Mwenda v Republic (Criminal Appeal E035 of 2022)
[2023] KEHC 18776 (KLR) (27 April 2023) (Judgment)

Neutral citation: [2023] KEHC 18776 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL APPEAL E035 OF 2022

MS SHARIFF, J

APRIL 27, 2023

BETWEEN

FRANKLINE MWENDA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the conviction and sentence of Hon E. Ayuka S.R.M in original Nkubu PMC S.O Cause No. 14 of 2020 delivered on 5/5/2021)

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*, 2006. The particulars were that on 27/1/2020 in Imenti South Sub County within Meru County, he intentionally and unlawfully attempted to penetrate the vagina of YM, a child aged 16 years. He faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*.

2. The appellant pleaded not guilty and evidence was therefore taken as follows;

3. PW-1, YM stated that on 27/1/2020 at about 6.20 a.m while heading to school, she met the accused and while by-passing, the appellant came from behind and hit her causing her to fall down and held her tightly on the ground demanding sexual intercourse. She screamed and a teacher by the name Kaimenyi heard her and also screamed. The appellant had been attempting to drag her into a bush but on hearing the screams from teacher Kaimenyi, he abandoned her and fled into a coffee plantation. PW1 thereafter reported the incident at school and she was taken to Nkubu Police Station and later Kanyakine Sub County Hospital.

4. PW-2, EK stated that she met the complainant on her way to school and shortly thereafter she encountered a man drinking a liquid from a bottle. As she walked on, she heard screams of a girl and when she turned and looked back, she saw the man she had met dragging the complainant to a coffee

plantation. She then she screamed and the man let go of the complainant and immediately fled into the coffee plantation. She proceeded with her journey and later met the same man who had emerged from the coffee plantation and being apprehensive of what he might do to her, she went back home and reported the incident to her husband. She later called the complainant's teacher to check on her. She had not known the man prior to the case.

5. PW-3, MG, the complainant's teacher stated that upon her colleague David receiving the call from PW-2, she escorted the minor to hospital where she was treated.

6. PW-4, PC. C Mueni from Nkubu Police Station received PW-1 and her teacher at the station. She interrogated her and recorded her statement. She investigated the case and charged the appellant.

7. PW-5, Baiyenia Moses, a clinical officer from Kanyakine Sub County hospital examined PW-1 and noted an injury to the neck, tenderness with bruises and tender upper back. He assessed the degree of injury as harm.

8. The appellant was put on his defence and elected to give unsworn testimony to the effect that the case was framed by his father and the complainant's due to perennial differences between him and his father. That he had never seen the complainant before.

9. The on conclusion of the hearing and after considering the evidence the trial court convicted the appellant and sentenced him to 10 years imprisonment. The appellant preferred the instant appeal premised on the following grounds;

    a. The learned trial magistrate erred in both law and fact by failing to note that the light intensity was not sufficient to be relied upon by the court in order to meet justice.

    b. The learned trial magistrate erred by failing to note that the clinical examination report did not link the appellant with the ordeal.

    c. The learned trial magistrate erred by failing to note that the period spent in custody (pre-trial) under section 333(2) of the *Criminal Procedure Code* was not considered.

    d. The learned trial magistrate erred by failing to note that the prosecution failed to summon crucial witnesses who could have shed light on the matter.

11. The appeal was disposed of by way of written submissions. Both parties complied and their respective submissions are on record and given due consideration.

12. The appellant relying on the decisional authority in *Matianyi v Republic* [1986] KLR, 198 submits that the investigating officer failed to conduct identification parade and that in *Lesarau v Republic* [1988] KLR 783, it was held if identification is based on recognition, the court should be wary of the possibility of mistaken identity.

13. On the failure by the prosecution to call vital witnesses, it is submitted that there was need to call Nkatha as mentioned by PW-2 that she reported the incident to. The case of *JMN v Republic*-Criminal Appeal No 139,140 and 141 (citation not provided) has been cited for the proposition that a negative inference can be drawn against the prosecution if such vital witnesses are not summoned to testify.

14. On the period spent in remand, it is submitted that the trial magistrate failed to order the sentence to commence from the date of arrest since the appellant was in custody all through the trial. The proviso to section 333(2) of the *Criminal Procedure Code*, the judiciary sentencing policy guidelines and the authorities in *Ahamad Abolfathi Mohammed & another v Republic* [2018] eKLR have been cited.

15. On the respondent's part, it is submitted that the prosecution's evidence was not challenged in cross examination and urges the court to dismiss the appeal and uphold the conviction and sentence.

Analysis and determination.

16. In *Okeno v Republic* [1972] EA 32 at 36, the East Africa Court of Appeal stated on the duty of the Court on a first appeal held 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 (*Pandya v R* [1957] EA 336) 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. (*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 court's 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."

17. The offence with which the appellant was charged with is found in section 9(1) of the *Sexual Offences Act* which provides;

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

18. Judicial authorities have interpreted this Section and came up with the ingredients that need to be established. In *Rodgers Odhiambo Mangeni v Republic* [2022] eKLR, Githua J held;

.......to establish a charge of attempted defilement, the prosecution must prove beyond doubt all the ingredients of the offence of defilement except penetration which is what completes the offence of defilement. The prosecution must therefore prove that the victim was a child within the meaning of the Children's Act; that the accused was positively identified as the assailant and the overt acts or steps taken by the accused towards committing the offence of defilement which was not completed.

19. In *David Aketch Ochieng v R,* [2015] eKLR it was held:

> " ....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."

20. Mativo, J in *Moses Kabue Karuoya v Republic* [2016] eKLR held that:

> " At the risk of repeating the position laid down in the above cited authorities, I reiterate that the key ingredients of the offence before me can be summarized as follows, namely, (a) Intend to commit the offence; From the evidence tendered, I find that intent was established. The second requirement is the accused must (b) Begin to put his intention to commit the offence into execution by means which are adapted to its fulfilment. This means that the accused begins to carry out his intention to commit the offence in a way suitable to

bring about what he intends to achieve. Evidence tendered is that the appellant knocked her down, lied on her, lowered her panty & forcefully opened her legs. Lastly the accused must (c) Do some overt act which manifests his intention; that is, the accused performs an act which is capable of being observed by another (although it may not have been) and which in itself makes clear his intention to commit the offence. It is said the appellant forced the complainant down, lied on her, lowered her under wear to knee level, forced her thighs open and ejaculated after which he felt relieved and let her go. These were overt acts which viewed in the circumstances show a clear intention to commit the offence, but the appellant fell short of completing the offence owing to the circumstances explained

21. Applying the above authorities to the matter herein, PW-1 stated that the appellant followed her from behind, hit her causing her to fall, held her tightly on the ground and strangled her while demanding sex. He lifted her and tried dragging her to a coffee plantation before he was disrupted by the screams of PW-2.

22. From the above authorities, it is clear that for one to be convicted of an attempt, he should have made all the preparatory acts to commit the offence except that the act was not completed. The injuries sustained by the complainant were captured by PW-5 and his findings were that she sustained tenderness without bruises on the neck and tender upper back.

23. Having subjected the evidence to a whole new scrutiny, I am unable to find evidence that the appellant attempted to defile the complainant since there were no preparatory steps showing the appellant actually took steps to complete the act complained of. What was laid before the trial court was evidence amounting to an assault on the complainant and nothing more. It is not enough to say that the appellant was stopped on his tracks by the screams from the complainant and PW-2.

24. In the circumstances, I find the conviction to have been unsafe for being founded on no evidence at all and I hereby find that the appeal is merited. Consequently, the conviction is for attempted defilement is hereby set aside and the sentence quashed.

25. The appellant is thus found guilty of the offence of assault causing actual bodily harm contrary to section 251 of the *Penal Code* and he is hereby sentenced to serve an imprisonment term of five years. The computation of his sentence shall be from the date of his arrest.

It is hereby so ordered.

Dated, delivered and signed at MERU* this 27th day of April 2023.

MWANAISHA. S. SHARIFF

JUDGE