealed that she was sexually active and that the offence occurred in a full school setup and that she did not report to her mother that she had been defiled.

[**11**] RJ admitted that she did not report to her mother that she was defiled. She stated that she reported to another pupil whom she found outside the appellant's office and to a teacher named ***AJ***. The two were not called as witnesses. Instead, ***M*** who had called her to see the appellant gave evidence. But it was clear from the evidence of ***M*** in cross-examination that she did not see RJ leave the appellant's office. She testified in part:

> **"I did not see … (*1st complainant*) leave Melly's house (sic) I was told later…. I met (name) at home. K was met at home. I met (name) at the market."**

According to this witness, she met RJ later at home and told her what happened after she left her in the appellant's office.

[**12**] None of the witnesses gave evidence that they saw RJ come from the appellant's office crying. Thus the finding of the two courts below that other witnesses saw RJ come out of the appellant's office crying was both a misdirection and a misapprehension of evidence. According to ***K***, RJ did not complain to him that she was defiled and she only reported that the appellant attempted to defile her. Even on the following morning, she did not tell ***Keter*** that she was defiled. She only disclosed the fact of defilement to ***EB***– the Deputy Head Teacher who testified in part:

> **"The girl did not disclose full details to Mr. K or the mother. The mother asked me to speak (sic) to find out why she was crying. … then disclosed to me she had been defiled and informed K**".

Keter on his part said:

"As at initial report I received was attempted defilement, no actual defilement. The girl had not confided well to her mother".

The trial court issued witness summons to the mother of the 1st complainant but she did not testify.

[**13**] Further, RJ's evidence as to the time of the offence (2.00 p.m.) and that she went home thereafter was inconsistent with the evidence of JC and M. If the evidence of JC was that she was in the company of the 1st complainant at games time at 4 p.m. before she was called to the appellant's office, then the evidence of RJ that the incident occurred at 2 p.m. after which she went home cannot be true.

[**14**] ***Julius Murey,*** the Clinical Officer who examined the 1st complainant produced the P3 form which he filled and a medical chit from Chepterwai sub-district hospital. While reading the medical chit from Chepterwai Sub-District hospital, he testified that RJ's systematic examination was normal and nothing abnormal was detected. Regarding his own examination, he testified that there was no proof of forced sexual encounter and added:

"The only positive finding during the examination is that she has been sexually active. She said she had sex with a form IV boy."

The trial magistrate recalled him at his own instance saying:

"I shall recall the clinical officer. As he testified I did not have a look at the clinical documents he produced."

After re-calling him, the court cross-examined him and he stated:

"I produced the treatment note from Chepterwai. It was noted on examination of genital there was a bruised hymen. I apologise for misinterpreting the treatment note. I did not indicate anywhere that the complainant has sex with a form IV boy."

[**15**] **Julius Murey** indicated, in the P3 form that RJ's hymen was ruptured. There are other writings in the medical note from Chepterwai sub-district hospital in a different handwriting indicating bruises in *labia minora* and ruptured hymen. The medical officer who examined RJ at Chepterwai was not called as a witness. The examination at Chepterwai was done even before a complaint had been made to the police. It is submitted that the examination did not show the age of the rupture of the hymen. Apparently, the medical examination was inconsistent as whereas ***Julius Murey*** referred to a rupture, the medical note from Chepterwai showed a bruise of the hymen.

The record of the proceedings at the trial does not show that the appellant was given an opportunity to cross-examine the re-called witness. The appellant complains that he was denied a fair trial. By **section 150** of the **Criminal Procedure Code**, a trial court has power to recall a witness and re-examine him if it appears essential for the just decision of the case, provided that the accused is afforded an opportunity to cross-examine such witness.

The medical evidence was important as it was intended to prove penetration. The evidence of ***Julius Murey*** on re-call contradicted his earlier evidence. In the absence of any record that the right of the appellant to cross-examine the recalled witness was explained but waived, the complaint of the appellant is valid.

[**16**] ***K*** played a major role in the arraignment of the appellant. He met some witnesses on the night of 6th October 2009. He reported to the Children's Officer and to the District Officer on the same night. He did not report to the school administration until the following morning. He caused the arrest of the appellant by administration police even before reporting the crime to the regular police. He took RJ to Chepterwai sub-district hospital before reporting to police. ***PC WO Electine Kabata*** only took over the investigation after RJ had been taken to hospital and after the appellant had been arrested. Keter admitted that he was a neighbour of the appellant. The appellant gave evidence on oath and claimed that ***K*** had "cooked" the case because of differences in a land dispute. ***K*** was even interdicted by his superiors apparently arising from his role in this case. No doubt Keter was overzealous and the possibility of him having couched RJ and fabricated the charges could not be discounted. It is clear that the trial magistrate did not consider the appellant's defence at all. Further, the High Court considered the evidence of the appellant after accepting the prosecution evidence and made a finding that both offences had been proved. The evidence of the appellant should have been considered together with the prosecution evidence before any finding of fact could be made.

[**17**] As regards the offence of attempted defilement, the two courts below convicted the appellant merely because his actions or conduct indicated that he intended to defile JC. The High Court addressed itself thus:

"The question that calls for determination is whether or not the conduct of the appellant constituted an overt act sufficiently proximate to constitute an attempt to defile the complainant"

That was no doubt the correct test. The High Court cited the case of **Mussa s/o Saidi v Republic [1962] EA 454** where this Court said in part:

"Secondly, if the intention is established, the act itself must not be too remote from the alleged intended offence."

By **Section 8(1)** of the **Sexual Offences Act,** a person who commits an act which causes penetration with a child is guilty of the offence of defilement.

Section 9(1) of the Sexual Offences Act provides:

> **"A person who attempts <u>to commit an act which would cause penetration</u> with a child is guilty of the offence termed attempted defilement"** (underlining provided).

The main ingredient of the offence of attempted defilement is committing an act which would cause penetration. It is noteworthy that **section 11(1)** of the **Sexual Offences Act** establishes a distinct offence of committing an indecent act with a child. It follows that not every offensive act with a child necessarily amounts to attempted defilement.

As **section 9(1)** aforesaid shows the *actus reus* of attempted defilement is an act which would cause penetration.

As the evidence of the 2nd complainant revealed, the appellant did not even touch her. He did not even remove her underpants. He did not remove his genital organ. He did not even attempt to reach her genital organs. Without in any way trying to define the acts which would cause penetration, we find that the acts of the appellant described by JC, if they happened at all, are too remote to an act of penetration.

[**18**] In the final analysis, we find that the trial magistrate did not evaluate the evidence, including the evidence of the appellant. Indeed, he did not specifically find that RJ or any prosecution witness was a truthful witness. The High Court merely scrutinised the evidence without proper evaluation and re-consideration. Had the court performed its duty as a first appellate court, it would have found that on the whole, the offence of defilement was not proved by consistent and credible evidence and that the prosecution evidence and the appellant's defence cast reasonable doubt on credibility of the prosecution case. There was reasonable doubt that the appellant committed the two offences.

[**19**] For the foregoing reasons, the appeal is allowed in its entirety. The conviction in count 1 and 2 are quashed and the respective sentences set aside. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

We so order.

Dated and delivered at Eldoret this 28th day of June, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

<u>DEPUTY REGISTRAR</u>