Korir v Republic (Criminal Appeal E003 of 2022)
[2024] KEHC 9585 (KLR) (31 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9585 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CRIMINAL APPEAL E003 OF 2022

RL KORIR, J

JULY 31, 2024

BETWEEN

GILBERT KIPNG'ENO KORIR ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence in Criminal Case No. E014 of 2020 by Hon. J. Omwange, Senior Resident Magistrate at the Magistrate's Court in Sotik on 19th January 2022)

JUDGMENT

1. The Appellant was charged with the offence of attempted defilement contrary to section 9(1) as read with section 9(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the charge were that on 5th December 2020 in Sotik sub-county within Bomet County, intentionally attempted to cause his penis to penetrate the vagina of C.D. a child aged 13 years old.

2. An alternative charge of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act* No. 3 of 2006 was also brought against him. The particulars were that on 5th December 2020 in Sotik sub-county within Bomet County, unlawfully and intentionally touched the vagina of C.D. a child aged 13 years old with his penis.

3. The Appellant was arraigned before the trial court where he denied the charges and the matter proceeded to full hearing with the Prosecution calling six (6) witnesses in support of their case.

4. At the close of the Prosecution's case, the trial court found that the Appellant had a case to answer and placed him on his defence. He elected to give unsworn evidence and did not call any witnesses.

5. At the end of the defence case the trial court convicted him on the main count of attempted defilement and sentenced him to serve 20 years in jail.

6. Aggrieved by the decision of the trial court, the Appellant filed a Petition of Appeal on 24th January 2022 where he raised 5 grounds as follows: -

    1. That the learned trial magistrate erred in both law and fact by relying on uncorroborated evidence.

    2. That the learned trial magistrate erred in both law and fact by relying on evidence adduced by the Prosecution which was inconsistent and full of irregularities.

    3. That the learned trial magistrate erred in both law and fact by failing to analyze that the entire evidence was manufactured, manipulated and framed to meet the predetermined goal of fixing him.

    4. That the learned magistrate erred in law and fact by not considering that all evidence of the witnesses were borne by fabrication, bad blood between the Appellant and his wife.

    5. That the learned magistrate erred in both law and fact by rejecting his plausible defence without any further explanation of it.

7. It was his prayer that the conviction be quashed, and sentence set aside.

8. This Court gave directions on 21st September 2022 for the appeal to be canvassed by written submissions.

The Appellant's Submissions

9. The Appellant's submissions were filed on 20th February 2023. Firstly, the Appellant submitted that the charge was defective because the word 'Act' was missing on the charge sheet under the description of the legal provision which was incurable in law.

10. The Appellant submitted that no one saw him committing the alleged offence and therefore the aspect of intention to defile was not proven. He submitted that PW1 and PW2 the complainant were incredible witnesses whose evidence ought not to be trusted and he relied on the case of *Ndung'u Kimanyi v Republic* [1979] KLR 283 where the Court of Appeal held that a witness whose evidence was relied upon ought not to create an impression that he was not a straightforward person or raise suspicion about his trustworthiness. It was his submission that for this reason, the conviction was unsafe.

11. The Appellant further submitted that the medical evidence did not support the contention by the complainant that the Appellant attempted to defile her because the Clinical Officer exonerated him from the offence.

12. Lastly, the Appellant submitted that he was not supplied with material evidence that the Prosecution intended to rely on during their case such as the Investigation Diary and further, that PW5 and PW6 did not see the Appellant at the scene but only found the complainant screaming. He urged the Court to allow the appeal.

The Respondent's Submissions

13. The Respondent (Prosecution) submitted that in order to prove the offence of attempted defilement, the age of the victim, identification of the perpetrator and an intention to commit the offence ought to be proved beyond reasonable doubt. The Prosecution submitted that the victim was 12 years old at the time of the offence as demonstrated by the certificate of birth (P.Exh1). Secondly, that the Appellant was not a stranger to the victim because he was her step-father and they both resided in the same

house. They also submitted that the incident happened in broad daylight and therefore, the issue of identification, did not arise.

14. On the third issue of an attempt to cause penetration, it was the Prosecution's submission that under section 388 (1) of the *Penal Code*, the ingredient necessary to commit the offence included an intention to commit the offence, putting the intention into execution by means adapted to its fulfilment and doing some overt act which manifested one's intention to commit the offence. They submitted that from the evidence on Record, the Appellant was found at the scene by PW1 in circumstances that indicated that he was ready to have sexual intercourse with PW2 because he was lying on top of her with his trousers lowered to his knees and the victim's skirt raised to her waist with her biker removed. It was their submission that had PW1 not walked in on him, the Appellant would have executed his intention of having sexual intercourse with PW2.

15. The Prosecution finally submitted that the Appellant's defence was uncorroborated as he was placed at the scene of the crime. Further that he never raised the issue of being framed by PW1 or PW2 during the trial. Thus, his defence was an afterthought and the Court ought to uphold the decision of the trial court.

Analysis and Determination

16. It is trite that the duty of a first appellate court is to examine afresh the evidence before the trial court and arrive at its own findings. This principle was restated by the Court of Appeal in *David Njuguna Wairimu v Republic* [2010] eKLR thus: -

> "The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."

17. I have considered the evidence before the trial court, the grounds of appeal and the rival submissions. The issues for my determination are as follows: -

    i. Whether the Prosecution proved the offence of attempted defilement to the required legal standard.

    ii. Whether the sentence meted was legal and appropriate.

    i. Whether the Prosecution proved the offence of attempted defilement to the required standard.

18. The offence of attempted defilement is premised under section 9 of the *Sexual Offences Act* as follows: -

    9. Attempted defilement

    (1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.

    (2) A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years.

    (3) The provisions of section 8(5), (6), (7) and (8) shall apply *mutatis mutandis* to this section.

19. The term attempt is defined by section 388 of the *Penal Code* as follows: -

1. When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.

2. It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfilment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.

3. It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence."

20. The ingredients of the offence of attempted defilement were outlined by Kemei J. in the case of *Benson Musumbi v. Republic* [2019] eKLR as follows: -

> " The prosecution in an offence of attempted defilement must prove the other ingredients of the offence of defilement except penetration; it must prove the age of the complainant, positive identification of the assailant, and then prove steps taken by the assailant to execute the defilement which did not succeed. Attempted defilement is as if it were a failed defilement, because there was no penetration."

21. From the definition above, it follows for a charge of attempted defilement to stand, the Prosecution must prove beyond reasonable the age of the complainant; that the overt act (attempted penetration) was committed; and the positive identification of the assailant.

The age of the complainant

22. The importance of proving the age of a victim in a defilement case has been restated in several authorities. The Court of Appeal in *Hadson Ali Mwachongo v Republic* [2016] eKLR held thus: -

> " The importance of proving the age of a victim of defilement under the *Sexual Offences Act* by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of victim. In Alfayo Gombe Okello v Republic Cr. App. No. 203 of 2009 (Kisumu). This Court stated as follows;
>
> "....In its wisdom Parliament chose to categorize the gravity of that offence on the basis of the age of the victim, and consequently the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1).?"

23. It is now an established principle that the age of a victim can be proven in several ways. The Court of Appeal in Malindi in *Mwalengo Chichoro Mwajembe v Republic*, Msa. App. No. 24 of 2015 (UR) held as follows: -

" .....the question of proof of age has finally been settled by decisions of this court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. See *Denis Kinywa v Republic*, Criminal

Appeal No. 19 of 2014 and *Omar Uche v Republic*, Criminal Appeal No. 11 of 2015. We doubt if the courts are possessed of the requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond reasonable doubt. This form of proof is a direct influence by the decision of the Court of court Appeal of Uganda in Francis Omuroni is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable....."

24. The Prosecution adduced the evidence of a birth certificate and the testimonies of both the victim and her mother in proving her age. PW1, the victim's mother testified that the minor was 12 years old and was born on 5th June 2008. She produced her birth certificate (P.Exh1). The victim herself also testified that she was 12 years old and a student at Taabet Primary School in class 6.

25. I have re-examined the victim's Birth Certificate (P.Exh1) and confirmed that she was born on 5/6/2008. This means that she was 12 years old at the time of the alleged commission of the offence. I find that this ingredient has been proven beyond reasonable doubt.

Positive identification of the perpetrator

26. It was PW1's testimony that the Appellant was her husband and a stepfather to the victim. PW2 the victim also referred to the Appellant as her father during her examination-in-chief. The victim further testified that the incident occurred at around 3.00 p.m. on the said date. It is my view that being well known to the victim, particularly being her stepfather, it would have been impossible for the Appellant to be mistakenly identified if he was the one who committed the alleged offence. I shall however return to this aspect of identification later on in the judgment.

Proof that the overt act was committed

27. Penetration is defined under section 2 of the *Sexual Offences Act* as follows: -

> " "penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person."

28. It follows then that in a case of attempted defilement, the Prosecution must demonstrate that an accused person took all the necessary steps to begin an act of penetration but was unable to complete the same either at his own volition or through the intervention of another. There must be no penetration but only evidence of its attempt as held by Makau J in *David Aketch Ochieng v R*, [2015] eKLR as follows: -

> "....For a successful prosecution of an offence of an attempted defilement, the prosecution must adduce sufficient evidence to the required standard to prove an attempted penetration. This may in my view include bruises, or lacerations from complainant's vagina, and/ or bruises or lacerations of culprit's genital organ and finding made discharge such as semen or spermatozoa outside the complainant's vagina or innerwear without there being penetration."

29. In this case, the Prosecution called on the evidence of the minor and produced the medical examination report to prove attempted penetration. The minor testified that:

> " The accused did bad manners to me. The accused forced me down on the ground after causing me to fall... he then removed my clothing. I was wearing a skirt, sweater and dress. I was also wearing a panty and a biker. The accused undressed me by removing my pant and biker and removed my clothes halfway. All were halfway. The accused then removed his

trouser up to the knee. I don't remember if he had a panty. He then lied on top of me. The accused then inserted his male genital organ into my female genital organ...."

30. The Clinical Officer (PW3) on the other hand testified that he examined A.C on 23rd April 2021. That upon examination, he found nothing positive. The hymen was intact and there were no positive findings. He testified that he examined the complainant after 5 months.

31. It was the Appellant's submission that the medical evidence exonerated him as it did not support the alleged penetration. The Prosecution on the other hand submitted that the medical examination report did not support penetration because the accused had attempted to defile the victim but was unsuccessful since his wife walked in on him.

32. I have considered the evidence on Record as to whether or not there was penetration arguments in this regard or attempted penetration. I have also considered the rival arguments in this regard. I have looked at the Post Rape Care Form (PRC) produced as Exhibit 4. The same was filled on 23rd April 2021. The Clinical Officer observed that the hymen was normal and intact and concluded "No evidence of defilement/penetration." I have further considered the P3 Form which he produced as P. Exh 3 and noted that he concluded that there was no evidence of defilement. It is my view that the examination conducted 5 months later could not have been expected to yield anything. It is my further view that the whole prosecution evidence was wanting. For instance, why did it take 5 months for PW2 to be medically examined? The P3 Form (P.Exh 3) was issued on 5th December 2020 being the material day but it was filled by Geoffrey Kirui (PW3) on 23rd April 2021 when he examined PW2. This leaves this court with more questions than answers.

33. The evidence of Carolyne Cherono (PW5) and Martha Chepkoech (PW6) was all hearsay evidence. Both of them gave evidence on an event that they did not witness but were told. They did not have a first-hand account of what happened between the Appellant and PW2.

34. Turning to PW2's evidence, courts are empowered by dint of section 124 of the *Evidence Act* to convict an Accused person solely on the evidence of the victim, but only on the condition that the trial court believes their testimony. The trial court should always record its reasons for believing the victim before convicting an Accused person on the victim's sole testimony. Section 124 of the *Evidence Act* provides: -

Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act*, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

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.(Emphasis mine)

35. I have carefully gone through the trial court proceedings and the Judgment dated 19th January 2022 and I note that the trial court did not record its reasons for believing the testimony of PW2. I have reconsidered PW2's evidence and I am not convinced she was being truthful. I have already laid out PW2's testimony earlier in this Judgment and it was her testimony that the Accused inserted his male genital organ into her female genital organ. Her evidence was not supported by PW3's evidence who stated that upon examining her, albeit 5 months later, he found that her hymen was intact and this was supported by the P3 form (P.Exh3) and the PRC form (P.Exh4).

36. The two testimonies of PW2 and PW3 contradicted each other. If PW2 was truthful, then the medical examination would not have revealed an intact hymen. Additionally, Martha Chepkoech (PW6) who

was the Assistant Chief testified that PW2 reluctantly confirmed to her that she had been defiled. For those reasons, I am disinclined to believe the testimony of the victim (PW2).

37. The mother's (PW1) testimony also contradicted the clinical officer's (PW3) testimony. PW1 testified that she walked in on the Accused who was her husband and PW2 having sex and that he was on top of her. I am also disinclined to believe PW1's evidence which also contradicted PW3's evidence and further add that as PW2's mother, she failed her daughter. She should have ensured that PW2 was medically examined immediately she reported the matter to Sotik Police Station and was issued with a P3 Form. While the medical officer would not have found any evidence of defilement because it was a failed attempt, he would have recorded his observations on the psychological state of the minor.

38. The whole prosecution evidence only created suspicion that there could have been an attempt at defilement of PW2 by the Accused. Suspicion however cannot lead to a conviction. The Court of Appeal in *Sawe v Republic* [2003] KLR 364 stated thus:-

> " Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt."

39. The ingredients of attempted defilement must be proved conjunctively and not disjunctively. When one of the elements cannot be adequately established based on the absence of some fact or otherwise, thereby creating any form of doubt, that doubt must go to the benefit of the Accused.

40. It is my finding that the Prosecution have not proved the ingredient of attempt beyond reasonable doubt and I am thus reluctant to find that the Appellant committed the offence of attempted defilement. The identification of the Appellant as a person known to the complainant and PW3 because he was father and husband respectively is what was proved. His identification as the person who committed the offence does not hold as it has not been proved that the alleged offence did occur.

41. In considering the alternative charge of committing an indecent act with a child, the offended section of the law is section 11(1) of the *Sexual Offences Act*. It states as follows:-

Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.

42. The *Sexual Offences Act* also defines what entails an indecent act. Section 2 provides as follows:-

> " indecent act" means 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."

43. Having found that the Prosecution failed to prove the ingredient of attempt and having found PW2's evidence as untruthful, it is even harder for this court to find that there was any sexual contact between the Appellant and PW2. PW2's whole testimony as previously found, created doubt in the court's mind and the standard of proof in this charge was proof beyond reasonable doubt, which the Prosecution have failed to meet. It is my finding that this charge has not been proven.

44. In the final analysis, the Prosecution failed to prove its case beyond reasonable doubt and the evidence they presented was insufficient to warrant a conviction.

45. With respect to sentence, Section 9(2) of the *Sexual Offence Act* which is the penal section provides for a minimum of 10 years' imprisonment. This means that the court exercising discretion should

increase the same considering the aggravating circumstances. In this case the Appellant was sentenced to 20 years' imprisonment without an indication of any aggravating circumstances warranting the stiff sentence. It is my view that the sentence was harsh and excessive.

46. As I pen off this judgement, I must reiterate the importance of recording the trial court's observations of the victim, their demeanor and their testimony, which should be recorded as nearly as possible in the words used by the child probably with an interpretation of the court's understanding of the words used. The trial court being an arbiter ought to have commented on the medical examination conducted 5 months after the charge. From the record, the accused was charged on 8th December 2020. Was there a subsequent attempt to defile the minor? If indeed the minor was subjected to the attempted defilement, and any other subsequent sexual abuse, then it is clear to this court that her mother and the Investigation failed her.

47. In the end, I find the Appeal merited. The conviction was unsafe owing to insufficiency of evidence. I quash the conviction and set aside the sentence. The Appellant is set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

JUDGMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 31ST DAY OF JULY, 2023.

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R. LAGAT-KORIR

JUDGE

**Judgment delivered in the presence of the Appellant acting in person, Mr. Njeru for the State, and Siele (Court Assistant)