IN THE COURT OF APPEAL

AT MALINDI

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CRIMINAL APPEAL NO. 16 OF 2017

BETWEEN

TYSON GEORGE NGOWA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Malindi (Chitembwe, J.) dated 29th August, 2016

in

***H.C.CR.A No. 40 of 2015*)**

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JUDGMENT OF THE COURT

1. On 31st April, 2014 at around 2:00 p.m. three girls namely, HJ (PW1), AH (PW2) both aged 5 years old and LMC aged 10 years old were playing outside. According to HJ and AH, **Tyson George Ngowa** (the appellant) who also lived in the same homestead with the girls, called HJ and sent her to take a knife to his house. It appears he followed her to his house and asked her to sweep the floor. The other two being children were right behind them and thinking that it was all fun and games they offered to help HJ sweep the house. The appellant declined the offer and chased the two girls away leaving him alone with HJ. He ordered HJ to remove her clothes and when she refused to do so he removed them himself, laid her on the bed, applied coconut oil on her private part and begun doing bad things to her. In her own words, HJ stated that *'he inserted his stick in my private parts'*. She began crying and screaming but no one came to her aid. Meanwhile, the two girls who were peeping through the window witnessed everything at least as per AH. Eventually, the appellant released her and when HJ's grandmother, T S M (PW3) returned from work HJ told her what had happened.

2. The matter was reported to the police and the minor was examined by Ibrahim Abdullahi (PW4), a clinical officer at Malindi District Hospital, who filled in the P3 form. His observations were that HJ's hymen was intact and there was no injury on her genitals. Later Cpl. Margaret Terenoi (PW5) searched the appellant's house and recovered an empty bottle of coconut oil. The foregoing is what informed the police to charge the appellant with one count of attempted defilement contrary to ***Section 9(1)*** as read with ***subsection (2)*** of the ***Sexual Offences*** Act and an alternative count of committing an indecent act

with a child contrary to ***Section 11(1)*** of the ***Sexual Offences Act***.

3. The particulars of the main count were that on 31st March, 2014 at *[particulars withheld]* within Kilifi County, the appellant unlawfully and intentionally attempted to cause his penis to penetrate the vagina of HJ a child aged 5 years. On the alternative count, the particulars read that on the above mentioned date and place, the appellant intentionally and unlawfully committed an indecent act by touching the female genital organ namely, the vagina of HJ a child aged 5 years using his penis.

4. In his defence the appellant gave a sworn statement and called 3 witnesses. He testified that he was arrested for unknown reason(s) on 18th April, 2014 while he was in his house. At the police station the police asked for a bribe of Kshs. 10,000 to secure his release. He was not able to raise that kind of money hence he was arraigned and charged in court the following day. He maintained that he did not commit the offences he was charged with and he had been framed by the minor's mother. By way of corroboration Baraka Daniel (DW4) stated that on the material day he was with the appellant from noon until 4:00 p.m. when they parted company. Further, LMC admitted that she played with the two girls on the material day save that she did not witness anything regarding the offence.

5. The trial court weighed the evidence on record and found that the prosecution had proved its case beyond reasonable doubt. As a result, the appellant was convicted of the offence of attempted defilement and sentenced to 20 years imprisonment. Aggrieved by that decision, the appellant preferred an appeal in the High Court which was dismissed by a judgment dated 29th August, 2016. Unrelenting, he has filed this second appeal anchored on the grounds that the learned Judge erred in law by:-

> ***a) Failing to re-analyze and re-evaluate the evidence before the trial court thus arriving at an erroneous conclusion.***
>
> ***b) Failing to appreciate that the prosecution's evidence was marred with contradictions.***
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> ***c) Failing to appreciate that the alleged coconut oil bottle was recovered in the appellant's absence.***
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> ***d) Confirming the harsh sentence issued by the trial court.***
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> ***e) Failing to hold that the charge sheet was at variance with the evidence adduced.***
>
> ***f) Ignoring the alibi defence put forth.***

6. At the hearing of the appeal, the appellant appeared in person and relied on his written submissions on record. He reiterated he had been framed. Expounding further, he submitted that there existed a grudge between the complainant's mother, one R and himself. In fact, Baraka had heard Riziki threaten him after a quarrel and a week later he was arrested and charged. It was evident from HJ's testimony and the P3 form that initially the nature of the charge against him was defilement. HJ stated that he had defiled her yet the medical evidence indicated otherwise, that is, that her hymen was intact. Consequently, the subsequent charge of attempted defilement was an afterthought. Furthermore, there was no reasonable explanation for the delay from the date the incident was reported on 31st March, 2014 to 18th April, 2014 when he was arrested.

7. He argued that there was contradictory evidence in regard to his house. On one hand, AH testified that they allegedly peeped through the window and saw what happened while Cpl. Margaret stated that the appellant's house was made of mud and had holes in the wall making it possible for someone to see into the house. On the other hand, LMC was clear that his house was made of stone bricks with iron sheet roofing hence it was not possible for someone to peep in. Last but not least, he contended that the prescribed sentence for attempted defilement under ***Section 9(2)*** of the ***Sexual Offences Act*** is a minimum of 10 years imprisonment thus the sentence of 20 years imprisonment was harsh.

8. In opposing the appeal, Mr. Wamotsa, Senior Prosecution Counsel, submitted that the appellant's conviction was based on overwhelming evidence. HJ gave a detailed account of the sequence of events; the events were indicative that the appellant intended to defile HJ. Even though that intention was not completed the offence of attempted defilement had been established. As far as he was concerned, the evidence of HJ and AH displaced that of LMC who he termed a hostile witness whose intention was to assist the appellant. All in all, there was no reason to interfere with the findings of the two courts below. He also urged that the sentence issued was lawful.

9. We have considered the record, submissions by the appellant and learned counsel as well as the law. It is trite that in a second appeal, such as this, and by dint of ***Section 361*** of the ***Criminal Procedure Code***, this Court is restricted to addressing itself on matters of law only. In the discharge of this function we bear in mind a cardinal principle of law that enjoins us not to interfere with the concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See ***Mwita vs. R [2004] 2 KLR 60***.

10. ***Section 9(1)*** of 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."***

11. With the foregoing description in mind and having perused the evidence on record, we concur with the two lower courts that the prosecution's evidence did establish the said offence. It is clear that HJ in her evidence set out in detail the events that occurred on the material day and her evidence was corroborated by AH. In particular the trial court in its own words expressed that:-

> ***"In this case, PW1 and PW2 were able to identify the accused person as being the one who attempted to defile PW1. Do the actions of the accused person constitute an act of attempted defilement? In my humble view it does. The accused person herein attempted to defile PW1 by touching her vaginal area with his hands while applying coconut oil on it and by removing her clothes. He then proceeded to attempt to insert penis into PW1's vagina and that must be what she described as 'inserting his stick in her private parts'. After analyzing the evidence on record I find that the prosecution has proved its case against the accused person beyond reasonable doubt …"***

12. To us, the inconsistencies and contradictions which the appellant pointed out did not water down the prosecution's case. We say so because firstly, the contradiction on the events of the material day between on one hand, HJ and AH and on the other hand, the trial court found that HJ was a credible witness. There is no reason to interfere with that finding since it is the trial court that had the opportunity to observe her demenour when she gave evidence. See ***Martin Nyongesa Wanyonyi vs. R [2015] eKLR***. Furthermore, the two courts reconciled the different versions and found the prosecution's version to be plausible. In that regard we rely on the case of ***Erick Onyango Ondeng' vs. R [2014] eKLR***, wherein this Court held as follows:

> ***"The hearing before the trial court invariably entails consideration of often contradictory, inconsistent and hotly contested facts. The primary duty of the trial court is to carefully analyse that contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers." Emphasis added.***

13. Secondly, on whether the appellant's house was made of mud or brick stones, we are conscious of this Court's position in ***Philip Nzaka Watu vs. R [2016] eKLR***, that:-

> ***"However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena***

exactly the same way. Indeed as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."

Applying the foregoing we are of the view that the contradictory evidence adduced by the prosecution and the defence neither went to the root of the appellant's conviction nor did it prejudice his defence.

14. Thirdly, to the extent that HJ testified that she had been defiled, we can do no better than set out the sentiments of the trial court thus:-

"The appellant further argued that whereas PW1 testified that she was defiled, the medical evidence shows her hymen was intact. It should be noted that PW1 was born on 20th February, 2009. By 31st March, 2014 she was five years old. She could not be in a position to differentiate between defilement and attempted defilement. That is why the police decided to charge the appellant with attempted defilement. This cannot be an issue."

We agree with above sentiments and we are unable to see how the charge of attempted defilement could be interpreted as an afterthought. By the time the appellant was arraigned and charged he was aware that the offence he was charged with was attempted defilement and not defilement.

15. On Alibi, it is settled that that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution. See ***Victor Mwendwa Mulinge vs. Republic [2014] eKLR***. In this case the totality of the prosecution's evidence dislodged the appellant's alibi that he was at the material time with Baraka. We also cannot help but note that the prosecution explained the delay in arresting the appellant was due to the period of time it took tracing witnesses to record statements. The explanation was supported by Tatu's uncontroverted evidence that after the incident she had to move with the minor out of the homestead which was not conducive due to the acrimony that had arisen.

16. Turning to consider the question of sentence, we reiterate that by ***Section 361(1)*** of the ***Criminal Procedure Code***, severity of sentence is a matter of fact and as such is outside the jurisdiction of this Court on second appeal. Besides the sentence meted out against the appellant was lawful.

17. In the end, we find no reason to interfere with the concurrent findings of the two lower courts. Therefore, the appeal lacks merit and is hereby dismissed.

Dated and delivered at Malindi this 7th day of December 2017.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

…….…….

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR