IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, MWERA & MURGOR, JJ.A.)

CRIMINAL APPEAL NO.52 OF 2013

BETWEEN

SIMON NDUGI NGUGI

BONFACE NYUTU NGURE.....APPELLANTS

AND

REPUBLIC.....RESPONDENT

(Appeal from a ruling of the High Court of Kenya at Nairobi (Ochieng, J.) dated 7th June, 2011

in

HC.CR.A.No.171 & 172 of 2010)

****

JUDGMENT OF THE COURT

The two appellants herein, ***Samuel Ndugi Ngugi*** (the 1st appellant) and ***Boniface Nyutu Ngure*** (the 2nd appellant) were charged in the Senior Resident Magistrate's Court (Githunguri) separately as follows: that on 7th January, 2009 at ***[particulars withheld],*** Kiambu, the 1st appellant unlawfully had carnal knowledge of ***E W M***, a female child aged six years contrary to ***Section 8(1)(2) of the Sexual Offences Act***. Alternative to that charge of defilement, the same appellant faced the charge of committing indecent act with the said child ***E W M*** on the same day and place by viewing and touching Esther's birth carnal, contrary to Section 11(1) of the Sexual Offences Act.

On his part, the 2nd appellant was charged with also committing an indecent act with the said ***E W*** by viewing and touching her birth carnal.

After trial, the 1st appellant was found guilty of attempted defilement contrary to ***Section 9(1)(a), (2)*** while the 2nd appellant was found guilty of the offence as charged under ***Section 11(1) of the Sexual Offences Act***. They were convicted and each ordered to serve 40 years in prison. Both appealed to the High Court (***Ochieng, J.***). Their appeals were dismissed both on conviction and sentences – hence the present appeal.

The learned trial magistrate considered all the evidence that pointed to the charge, that the 1st appellant placed his male shaft in the complainant's (***E W***, PW1) female organ, but with the medical report (P3) produced by ***Dr. Stepehn Ndolo*** (PW5) which stated that PW1's hymen was intact, concluded that the offence proved was only attempted defilement because there was no penetration. The High Court, on its part, upheld the finding by the lower court that indeed the 1st appellant was guilty of attempted defilement, penetration being a central ingredient in the offence of defilement, having not been proved.

As regards the 2nd appellant, the lower court found that his part in the whole thing was that he held the complainant's head (mouth) and hands while the 1st appellant removed her underpant and inserted his male shaft in the complainant's reproductive organ. The learned trial magistrate said:

> ***"Touching a child's hands and head against her will and covering her mouth while an accomplice commits an offence --- and viewing the said private parts connects the offence."***

So the 2nd appellant was convicted of committing an indecent act against the complainant. The High Court upheld that conviction by remarking that:

> ***"…the 2nd appellant was guilty of an indecent act with a female."***

The appellants filed separate memoranda of appeal later substituted by what each termed, supplementary grounds of appeal together with written submissions. They relied on the latter with limited oral remarks.

Considering his submissions in a condensed manner, the 1st appellant told us that on his conviction, the sentence of 40 years in prison was harsh and excessive. That the charge against him was not proved beyond a reasonable doubt. Further, that he was not medically examined for any connection the alleged offence and essential witnesses were not called to testify. The 1st appellant added that the complainant had been inconsistent in her evidence while the doctor who testified exonerated him. And finally that his defence was not taken into account and the High Court did not reevaluate the evidence on record so as to come to its own conclusions.

The 2nd appellant's grounds and submissions were couched in more or less the same manner in that the sentence of 40 years meted out on him was harsh and excessive. For the offence as charged, the sentence ought to have been only 10 years imprisonment. He, too, was of the view that the charge against him was not proved beyond a reasonable doubt and one key witness (the complainant's grandmother) was not called to testify. It was the 2nd appellant's further contention that the learned Judge did not reevaluate the evidence on record so as to arrive at his own conclusions and, in any event, his defence was not considered.

Mr. Kivihya, Assistant Director of Public Prosecutions, learned counsel for the Republic opposed the appeal on the basis that the evidence tendered by the prosecution proved the respective charges and the two courts below, accordingly, made concurrent findings. He added that the 1st appellant was properly convicted of attempted defilement of a female aged 6 years and her evidence was corroborated by that of her father ***D K*** (PW2) and the doctor (PW5 above). At the end of his argument, counsel was of the view that the evidence proved attempted defilement and the sentence of 40 years was legal considering the provisions of ***Section 9(2) of the Sexual Offences Act*** whereon conviction one is liable to a term of not less than ten years in prison while defilement itself would have attracted life imprisonment in the circumstances. He also supported the conviction and sentence of the 2nd appellant which the High Court confirmed.

Beginning with the issue of sentence, much as both appellants complain that it was harsh and excessive, which may well be so, considering that both were slightly over 20 years of age at the time they were sentenced on 12th March, 2010, the law only permits us to consider matters of law on second

appeal. We can only consider sentence in a very limited way. ***Section 361(1) of the Criminal Procedure Code*** states that:

> ***"361. (1) A party to an appeal from a subordinate court, may subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section –***
>
> (a) ***on a matter of fact, and severity of sentence is a matter of fact; or***
>
> (b) ***against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under Section 7 to pass that sentence."***

In brief, the relevant statute does not allow this Court to hear appeals against severity of a sentence usually termed as harsh and excessive unless, the sentenced was enhanced by the High Court or the lower court where the appellant was charged, had no power to pass the sentence and therefore the same was illegal. That should dispose of the appellants' pleas before us that the lower court imposed harsh and excessive sentences. But the sentences as imposed, if convictions were proper, were lawful because both ***Sections 9(2)*** for attempted defilement and committing an indecent act under ***Section 11(1) of the Sexual Offences Act*** state the sentences. Both provide that, on conviction one will be liable to a sentence of not less than ten years imprisonment. Therefore the terms of imprisonment for 40 years are lawful.

Both appellants contended that the charges against them were not proved to the required standard or beyond a reasonable doubt. Beginning with the conviction of the 1st appellant, the two courts below were satisfied that the evidence of PW1, PW2 and PW5 proved the offence of attempted defilement. The offence only ended at the attempting stage because there was no proof of penetration, the complainant's hymen having been found intact. As stated earlier, penetration of the female organ by the male shaft is an essential ingredient to the charge of defilement. Thus in absence of penetration or evidence to prove it, both the trial court and the High Court arrived at the correct conclusion that what was proved as against the 1st appellant was only an attempt to defile. Accordingly, that conviction was safe.

The appellant did not demonstrate to us which vital witnesses were omitted from testifying thereby creating a doubt in the prosecution case.

Having gone over the record of the lower court, and having noted that the learned Judge did indeed review and reevaluate evidence on that record to come to his own conclusion, we see no merit in these two grounds and we dismiss them.

Moving to the 2nd appellant, he was charged with the offence of committing an indecent act in that:

> ***"On the 7th day of January, 2009 at [particulars withheld] Village in Kiambu District within Central Province committed an indecent act with a child namely E W M by viewing and touching her birth carnal."***

First, we had a problem of finding which part of the victim constituted a "*birth carnal*" which the appellant viewed and touched. Under Section 2 of the Sexual Offences Act the phrase or term indecent act is defined as meaning:

> ***"---an unlawful intentional act which causes –***
>
> ***(a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration;***
>
> ***(b) exposure or display of any pornographic material to any person against***

his or her will."

The complainant testified that while ***Ndugi*** lay on her and "*put his thing of passing urine"* in hers:

…

"Nyutu held my head and hands."

And as reproduced above, the learned trial magistrate found that the 2nd appellant had been guilty of:

"Touching a child's hands and head against her will and covering her mouth while an accomplice commits an offence on the body of the said child --- and viewing the said private parts no doubt connects the offence."

It was not stated in evidence anywhere that any part of the body of the 2nd appellant came in touch or contact with the genital organs, breasts or buttocks of the complainant, let alone what constituted the viewing element in the charge. Viewing anything, let alone the so-called *"birth carnal"* which we could not establish, is not an element in the offence of committing an indecent act. Accordingly, the 2nd appellant ought not to have been found guilty of the offence as charged. Since it was the evidence of PW1 and PW2 that he was present and held the complainant as the 1st appellant attempted to defile her, we take the view that the 2nd appellant should have been charged with abetting and aiding a commission of an offence as provided for under ***Section 20(1)(c) of the Penal Code***.

"20. (1) When an offence is committed each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say –

(a) --- ***(b) ---***

(c) every person who aids or abets another person in committing the offence;

(d) ---

(2) --- (3) ---."

In short, under this provision of law, one who aids and abets commission of an offence is equally liable as the principal offender. The 2nd appellant was not charged with the offence under ***Section 20(1)(c)*** above, for aiding and abetting the 1st appellant in attempting to defile the complainant and consequently, all we can do is allow his appeal, because there was no evidence adduced to support the charge of committing indecent act.

Accordingly, we are of the view that had the learned Judge properly re-evaluated the evidence against the 2nd appellant, he could have come to the conclusion that it did not support the charge laid.

In sum, we dismiss the appeal by the 1st appellant and allow that of the 2nd appellant. Conviction thereon is quashed and the sentence set aside. The 2nd appellant shall be set at liberty forthwith unless otherwise lawfully held.

Dated and Delivered at Nairobi this 20th day of February, 2015

P. N. WAKI

…….....

JUDGE OF APPEAL

J. W. MWERA

….....

JUDGE OF APPEAL

A. K. MURGOR

….....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR