Kiplagat & another v Republic (Criminal Appeal 38 of 2023)
[2024] KEHC 8998 (KLR) (Crim) (26 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8998 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYANDARUA

CRIMINAL

CRIMINAL APPEAL 38 OF 2023

CM KARIUKI, J

JULY 26, 2024

(FORMERLY NYAHURURU CRIMINAL APPEAL NO. 43 OF 2019)

BETWEEN

JOSEPH KIPROTICH KIPLAGAT ..... 1ST APPELLANT

JOHN KAMAU MWANGI ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant herein were charged with the offence of attempted defilement contrary to Section 9 (1) and (2) of the *Sexual Offences Act*. The particulars of the offence being that on the 4th day of August 2018 at Mairo Inya Location within Nyandarua County attempted to cause their penis to penetrate the vagina of HWK, a girl aged 11 years old.

2. Subsequently, the trial court conducted a full hearing and the Appellants were convicted and sentenced to 10 years imprisonment. As a result, the Appellants were dissatisfied with the trial court's conviction and filed the instant appeal which raised the following grounds of appeal:-

    i. The Hon Magistrate erred in law and fact in convicting the Appellants even when they had not been identified as the perpetrators by any witness.

    ii. The Hon Magistrate erred in law and fact in failing to find that in the circumstances of the case, there was need to have an identification parade conducted in order for the 1st Appellant to be identified or otherwise.

iii. The Hon Magistrate erred in law and fact in finding that the house where the offences were said to have been committed belonged to the 1st Appellant even when the same had not been proved.

iv. The Hon Magistrate erred in law and in fact in convicting the Appellant for a charge whose particulars did not match the evidence tendered before court.

v. The Hon Magistrate erred in law and in fact in convicting the Appellant based on evidence that was contradictory, inconsistent and insufficient.

vi. The Hon Magistrate erred in law and in fact in relying on the uncontroverted testimony of the complainant.

vii. The Hon Magistrate erred in law and in fact in failing to consider the 1st accused defence of alibi which was uncontroverted.

viii. The Hon Magistrate erred in law and in fact in failing to make an inquiry as to the age of the 2nd Appellant when he was brought to court to answer to the charges.

ix. The Hon Magistrate erred in law and fact in allowing the case against the 2nd Appellant who was a minor then, to proceed past 3 months being the statutory period for criminal proceedings against minors.

x. The Hon Magistrate erred in law in fact in failing to declare that the proceedings against the 2nd Appellant were illegal, unlawful and/or a nullity after the lapse of 3 months from the date of arraignment and/or plea taking.

xi. The Hon Magistrate erred in law and in fact in relying on circumstantial evidence without warning herself on the dangers of doing do.

xii. The Hon Magistrate erred in law and in fact in convicting and sentencing the Appellant based on charges that were proved by the prosecution.

xiii. The Hon Magistrate erred in law and fact in failing to find that the prosecution had not established its case beyond reasonable doubt.

xiv. The conviction is dangerous and against the weight of the evidence.

xv. The sentence is excessive and illegal.

3.Appellants Submissions

4. The Appellants submitted that an identification pared is absolute when the accused is a stranger to the complainant and in the prevailing circumstances an identification parade was extremely necessary owing to the fact that the Appellants were strangers to the complainant since she did not recognize either of them. Reliance was placed on *Republic v Valentine Maloba & 2 others* [2021] eKLR, *David Mwita Wanja & 2 others v Republic* which cited the case of *Njihia v R* [1986] KLR 422.

5. It was submitted that there were contradictions between the PW1 and PW4's testimony that go to the heart of the matter since they relate to material facts. Reliance was placed on *AHM vs Republic* (Criminal Appeal E043 of 2021) [2022] KEHC 12773 KLR, *Richard Munene v republic* [2018] eKLR. Further, the Appellant submitted that there was insufficient evidence because the prosecution did not call any witness to prove that indeed the house where the crime was committed belonged to the Appellants herein. Reliance was placed on *Isaiah Sawala alias Shady v Republic* [2021] eKLR

6. The Appellants contended that DW1, the 1st Appellants mother told the court that her son was in Olkalou on the fateful day where he used to live with his sister. It was asserted that the prosecution never adduced evidence to controvert his defense of alibi and put the accused at the scene of crime and that the trial court did not consider this defense of alibi despite the fact that it introduced reasonable doubt in the mind of the court. Reliance was placed on *Kiarie v Republic* [1984] eKLR

7. The Appellants averred that according to the trial court the house where the offence was allegedly committed was a circumstantial evidence linking them to the crime yet the ownership pf the said house was not firmly established since the opening of the house by the 1st Appellant cannot be taken to mean that he owned the house. That PW2 stated that when the complainant led them to the house in question, she could not remember the exact house but she was led by a stone that hit her the previous night in concluding that that was the house. They also reiterated the 1st Appellant's defense of alibi. Reliance was placed on *Ahamad Abolfathi Mohammed and Another v Republic* [2018] eKLR, *Abanga alias Onyango v Republic* CR. App no. 32 of 1990 (UR), *Sawe v Republic* [2003] KLR 364

8. It was stated that the failure by the prosecution to place the Appellant at the scene of the crime and the resultant failure to establish the ownership of the house where the crime was committed weakens the chain of circumstances relied upon and therefore the crime could have been committed by other persons and not the Appellants before the court. in conclusion, the Appellants urged the court to allow the appeal, set aside the trial court's conviction and set the Appellants herein at liberty.

a. Respondents Submissions-

Not available at the time of drafting this opinion.

9. Analysis and Determination

10. This being a first appellate court it is duty bound to re-analyze and re-consider the evidence tendered before the trial court with a view to arriving at its own independent conclusions. In the case of *Kiilu & Another v Republic* [2005]1 KLR 174, the Court of Appeal stated thus:

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.
>
> It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses."

11. The Appellants herein were charged with the offence of attempted defilement. Section 9 (1) and 9 (2) of the *Sexual Offences Act* states thus:-

9.(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"

12. In the case of *Benson Musumbi v Republic* [2019] eKLR the court considered what should be proved regarding ingredients of the offence of defilement. It stated thus:-

> " 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."

13. In *John Gatheru Wanyoile v Republic*[2019] eKLR the court reiterated as follows:

> " It is clear that the elements of the offence of attempted defilement are similar to those of defilement save that there was no penetration. The prosecution must prove that the child was a minor, that there was an act to cause penetration, which was not successful, and that there was positive identification of the accused defiler."

14. Therefore, the court has to establish the following ingredients: -

    i. The age of the complainant

    ii. The overt act committed

    iii. Positive identification of the assailant(s)

15. With regard to the complainant's age, she was stated to be 11 years old. The same was proved vide P. Exhibit 4 which was her birth certificate which indicated that the victim was born on 8/7/2008 making her 11 years old when the offence was committed. In my view, with the evidence on record, the prosecution indeed proved beyond any reasonable doubt that the victim was a child aged 11 years old at the time of the alleged incident.

16. On the issue of the attempt to defile, the *Sexual Offences Act* does not define the term attempt but Section 388 of the Penal Code defines the term "attempt" as: -

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

    ii. 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 fulfillment 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.

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

17. PW1 stated that on the material evening she had gone outside to pick her tyre which she has forgotten outside at around 7pm, when a sack was put over her head till her chest then she was put on a motor cycle. She stated that there was someone else who sat behind her then she felt the motor bike going somewhere downhill on the road but it did not go very far. They rode for around 5-10 minutes then she was stopped and lifted up somewhere.

18. It was her testimony, that her legs were tied up. The sack was then removed from her head. She stated that she did not know where she was but she was but she was in a house where there was one big sheet was sub diving the house. She was told to remover her clothes and she refused. The lights were off but the big sheet had colors so she could see it. She then told them she was hungry and she hazard the assailants speaking then they went away but left the door unopened. She untied her legs and got outside and the saw the main gate and that is how she escaped.

19. PW1 also asserted that the assailants tore her clothes specifically her trouser when she refused to remove them. The clothes were produced in evidence. She stated that they were torn by the man who caught her when she refused to remove her clothes.

20. From the aforementioned Section 388, it follows that it must be proved by evidence that somebody did an act or acts which would show that he or she was intending to commit the offence, but failed to commit the complete offence.

21. As to whether there was an act to cause penetration that was not successful, in the case of *Benson Musumbi v Republic* [*supra*] it was stated that:-

> " In order to prove an attempt to commit an offence, the prosecution must prove the mens rea which is the intention and the actus reus which constitute the overt act which is geared to the execution of the intention. The actus reus must be more than mere preparation to commit the act as there is a difference between mere preparation to commit an offence and attempting to commit an offence."

22. Furthermore, in *Daniel Simiyu Wanyonyi v R* [2019] eKLR it was held that:

> " This Court when dealing with an appeal from a conviction of attempted defilement in Bungoma HC. Cri. Appeal No. 176 of 2016 stated; when a court of law is faced with any charge on an attempted offence, care has to be taken to ensure that the attempt, as opposed to mere acts of preparation, is proved since however strong the evidence may be if it only relates to actions in preparation to commit a certain crime, that cannot justify a conviction on an attempted charge. In the circumstance or clarity purposes, the evidence must be led which goes beyond the preparatory stages and right to the doorstep of possible commission of the offence. It ought to be demonstrated that the accused had committed the last act to the actual commission of the specific offence attempted. Likewise, the intention to commit the crime must also be proved.

23. In *David Ochieng Aketch v Republic* [2015] eKLR, Makau J observed as follows on attempted defilement: -

> " The Appellant was charged and convicted with an attempted defilement contrary to Section 9 (1) of *Sexual Offences Act* No. 3 of 2006. What is attempted defilement? It can safely be stated to be the unsuccessful defilement. For a successful prosecution of an offence of 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 male discharge such as semen or spermatozoa outside the complainant's vagina or innerwear without there being penetration. There was absence of penetration or evidence linking the culprit with the offence of attempted defilement."]

24. Accordingly, this court has to the answer the question of the prosecution prove any act or acts that could constitute an attempt to defile the victim? The trial magistrate in her judgement stated thus:-

> " I consider that the proved acts of the assailants as to abducting the complainant by putting a sack over her head, put her on a motorbike, took her to the 1st accused person's rental house, tied her legs up, tore her clothes after she failed to remove the clothes as asked before she interrupted them claiming to be hungry are all acts from which the intention to defile the complainant may be inferred as they are not consistent with any other reasonable explanation....."

25. However, guided by the aforementioned Section 388 and the cite case laws, I disagree with the trial magistrate's observations. Notably, at no pint did the victim state that the Appellants touched her private parts or her inner wear in an attempt to take them off. She also never testified that she saw the any of the Appellants' penis. The medical evidence produced by PW7, the doctor who examined the complainant stated that she had no injuries and normal external genitalia. He indicated that she was not examined further as she insisted that she had not been defiled

26. From the evidence, it is clear that the Appellants might have been preparing to commit the act but had not attempted to do so. The Appellants were better charged with kidnaping and abduction as a result of their unlawful actions rather than attempted defilement as was the instant case. Considering this evidence and the case law cited above, it is my finding that there was no attempted penetration.

27. Having opined that there was no attempted penetration, I am inclined to agree with the Appellants that the prosecution failed to prove their case against them beyond reasonable doubt. Therefore, there is no need to interrogate whether the victim identified the Appellants as the same would be an act in futility. Notwithstanding, having scrutinized the evidence on positive identification of the Appellants, I am not convinced that the Appellants were positively identified.

28. In the circumstances, I find and hold that the Appellants conviction was unsafe. I hereby quash the conviction of the Appellants and set aside the sentence of ten years imprisonment imposed on them. Therefore, unless otherwise lawfully held, the 1st and 2nd Appellant are hereby set at liberty forthwith.

    I. The appeal be and is hereby allowed, conviction quashed and sentence set aside.

    II. Therefore, unless otherwise lawfully held, the 1st and 2nd Appellant are hereby set at liberty forthwith.

JUDGMENT DATED AND SIGNED AT NYANDARUA THIS 26TH DAY OF JULY, 2024 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

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CHARLES KARIUKI

JUDGE