Kagiri v Republic (Criminal Appeal 177 of 2019)
[2023] KEHC 204 (KLR) (Crim) (25 January 2023) (Judgment)

Neutral citation: [2023] KEHC 204 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL 177 OF 2019

LN MUTENDE, J

JANUARY 25, 2023

BETWEEN

EDWARD NDUNGU KAGIRI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal against the original conviction and sentence in Sexual Offences Case No. 5621 of 2014 at the Chief Magistrates' Court Makadara by Hon. Stephen Jalang'o - SRM. on 20th August, 2018)

JUDGMENT

1. Edward Ndungu Kagiri, the Appellant, was charged with the offence of attempted defilement contrary Section 9(1)as read with Section9(2) of the *Sexual Offences Act* No. 3 of 2006. Particulars being that on 29th day of November, 2014 in Njiru District, within Nairobi County, he intentionally attempted to cause his penis to penetrate the vagina of SN a child aged five and a half years.

2. In the alternative, he faced a charge of committing an Indecent Act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006. Particulars being that on 29th day of November, 2014 in Njiru District, within Nairobi County, he intentionally touched the buttocks/ vagina of SN a child aged five and a half years with his fingers.

3. The case as presented by the Prosecution was that on the 29th November, 2014, the complainant and PW3 FN were playing when the appellant offered to give them sweets. They entered his house but were not given any sweets. However, the appellant asked PW3 to lie on the bed and cover her face which she did. In the meantime, he removed the complainant's pair of shorts but not the pant and made her lie on the seat facing down. Then he inserted a finger in her vagina. During that time PW2 MKW learnt that her daughter and PW3 were inside the house of the appellant. She sent his daughter to call them, but, he allegedly refused to open the door. She went to the house and opened the door from

outside. According to her, the house was dark inside, therefore, she switched on the lights and saw the complainant who looked confused, PW3 was on the appellant's bed with her head covered, while the appellant was relaxing on the seat.

4. PW2 screamed and checked the complainant but did not see any injuries. But, she complained that the appellant had inserted fingers in her genitalia. The appellant locked himself up in the house but people who gathered damaged the house hence the appellant ran and sought refuge at the chief's office where he was re-arrested and taken to Dandora Police Station.

5. At about 10:00pm on the material date the complainant was examined by Consolata Omerikwa, a clinical Officer with Doctors without Borders/Medecins Sans Frontieres(MSF), sexual violence recovery centre, but, no physical injuries were found on the complainant. Subsequently, the complainant was examined by PW6 Dr. Kizzie Shako who found her with a normal genetalia. No tenderness or pain was noted.

6. Upon being placed on his defence the appellant stated that he used to work as a conductor but at the time of the stated allegations, he had gone to sleep. And, as he rested on a chair, children went to his house to pick a tyre which they wanted to play with. As he rested the mother of the child went to the house and sought to know what he was doing with the three children. She screamed and he closed the door. A crowd gathered and he went to the Police Post to report. That he was taken to Kenyatta National Hospital. He sought forgiveness and added that he did not know that it was wrong to be in the house with children.

7. The trial court analyzed evidence adduced and reached a finding that the appellant attempted to defile the complainant. It convicted and sentenced him to serve ten (10) years imprisonment.

8. Aggrieved, the appellant proffered an appeal against the conviction and sentence on grounds that may be condensed as: The trial court relied on evidence that was contradictory and inconsistent; the case was not proved beyond reasonable doubt; evidence of the child lacked corroboration; the trial court was prejudiced having acted on non-existent facts; and that the finding of the court was not sustainable.

9. The appeal was canvassed through written submissions. It is urged by the appellant that testimonies of PW1,PW2 and PW3 were inconsistent. That PW1 having stated that the appellant did not remove her pant, the allegation that he inserted fingers into her vagina was inconsistent. That the testimony of PWI that she saw PW2, her mum at the balcony pick a stone to knock the house of the appellant, while PW2 alleged that the house was dark she had to switch on lights that is when she saw PW1 standing at the door, was inconsistent and contradictory. That PW3 having alleged that she was told to cover her head and having allegedly seen the appellant and complainant engage in "tabia mbaya" is inconsistent. Arguing that such evidence should be disregarded, the appellant cited the case of *Richard Munene v Republic*(2018)eKLR, where the court of appeal stated that:

> "Contradictions, discrepancies and inconsistencies in evidence of a witness go to discredit that witness as being unreliable. Where contradictions, discrepancies and inconsistencies are proved, they must be resolved in favour of the accused. It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it."

10. That ingredients of the offence of defilement were not proved. To buttress the argument the appellant cited the case of *Peter Ndoli Adisa v Republic*(2018)eKLR Riechi J. stated that:

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

11. That evidence of witnesses having been contradictory, there was need for corroboration. That it is doubtful if the appellant was given a fair trial as the trial court acted on non-existent facts.

12. The appeal is opposed by the Respondent who submits that the age of the victim was proved by the fact that she was a child. That the appellant having inserted his fingers in the vagina of the child, it constituted the offence of committing an indecent act as provided by section 11(1) of the *Sexual Offences Act*. That evidence of PW3 who stated that the appellant did "tabia mbaya" with the victim corroborated evidence of the minor. That evidence of the minor complainant was consistent as it is possible to insert fingers in the vagina without necessarily removing a pant and that the appellant admitted the fact of the victim having been in his house.

13. This being a first appellate court I must examine and analyze evidence adduced at trial afresh and reach independent conclusions bearing in mind that I had no opportunity of seeing or hearing witnesses who testified. This duty of the court on a first appeal was stated by the court in *Okeno -vs- Republic* [1972] EA 32 as follows:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v. R* [1957] EA 336) and to the appellate courts own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions - *Shantilal M. Ruwala v. R* [1957] EA 570. 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 courts' findings and conclusions; it must make its own findings and draw its own 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 - See *Peters v. Sunday Post* [1958] EA 424".

14. Section 9(1) of the *Sexual Offences Act*(SOA) provides thus: A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.

15. An attempt to commit an act that amounts to an offence is defined by Section 388 of the *Penal Code* that enacts as follows:

    (1) 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.

    (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.

16. A child is defined by Section 2 of the *Children Act* as:

> " ... an individual who has not attained the age of eighteen years"

17. Therefore, the court to be persuaded to reach a verdict of guilty, it must find that there was proof beyond reasonable doubt of all ingredients of the offence that are captured as: the age of the victim; the attempt to penetrate the victim; and; positive identification of the perpetrator.

18. On the question of age, the same is proved by medical evidence, documents issued at birth and even evidence tendered by the parents or guardians. In the case of *Francis Omuroni vs. Uganda*, Criminal Appeal No. 2 of 2000, the Court of Appeal (Uganda) it was stated that:

> " In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense"

19. PW2 the mother of the complainant told the court that she was five and a half years old. Although she did not adduce in evidence documentary evidence, the fact of the complainant having been a child was not in dispute. The trial court also had the opportunity of observing the child at the point of testifying in court, when she stated that she was a child.

20. Penetration is defined by Section 2 of the *Sexual Offences Act* as follows:

> " ...Partial or complete insertion of the genital organs of a person into the genital organs of another person."

21. Looking at the defence put up, the appellant admitted the fact of the children having been found in his house. The complainant testified that having entered the house the appellant made her remove the pair of shorts that she was wearing. Although she remained with a panty, he inserted fingers in her vagina. It is argued by the appellant that evidence of the complainant required corroboration.

22. Section 124 of the *Evidence Act* provides that: Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is 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.

23. It is acknowledged by the appellant that according to that provision of law evidence of a child of tender years does not need corroboration. What therefore matters would be if the court found the child to be telling the truth. PW3 also a minor alluded to having seen the appellant doing bad manners with the complainant. Bad manners is some behavior that is wrong, and not accordance to fact.

24. It is however argued that there were inconsistences and contradictions in evidence of the witnesses. In the case of *Phillip Watu v Republic*(2016)eKLR, the Court of Appeal stated 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 phenomenon 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".

25. PW3 was told to lie on the bed and cover herself, but, she was not restrained from seeing what was happening.

26. From the definition of an attempt by the Penal Code, the prosecution was duty bound to prove existence of some act from which a criminal intent could be inferred. In the case of *David Aketch Ochieng v Republic*(2015)eKLR, Makau J stated that:

> " 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 culprits genital organ and finding male discharge such as semen or spermatozoa outside the complainant's vagina or innerwear without there being penetration."

27. Particulars of the offence indicate that the assailant attempted to cause his penis to penetrate the vagina of the victim. However, evidence adduced did not support that allegation. Therefore, it was a misdirection on the part of the trial court to convict on the main count.

28. On the alternative charge, the appellant was stated to have committed an act of defilement with the child. Section 2 of the SOA defines indecent act as:

> (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.

29. Although the appellant claimed that the children had gone to his house to pick tyres which they were to play with, these were children who used to be left with the appellant's children and were well known to him. It was unlikely that the child would come up with such a serious allegation against him for no apparent reason. Therefore, I find that the appellant used his fingers, part of his body, to come into contact with the complainant's genitalia. This was an indecent act.

30. On sentence, the law provides for a sentence of not less than ten(10) years imprisonment. In the case of *Dismas Wafula Kilwake vs Republic*(2019)eKLR the Court of Appeal stated as follows:

> " Being so persuaded, we hold that the provisions of Section 8 of the *sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained

> by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing."

31. The upshot of the above is that I set aside the conviction for the offence of attempted defilement which I substitute with a conviction on the alternative charge of committing an indecent act with a child, contrary to Section 11(1) of the SOA.

32. In the result, I sentence the appellant to serve five(5) years imprisonment that will be effective from the date of sentence, the 2nd day of August, 2019, since the appellant was out on bond during trial.

33. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 25TH DAY OF JANUARY, 2023.

L. N. MUTENDE

JUDGE