**Mafumbo v Republic (Criminal Appeal E013 of 2020)**
**[2024] KEHC 11229 (KLR) (27 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11229 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KITALE**

**CRIMINAL APPEAL E013 OF 2020**

**AC MRIMA, J**

**SEPTEMBER 27, 2024**

**BETWEEN**

**PAUL MAKHANU MAFUMBO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Appeal arising out of the conviction and sentence of Hon. Moranga (SPM) in Kitale Chief Magistrate's Court Criminal Case (S.O.) No. 116 of 2019 delivered on 12th February 2020)***

**JUDGMENT**

**Background:**

1. Paul Makhanu Mafumbo, the Appellant herein, was charged with the offence of Attempted Defilement contrary to Section 9(1)(2) of the *Sexual Offences Act* No. 3 of 2006.

2. The particulars of the offence were that on 1$^{4th}$ May 2019 at [particulars withheld] within Trans-Nzoia County intentionally attempted to cause his penis to penetrate the vagina of SMM a child aged 10 years.

3. The Appellant faced the alternative charge of Committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006.

4. The particulars were that on 14$^{th}$ May 2019 at [particulars withheld] within Trans-Nzoia County intentionally attempted to cause his penis to penetrate the vagina of SMM a child aged 10 years with his penis.

5. Six witnesses testified on behalf of the Respondent herein. Upon close of its case, the Appellant was placed on his defence.

6. The Defendant was the sole Defence witness. He gave unsworn evidence.

7. At the close the trial, the Appellant was found guilty of the offence of attempted defilement. He was convicted and sentenced to seven years in jail.

**The Appeal:**

8. The Appellant was dissatisfied with the conviction and sentence. He urged his case through three grounds as enumerated in his written submissions.

9. The Appellant submitted that the learned Trial Magistrate failed to find that the evidence adduced by PW1 and other prosecution witnesses exonerated him from the scene of the crime.

10. He stated that the evidence of prosecution was inconsistent and was discredited during cross examination. He relied on the decision in *Mawila Pordist v Republic* Vol. 947 pg. 48 where it was observed that uncorroborated evidence is untrustworthy.

11. In his second ground, the Appellant submitted that the Respondent failed to call crucial witnesses including one, Segero a friend to PW2 who would have given evidence on the occurrence of the crime.

12. In concluding its case, the Appellant submitted that the Learned Trial Magistrate failed to consider the credible defence it put forth including his claim of alibi.

**The Respondent's case:**

13. The Respondent challenged the appeal through written submissions dated 20th July 2023.

14. Based on the decision in Criminal Appeal No. 358 of 2010, *Francis Mutuku Nzagi v Republic*, the Respondent submitted that it established the 'intention to penetrate' a key ingredient in the offence of attempted defilement as well as the age of the victim and identity of the perpetrator.

**Analysis:**

15. This being a first appeal, this Court is duty bound to re-consider and to re-evaluate the evidence adduced before the trial Court with a view to arriving at its own independent conclusions and findings (See *Okono v Republic* [1972] EA 74).

16. In Criminal Appeal No. 280 of 2004 *Odhiambo v Republic* (2005) 1 KLR, the Court of Appeal spoke to the role of this Court. It observed as follows: -

> ... On a first appeal, the Court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion.

17. As an important consideration, this Court ought to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court. It therefore must give due allowance in that respect. (See *Ajode v Republic* [2004] KLR 81).

18. From the pleadings and the submissions filed, the issue that arises for determination is whether the Respondent proved the offence of attempted defilement beyond reasonable doubt.

19. Section 9(1) and (2) of the *Sexual Offences Act* creates the offence and punishment for attempted defilement as follows;

> 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.

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

20. It can be deciphered from the foregoing that that the key ingredients that establishes the offence of the attempted defilement are;

a. The attempt to cause penetration.

b. Age of the victim and

c. Identity of the perpetrator.

21. Bearing the foregoing in mind, I now turn to dealing with the issues.

**Attempt to penetrate:**

22. In dealing with this issue, there is need to first go through the evidence on record.

23. The complainant, SMM, testified as PW1. Upon being taken through voir-dire examination, it was her evidence that she stayed at [particulars withheld] village with her grandmother. She also stated that sometimes in 2019, her grandmother sent her to the shop to buy salt. That, when she got there, the assailant was also buying something. When she was informed that there was no salt, she made her way back home.

24. It was her further evidence that the assailant started following her and held her skirt from behind. He asked her to keep quiet. She was taken to the river, not so far from the shop and their home. The assailant then tripped her to the ground under some trees.

25. It was PW1's testimony that she held on to the trees as she tried to figure out how she could escape. PW1 then struggled to get away from the assailant. In the process, PW1's leg, hand and face were scratched as the assailant tried to remove her clothes.

26. The assailant the told PW1 'tumalizane' then pushed her to the ground and sat on her back. It is at that point that she screamed. Suddenly, Joash and Kennedy, who were carrying water from the river came to her rescue. When the assailant saw Joash, he ran away and PW1 was rescued.

27. The evidence of PW2,JM, who was PW1's grandmother corroborated that of PW1.

28. PW2 testified that she had sent PW1 to buy salt from the shop but took long to come back, but eventually did. On arrival, she was crying and her clothes were muddy and had an injury in her mouth. On enquiry, PW1 narrated what had befell her.

29. Joash Wafula and Kennedy Simiyu testified as PW3 and PW4 respectively. PW3 testified that he was the one of those who rescued PW1. It was his evidence that on 14th May 2019 at about 7.30pm, he had gone to collect water from the river with his brother PW4 when they heard a child screaming from the woods.

30. PW3 and PW4 ran towards the direction where the screams came from and found PW1 and the assailant, whom they knew quite well. As soon as the assailant saw them, he fled. They then took PW1 to PW2's home.

31. PW1 was later taken to Matunda Sub County Hospital where she was examined and treated by PW5, Fredrick Kimosop, a Clinical Officer. PW5 stated that PW1 visited the hospital with scratch bruises on her nose and on both legs below her knees.

32. A P3 Form and treatment notes were produced in evidence and the injury assessed as 'bodily harm'.

33. That was the evidence on the alleged act. Now, a look at the law on attempted offences follows.

34. Section 388 of the *Penal Code* defines "attempt" as follows: -

> 388 (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 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.
>
> (3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence.

35. The above section brings out the two main ingredients of an attempted offence; the mens rea which constitutes the intention and the actus reus which constitutes the overt act towards the execution of the intention.

36. In *R v Whybrow* (1951) 35 CR App. Rep, 141, Lord Goddard C.J., had the following to say on mens rea when the Court dealt with the offence of attempted murder: -

> ..... But if the charge is one of attempted murder, the intent becomes the principal ingredients of the crime.

37. Eminent learned authors in criminal law, J. C. Smith and Brian Hogan in their book *Criminal Law*, Butterworths, 1998 (6th Edition) at page 288 while discussing the aspect of mens rea in an attempted murder had this to say: -

> .... Nothing less than an intention to kill will do.

38. And in *Cheruiyot v Republic* (1976 - 1985) EA 47 Madan, JA, as he then was, while approving the holding in *R v. Gwempazi s/o Mukhonzo* (1943) 10 EACA 101, *R v. Luseru Wandera* (1948) EACA 105 and *Mustafa Daga s/o Andu v R* (1950) EACA 140, stated as follows on mens rea in an attempted murder charge: -

> In order to constitute an offence contrary to Section 220, it must be shown that the accused had a positive intention unlawfully to cause death.... The essence of the offence is the intention to murder as it is presented by the prosecution.

39. The Court of Appeal had yet another occasion to look at the aspect of the actus reus in attempted offences. In *Abdi Ali Bare v Republic* (2015) eKLR, Learned Honourable Justices Githinji, Mwilu and M'Inoti, had the following to say as they considered the offence of attempted murder: -

> ..... The more challenging question in a charge of attempted murder is the actus reus of the offence. Although a casual reading of Section 388 of the *Penal Code* may suggest that an

attempt is committed immediately the accused person commits an overt act towards the execution of his intention, it has long been accepted that in a charge of attempting to commit an offence, a distinction must be drawn between mere preparation to commit the offence and attempting to commit the offence. In the work quoted above by Smith & Hogan, the authors give the following scenario at page 291 to illustrate the distinction:

D, intending to commit murder buys a gun and ammunition, does target practice, studies the habits of his intended victim, reconnoiters a suitable place to lie in ambush, puts on a disguise and sets out to take up his position. These are all acts of preparation but could scarcely be described as attempted murder. D takes up his position. loads the gun, sees his victim approaching, raises the gun, takes aim, puts his finger on the trigger and squeezes it. He has now certainly committed attempted murder....

In the present appeal, to prove attempted murder on the part of the appellant, he must be proved to have taken a step towards the commission of murder, which step is immediately and not remotely connected with commission of the murder. Whether there has been an attempt to commit an offence is a question of fact. The act alleged to constitute attempted murder, for example, must be sufficiently proximate to murder to be properly described as attempt to commit murder. In Cross & Joines' *Introduction To Criminal Law*, Butterworths, 8th Edition (1976), P. Asterley Jones and R. I. E. Card state as follows at page 354:

..[A]n act is sufficiently proximate when the accused has done the last act which it is necessary for him to do in order to commit the specific offence attempted....

The learned authors add that the court must answer the question whether the acts by the accused person were immediately or merely remotely connected with the commission of the specific offence attempted on the basis of common sense. Ultimately therefore, the real question is whether the acts by the accused person amounted to mere preparation to commit murder or whether the accused had done more than mere preparatory acts.

40. In *Keteta v R* (1972) EA 532, 534, Madan Ag CJ (as he then was), made remarks regarding actions that constitute an intention to commit a crime. The Learned Judge observed;

> .... 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.

41. And, in *Moses Kabue Karuoya v Republic* [2016] eKLR, the Court spoke to incomplete offences that constitute punishable offences as follows: -

> .... For the prosecution to prove the offence of preparation to commit a felony, they must establish that the accused had the intention to commit the offence. It must be shown that the appellant had put in motion his intention by making preparations to commit the offence. The prosecution must establish that the appellant made the attempt to put into effect his intention. The question that calls for determination is whether or not the conduct of the appellant constituted an overt act sufficiently proximate to constitute preparation to commit an offence.....

42. From the foregoing, it is easily deducible that when a Court is faced with any charge of an attempted nature, care must be taken to ensure that the attempt, as opposed to mere acts of preparation, is proved.

Regardless of how strong the evidence is, if it only relates to acts in preparation to commit a certain crime, that evidence cannot justify a conviction on an attempted charge.

43. For clarity purposes, 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.

44. With the above exposition of the applicable legal principles in relation to commission of attempted offences, this Court will now apply the said principles to this case.

45. From the foregoing sequence of events, the assailant's motive can be deciphered right from when he followed PW1 from the shop, to holding her from behind, forcing her into the woods near the river, attempting to undress her, tripping her down, sitting on her back and telling her 'tumalizane'.

46. Had PW1 not screamed so as to attract the attention of PW3 and PW4, then it is clear that the assailant was just about to have sexual intercourse with PW1. That is a clear indication of the assailant's intention to sexually Penetrate PW1.

47. Deriving from the foregoing, and in absence of any evidence contravening the motive derivable from the instant events, this Court finds that the events complained of were so proximate to the commission of an overt act of having sex with PW1. In the circumstances, the prosecution proved that an attempted offence was committed.

**PW1's age:**

48. The paramountcy of ascertaining the age of a victim of sexual offence was discussed by the Court of Appeal sitting in Kisumu in Cr App No 203 of 2009, *Alfayo Gombe Okello vs Republic* where the Learned Judges observe 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).

49. In this case, PW1's Certificate was produced as an exhibit without any objection. It shows that she was born on 24th June 2009.

50. It means, therefore, that, as of 14th May 2019, the day of commission of the alleged offence, PW1 was about 9 years and 11 months. PW1 was, hence, a child in law.

**Identification of the perpetrator:**

51. PW1 evidence was that she knew the assailant who was the Appellant. She stated that the Appellant was a neighbour and on the fateful day, she met him at the shop.

52. PW1 further recounted that as she walked back home, the Appellant followed her. It was her evidence that it was still not dark and she could see the Appellant clearly. The Appellant also spoke to PW1 and PW1 readily gave the Appellant's name to PW2 and the police.

53. The evidence of PW3 further corroborated PW1's testimony. He managed to see the Appellant run away from where PW1 was when he and PW4 answered PW1's distress call. Both PW3 and PW4 knew the Appellant well and recognized him without any difficulty.

54. In his defence, the Appellant denied committing the offence. He contended that he was framed up since his family and that of PW1 had differences that emanated from cows trespassing into PW2's land.

55. The evidence of identification in this case was that of recognition. Two witnesses testified to that end. They were PW1 and PW3.

56. In *Anjononi & Others v Republic* [1980] KLR 59 the Court of Appeal spoke to the significance of recognition in regard to identification as follows: -

> ..... recognition of an assailant is more satisfactory, more reassuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or another...

57. In the totality of the evidence on this issue, this Court finds no difficulty in finding that the Appellant's identification by way of recognition by PW1 and PW3 was without error. The Appellant was the one who attempted to defile PW1.

58. Having found as much, the appeal on conviction is unsuccessful.

**Sentence:**

59. The Appellant was sentenced to 7 years in jail. That was on 12th February, 2020 and after the Court exercised its discretion on the basis of the Supreme Court in Petition No. 15 of 2015 *Francis Karioko Muruatetu & another v Republic* [2017] eKLR.

60. The issue of a Court exercising discretion on sentencing in respect of the *Sexual Offences Act* was dealt with by the Supreme Court in *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment). The decision was rendered on 12th July, 2024.

61. In the said decision, the Supreme Court was categorical that the unilateral approach undertaken by Courts in applying the discretion which was discussed in respect of murder cases in the *Francis Karioko Muruatetu & another v Republic case* [*supra*] to other offences which provided for either minimum or specific sentences was wrong. In essence, until the sentences provided for in the *Sexual Offences Act* are properly challenged and decisions made on their applicability, the Supreme Court emphasized that such sentences remain legal and binding on Courts.

62. Section 9[2] of the *Sexual Offences Act* provides the sentence on attempted defilement as follows: -

> 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.

63. The correct sentence, therefore, in this matter was a minimum of 10 years in prison. The Appellant was instead sentenced to 7 years.

64. Although the sentence is not in tandem with the decision in *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others case* [*supra*], this Court will not interfere with it since the State did not seek its enhancement during the hearing of the appeal.

65. This Court, hence, affirms the sentence of 7 years imprisonment.

66. As stated above, the Appellant was sentence on 12th February 2020. He had been in remand during the trial. The matter began on 16th May, 2019. Therefore, by the time the Appellant was sentenced, he had been in custody for around 9 months.

67. By taking into account the period the Appellant was in remand during trial and the statutory one-third remission of the sentence, the Appellant has by now served the sentence of 7 years. He has satisfactorily earned his liberty.

**Disposition**

68. This Court is satisfied that the essential ingredients for the offence of attempted defilement were established beyond reasonable doubt. The conviction is hereby affirmed as well as the sentence.

69. In view of the foregoing discussion, the following final orders do hereby issue: -

    a. The conviction and sentence are hereby affirmed. Consequently, the appeal is wholly dismissed.

    b. The Appellant is, however, set at liberty forthwith unless otherwise lawfully held having fully served the sentence.

70. It is so ordered.

**DELIVERED, DATED AND SIGNED AT KITALE THIS 27TH DAY OF SEPTEMBER, 2024.**

**A. C. MRIMA**

**JUDGE**

Judgment delivered virtually and in the presence of:-

No appearance for Paul Makhanu Mafumbo, the Appellant in person.

Miss Kiptoo, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Chemosop/Duke – Court Assistants.