IN THE COURT OF APPEAL

AT ELDORET

(CORAM: NAMBUYE, MAKHANDIA & ODEK, JJ.A)

CRIMINAL APPEAL No. 62 of 2018

BETWEEN

FRANCIS KIPSANG CHEMASE.....APPELLANT

AND

REPUBLIC..... RESPONDENT

(An Appeal against the judgment and sentence of the High Court of Kenya at Eldoret (C.W. Githua, J) dated 30th May 2017

in

H. C Cr. A. No. 226 of 2013)

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JUDGMENT OF THE COURT

1. **Francis Kipsang Chemase**, the appellant, was charged with the offence of defilement contrary to ***Section 8 (1)*** as read with ***Section 8 (2)*** of the **Sexual Offences Act.** The particulars are that on the 10th day of December 2011 in Keiyo South District within Rift Valley Province, he unlawfully and intentionally caused penetration of his genital organ (penis) to the genital organ (anus) of BK. a boy aged seven (7) years. He faced an alternative charge of indecent act contrary to ***Section 11*** **(1) of the Sexual Offences Act.**

2. PW1, a minor named BK was a boy child seven (7) years old. After *voire dire* examination, the trial court formed the view the boy was not intelligent enough to give evidence on oath. He was, however, allowed to give an unsworn evidence. PW1 stated as follows:

> ***"I am BN. …. I attend school. I am in class 3. I know the accused who is in court. I was in a house of another mzee who herds cattle. I was sleeping in that house. Accused came from a kiosk and came to the house. He kicked me. I woke up. Accused promised me some Ksh. 60/=. I followed him upto a distance of about 100 metres. Accused did bad manners to me. I shouted for help and my uncle came to my rescue. He is Elias Kiprotich. Accused ran away on seeing Elias Kiprotich. On 11th day accused was arrested by police from Kamwosor in another person's house.… I know accused even by name. He is my neighbour. I was taken to Moi Teaching and Referral Hospital in Eldoret where I was treated and given some medicine."***

3. ***Elias Kiprotich*** **(PW2)** testified as follows:

> ***"I am a farmer. I know PW1 who is a son to my sister. On 10th February 2011 at about 3.00 pm I was from home going to visit my friend called Kiprotich. I heard PW1 crying from a nearby farm. I went to the scene and found accused sleeping on top of PW1 and he had removed his trouser. Accused saw me and ran away. I also met PW1 having removed the short. I reported to the village elder. PW1 went back home and I caught up with him. I took the child home and told my brother Ryan to take PW1 to hospital. The following day, we went looking for the accused but he locked himself in the house. The village elder called the police who came and arrested the accused. Accused is a neighbour and he lives about 100 metres away."***

4. ***Dr. Cynthia Cheptoi Kibet (*****PW3)**, a medical officer attached to the Moi Teaching and Referral Hospital testified that she examined PW1 who is seven years old. Upon examination of PW1, she found his penis was normal. His arms were painful and there was no discharge from the anal area. No sperms were found on the patient's anus. She filled the P3 Form on 14th December 2011. The diagnosis was that there was an attempt to defile PW1 but there was no penetration.

5. ***Police Constable No. 84091 Ali Jattan*** **(PW4)** testified that on 11th December 2011 at 6.40 pm he was at Kaptagat Police Station where he recorded witness statement from PW2. That a complaint was made that PW1 had been defiled and sodomized. That the appellant was arrested and brought to the Police Station. The appellant was charged with the offence of defilement.

6. In his defence, the appellant gave an unsworn statement. He stated that on 10th February 2011, he was at Kitale visiting his father's farm. That he went to Kitale on 3rd December and on 10th December he received a call from his father requiring him (the appellant) to take maize home. That he left Kitale and arrived at Kibomett at 3.00 pm. That he met his parents at home and he was given food. As he was eating, four men came and asked whether he could assist them. One of the men was PW2 who asked for money. He told them he had no money. That after about 30 minutes, PW2 came back accompanied by several members of the public shouting. That together with members of his family they entered the house. That he called Kamwosor AP Camp and four police officers came and rescued him. That PW2 framed him as they used to gamble and he had won several times.

7. Upon hearing and evaluating the prosecution and defence evidence, the trial magistrate convicted the appellant for the offence of attempted defilement. The appellant was sentenced to a term of 20 years' imprisonment. In sentencing the appellant, the magistrate noted that the appellant was not a first offender. He had a previous conviction for the offence of attempted defilement in **Cr. Case No. 4429 of 2006**.

8. The magistrate stated:

> ***"PW3 examined PW1 at Moi Teaching and Referral Hospital and she found that PW1's anus was painful. She concluded that there was an attempt to defile the complainant but there was no penetration. Taking into account PW3's evidence, it is clear therefore that the principal charge has not been proved. However, according to Dr. Kibet, there was an attempt to defile PW1…. It is my finding that there was an attempt to defile PW1 and according to the evidence of PW1 and PW2, it is the accused who attempted to commit the offence on PW1. The prosecution has therefore managed to prove beyond doubt that the accused attempted to defile PW1 contrary to Section 9(1) of the Sexual Offences Act No. 3 of 2006. I convict the accused for the offence of attempted defilement."***

9. Aggrieved by the conviction and sentence, the appellant lodged a first appeal to the High Court. His appeal against conviction and sentence was dismissed. In dismissing the appeal, the learned Judge stated that the evidence of PW1 and PW2 was corroborated by the evidence of ***Dr. Cnythia Cheptoi Kibet***. The Judge was satisfied that the prosecution had proved its case beyond reasonable doubt. The judge expressed herself as follows:

> ***"Under Section 180 of the Criminal Procedure Code, the learned trial magistrate had the power to convict the appellant with the offence of attempted defilement although he had not been charged with it. As stated earlier, after analyzing the evidence on record, I have come to the same conclusion as the learned magistrate did that the evidence proved beyond doubt the offence of attempted defilement and not the offence of defilement as submitted by the State…. I am thus satisfied that the appellant was properly convicted….***
>
> ***The record shows that the appellant is not a first offender…. In the circumstances, it cannot be said that the sentence of twenty years' imprisonment was manifestly harsh or excessive. I find that the sentence was lawful and reasonable. The same is hereby affirmed.***

10. Disappointed by the dismissal of his appeal, the appellant has lodged the instant appeal to this Court. The grounds of appeal are that:

> ***"(i) The learned judge erred in upholding the appellant's conviction when the prosecution case was not proved beyond reasonable doubt.***
>
> ***(ii) The judge erred when he/she disregarded the appellant's defence.***
>
> ***(iii) The evidence is insufficient to convict.***
>
> ***(iv) The appellant was not accorded a fair trial."***

11. At the hearing of the instant appeal, the appellant appeared in person while the State was represented by the Prosecution Counsel ***Mr. Mulamula***. Both parties filed written submissions.

APPELLANT'S SUBMISSIONS

12. In his submissions, the appellant averred that the offence of attempted defilement was not proved. That the trial magistrate erred in not finding that the charge sheet was defective. That the prosecution having failed to prove defilement, the best option was for the trial court to urge the prosecution to amend the charge sheet to accord with the evidence on record. That the proceedings before the trial court was invalid.

13. The appellant termed the testimony by PW1 as unreliable submitting that PW1 stated he was sleeping in the house when the appellant came from the kiosk. It was posited that how can someone sleeping inside a house see someone who is coming from a kiosk yet he is asleep? Further, it was submitted that the evidence on record by PW1 and PW2 was conflicting; that who between Ryan and Kiprotich took the complainant to hospital? That whoever took the complainant to hospital was not summoned to testify as a witness. That failure to avail the person was a big blow to the prosecution case.

14. The appellant further submitted that PW2 was a witness of doubtful integrity. That PW2 stated that there were no houses only a bush yet he testified there was a house about 30 metres away. It was further urged that PW2 testified to the fact that his relationship with the appellant was bad. That the two courts below ignored this fact and this was the motive of PW2 in fabricating the allegations and charge against the appellant. The appellant finally faulted the learned Judge for failing to find that the police or investigating officer did not visit the scene of crime to collect evidence and exhibits for purposes of producing the same in court.

RESPONDENT'S SUBMISSIONS

15. The State in opposing the instant appeal submitted that the prosecution had proved its case beyond reasonable doubt. It was submitted that the charge sheet was not defective as the offence of attempted defilement is a cognate offence to the offence of defilement and the trial magistrate was correct in convicting the appellant for a cognate offence. That the appellant was properly placed at the scene of crime vide the testimony of PW1 and PW2. That the medical report produced in court by PW3 proved that the offence of attempted defilement was committed.

16. On the issue of failure to call the persons who took the complainant to hospital, it was submitted that there is no mandatory number of witnesses who need to be called to prove the prosecution case. (See **Section 143 of the Evidence Act)**. That the appellant was given opportunity to cross examine the witnesses; that an order was made by the trial court for the appellant to be given copies of witness statements; that the appellant never complained that he did not get copies of the statements. That there was no violation of the appellant's right to a fair trial. The State submitted that the learned Judge correctly made a finding that the evidence of the complainant was corroborated by the testimony of PW2 and PW3. That the learned Judge correctly held that the 20-year term of imprisonment meted upon the appellant was neither harsh nor excessive.

ANALYSIS and DETERMINATION

17. We have considered the grounds of appeal and the written and oral submissions made by the parties. This is a second appeal and by dint of ***section 361(a)*** of the **Criminal Procedure Code**, this Court's jurisdiction is limited to matters of law. In **Karani vs. R [2010] 1 KLR 73** it was expressed that:-

> ***"This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law." See also Karingo -vs- R (1982) KLR 213; Njoroge -v- Republic [1892] KLR 388 and Chemagong -v- Republic [1984] KLR 611).***

18. In the instant appeal, the appellant was charged with the offence of defilement but convicted of the offence of attempted defilement. ***Section 9(1)*** **o**f the **Sexual Offences Act** describes the offence of attempted defilement in the following manner;

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

19. In ***Keteta -v- R*****, (1972) EA 532, 534,** Madan Ag. CJ. (as he then was) succinctly defined an attempt to commit an offence as follows:

> ***"A mere intention to commit an offence which is in fact not committed cannot constitute an attempt to commit it. There must also be an overt act which is immediately and remotely connected with the offence intended to be committed and which manifests the intention to commit the offence. A remotely connected act will not do."***

20. In this matter, the evidence on record reveals that the appellant lured the complainant from the house on the promise that he will give him Ksh.60/=. He lured the complainant to a nearby farm. The appellant had removed his trouser and PW2 found him lying on top of the complainant. PW1 stated that the appellant did bad manners to him and he screamed thereby attracting the attention of PW2. When PW2 reached the scene of crime, the complainant did not have his shorts on; the appellant's trouser was down; and the appellant ran away.

21. The appellant is charged with inserting his genital organ (penis) into the anus of the complainant. At the outset, we remind ourselves that ***Section 2*** of the **Sexual Offences Act** defines genital organ to include the whole or part of male or female genital organs and for purposes of the Act includes the anus.

22. A ground urged in this appeal is that the two courts below erred in convicting the appellant on a defective charge sheet. The gist of the submission is that the trial court ought to have directed the prosecution to amend the charge sheet to read attempted defilement. That the evidence on record does not prove defilement and thus the charge sheet was defective to the extent that it did not accord to the evidence adduced.

23. The learned Judge in considering the question of defective charge sheet expressed that pursuant to ***Section 180*** of the **Criminal Procedure Code,** the trial magistrate was correct in convicting the appellant for the offence of attempted defilement. ***Section 180*** provides that:

> ***"When a person is charged with an offence, he may be convicted of having attempted to commit that offence although he was not charged with the attempt."***

24. In **John Kariuki Murera vs. Republic [2002] eKLR,** it was aptly stated that ***Section 180*** of the **Criminal Procedure Code** is intended to be used where the attempt charge is of a less serious offence than the main offence from which the attempt charge has come. In **Kalu vs. Republic (2010) 1 KLR** it was observed as follows:

> ***"With the greatest respect to the learned Judge there was no law which would authorize a judge on appeal to convict a person with an offence with which that person was never charged. All the provisions of the Criminal Procedure Code which are under the heading: - "Convictions for Offences Other than Those Charged" and beginning with Section 179 up to Section 190 deal with situations in which a court is entitled to convict on a minor and cognate offence where a person is charged with a more serious offence. …."***

25. In the instant matter, it is not disputed that the prosecution did not prove the offence of defilement as charged. However, the evidence on record reveals an attempt by the appellant to defile the complainant. Having examined the record, we are satisfied that the two courts below did not err in finding that the offence of defilement was not proved. We are further satisfied that the evidence on record from the testimony of PW1 and PW2 disclosed the offence of attempted defilement. To this end, the learned judge did not err citing the provisions of **Section 180** of the **Criminal Procedure Code** as permitting the trial court to convict the appellant for attempted defilement of the complainant. We are further persuaded by the dicta in the case of **Douglas Mutunga Muthene vs. Republic [2018] eKLR** where it was correctly held that there is no doubt that the offence of attempted defilement is a cognate offence to the offence of defilement and a trial court can properly convict for attempted defilement even though an accused person is charged with the offence of defilement.

26. A further ground urged is that the two courts below erred in failing to find that the prosecution did not summon as witnesses the persons who took the complainant to hospital; that there are contradictions in the testimonies of the prosecution witnesses and that PW2 was not a credible witness.

27. We have considered the foregoing grounds of appeal. The failure by the prosecution to call as witnesses the person (s) who took the complainant to hospital did not dent the prosecution case. What is significant is all the ingredients of the offence of attempted defilement were proved to the requisite standard. The appellant was placed at the scene of crime by PW1 and PW2. Both PW1 and PW2 recognized the appellant and there is no question of mistaken identity. PW2's testimony is an eye witness account of what he saw. PW2 testified that he found the appellant on top of the complainant and that the appellant had removed his trousers. PW2 also testified that PW1 did not have his short on. PW1 testified that when the appellant lay on him he screamed and this attracted the attention of PW2. From the evidence on record, we are satisfied that the appellant's defence did not shake the prosecution case. We are satisfied that the appellant committed an *overt act which was immediately and actively connected to the offence of defilement that was intended to be committed and he did not succeed in committing it. The offence of attempted defilement was established and proved beyond reasonable doubt. As the learned Judge correctly observed, the sudden presence of PW2 interrupted the appellant and he did not complete the offence of defilement. Nevertheless, the cognate offence of attempted defilement was committed.*

28. On sentence, the trial court handed down a 20-year term of imprisonment to the appellant. In passing the sentence, the magistrate emphasized that the appellant was not a first offender. The learned Judge in affirming the sentence placed emphasis that the appellant was not a first offender. The minimum sentence for the offence of attempted defilement is imprisonment for a term of ten (10) years. The two courts below in meting out the twenty (20) year imprisonment laid emphasis on the appellant not being a first offender. We need to take previous convictions into account and that offenders with prior convictions should be punished severely, particularly if the priors are the same as the current conviction. Nevertheless, in the instant matter, despite mitigation, the two courts below did not give reason as to why the minimum sentence was not meted upon the appellant but rather laid emphasis that the appellant was not a first offender. Accordingly, we are inclined to interfere with the sentence meted upon the appellant by the trial court and as affirmed by the High Court. We hereby set aside the twenty (20) year term of imprisonment and substitute it with imprisonment for a term of ten (10) years with effect from 2nd July 2012 when the trial magistrate sentenced the appellant.

Dated and delivered at Eldoret this 17th day of October, 2019

R. N. NAMBUYE

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JUDGE OF APPEAL

ASIKE MAKHANDIA

……..

JUDGE OF APPEAL

J. OTIENO ODEK

……..……...

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR