



**Sang v Republic (Criminal Appeal E012 of 2022)  
[2023] KEHC 20384 (KLR) (29 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 20384 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BOMET  
CRIMINAL APPEAL E012 OF 2022**

**RL KORIR, J  
JUNE 29, 2023**

**BETWEEN**

**FESTUS KIPKORIR SANG ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the Conviction and Sentence in Sexual Offence Case Number  
49 of 2020 by Hon. J. Omwange in the Magistrate's Court at Sotik)*

**JUDGMENT**

1. The Appellant herein was charged for the offence of attempted defilement contrary to Section 9(1) (2) of the *Sexual Offences Act*. The particulars of the charge were that on 19<sup>th</sup> August 2020 in Konoin sub-county within Bomet County, he intentionally and unlawfully attempted to cause his penis to penetrate the vagina of AC, a child aged 7 years.
2. The Appellant also faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the charge were that on 19<sup>th</sup> August 2020 in Konoin sub-county within Bomet County, he intentionally and unlawfully touched the vagina of AC, a child aged 7 years.
3. The Appellant pleaded not guilty to the charges before the trial court, and a full hearing was conducted. The prosecution called six (6) witnesses in support of its case.
4. At the close of the prosecution case, the trial court ruled that a prima facie case had been established against the Accused and he was put on his defence.
5. At the conclusion of the trial, the Accused was convicted of the offence of attempted defilement and sentenced to serve 10 years in prison.



6. Being dissatisfied with the Judgment dated 16<sup>th</sup> February 2022, the Accused appealed to this court on the grounds reproduced verbatim as follows: -
- i. That the learned trial magistrate erred in both law and fact by relying on uncorroborated evidence.
  - ii. 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.
  - iii. That the learned trial magistrate erred in both law and fact by failing to analyse that the entire evidence was manufactured, manipulated and framed to meet the predetermined goal of fixing the Appellant.
  - iv. That learned trial magistrate erred in both law and fact by rejecting my plausible defense without any further explanation to it.
  - v. That the learned trial Magistrate erred in law and fact by not observing that Article 49(f) (i) & (ii) of the Constitution was against the Appellant.
  - vi. That the learned trial Magistrate erred in law and fact on meting out a mandatory minimum sentence which fell foul of Article 28 of the Constitution of Kenya, 2010.
7. This being the first appellate court, I have a duty to re-evaluate the evidence on record. This was succinctly stated by the Court of Appeal for *Eastern Africa in Pandya v. Republic* (1957) EA 336 where it stated:-

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court’s own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen.”

### **The Prosecution’s Case.**

8. It was the Prosecution’s case that the Appellant attempted to defile AC (PW1) who was aged 8 years. PW1 testified that while in the company of others, she was pulled into a tea shamba by the Appellant who then undressed and inserted his male genitalia into her genital organ.
9. MBC (PW2) who was the victim’s mother stated that on the material day at around 6 p.m., PW1 came back to the house crying and said that the Appellant had defiled her. That she took PW1 to Taboino then later to Mogogosiek Hospital for medical attention.
10. No. 233452 PC David Mudachi (PW3) was the investigating officer. He stated that he recorded the witness statements and issued a P3 form to the complainant.



11. MC (PW4) a minor, testified that she was in the company of PW1 when the Appellant came and took PW1 by pulling her hand. She further testified that the Appellant did bad manners to PW1 by opening his zip, removing his male organ and penetrated PW1.
12. Julius Kiprof Rono (PW5) stated that he received a call from Too, a village elder regarding the defilement. He stated that the Appellant was arrested the following day and taken to the police station.
13. Daniel Too (PW6) testified that he was a clinical officer and that he examined PW1 two days after the alleged defilement. He stated that upon examination, the hymen was intact and that there were no lacerations. It was his evidence that there was no evidence of penetration.

#### **The Appellant's Case.**

14. The Accused, Festus Korir Sang testified that on the material day, his neighbours came alleging that he had committed the offence and that it was not true.
15. On 27<sup>th</sup> July 2022, I directed that this Appeal be dispensed off by way of written submissions.

#### **The Prosecution's/Respondent's Submissions.**

16. The Prosecution submitted that PW1 was a minor and it was proved by the production of the birth certificate which indicated that PW1 was aged about 7 years.
17. It was the Prosecution's submission that PW6 testified that the hymen was intact and that there were no bruises or laceration of the victim's genitalia. That PW6 saw evidence of bruising on PW1's neck which indicated a struggle. It was the Prosecution's further submission that the evidence of a struggle showed an attempt to commit defilement and had PW1 not raised an alarm, the Appellant would have completed the offence.
18. The Prosecution submitted that the Appellant was properly identified. That PW2 testified that the Appellant was her neighbour. The Prosecution further submitted that the incident was witnessed by PW4.
19. It was the Prosecution's submission that the Appellant gave a general and a mere denial of the incident. That he further confirmed that there was no grudge with the victim's family so there was no reason for him to be framed for this offence.
20. The Prosecution submitted that the 10 year sentence was proper and legal as the court was mandated to give the mandatory minimum sentence of 10 years.

#### **The Appellant's/Accused's Submissions.**

21. It was the Appellant's submission that the Prosecution failed to produce enough evidence to prove that he committed the crime. That the Prosecution's case was marred with contradictions which were enough for the court to set him free.
22. The Appellant submitted that his constitutional rights were violated as he was held in police custody for six days. That the Prosecution did not explain the reasons for the delay and that violation of an individual's constitutional rights could no longer be taken lightly. The Appellant further submitted that he ought to get a fair trial.
23. It was the Appellant's submission that the sentence of 10 years was excessive. That sentencing was a matter for the discretion of the trial court and that discretion had to be exercised judicially. It was the Appellant's further submission that the court should have considered that he was a first offender and



that the time he had spent in prison had made him review his life and he had learnt the importance of being a law-abiding citizen. He prayed for a second chance as he was young and unmarried.

24. I have gone through and given due consideration to the trial court's proceedings, the Petition of Appeal filed on 20<sup>th</sup> February 2022, the Amended Memorandum of Appeal filed on 5<sup>th</sup> September, 2022, the Appellant's Written Submissions filed on 5<sup>th</sup> September 2022 and the Respondent's Written Submissions dated 9<sup>th</sup> March 2023 and the following issues arise for my determination: -
- i. Whether the Prosecution proved its case beyond reasonable doubt.
  - ii. Whether the Defence places doubt on the Prosecution case.
  - iii. Whether the Sentence was harsh and excessive.

**i. Whether the Prosecution proved its case beyond reasonable doubt.**

25. It is trite law that for the offence of attempted defilement to be established, the age of the victim, positive identification of the Accused and the attempt have to be proved.
26. The importance of proving age in sexual offences was underscored by the Court of Appeal in the case of *Eliud Waweru Wambui v. Republic* (2019) eKLR, where it stated that:-

“There is no doubt that in an offence such as faced the appellant, indeed in most of the offences under the Act where the age of the victim determines the nature of the offence and the consequences that flow from it, it is a matter of the greatest importance that such age be proved to the required standard, which is beyond reasonable doubt.”

27. PW1 testified that she was aged 8 years old. Additionally, MBC (PW2) who was PW1's mother produced a birth certificate that was marked as P.Exh 1. The birth certificate showed that PW1 was born on 25<sup>th</sup> April 2013. This meant by the time the offence occurred, she was 7 years and about 4 months old. The Appellant did not cross examine PW1 or PW2 on the PW1's age. Based on the evidence before me, I am satisfied that PW1 was 7 years and 4 months at the time of the commission of the offence.

28. With regard to the issue of identification, the Court of Appeal in the case of *Cleophas Wamunga v Republic* (1989)eKLR expressed itself as follows:-

“Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant wholly depends or to a great extent on the correctness of more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification”.

(See also Court of Appeal case of *Reuben Lukuru v Republic* (2019) eKLR)

29. The English case of *R v Turnbull* (1977) QB 224 is useful in this regard: -

“If the quality (of identification evidence) is good and remains good at the close of the accused's case, the danger of mistaken identification is lessened; but the poorer the quality, the greater the danger. In our judgment when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support



it; provided always, however that an adequate warning has been given about the special need for caution”.

30. PW1 testified that the Appellant is the one who pulled her into the tea plantation, undressed her and inserted his male organ into her female organ. MC (PW4) who was in the company of PW1 when the offence happened testified that it was the Appellant who had penetrated PW1. When PW1 and PW4 were cross examined, they confirmed that it was the Appellant who had penetrated PW1. In my analysis, PW1 and PW4 put the Appellant at the scene of crime and their evidence regarding the identification of the Appellant was unblemished.
31. PW1 and PW4 who were both minors were able to identify the Appellant in court. Regarding dock identification, the Court of Appeal in the case of *Muiruri & 2 Others v. Republic* [2002] 1 KLR 274, expressed itself as hereunder:-

“We do not think it can be said that all dock identification is worthless. If that were to be the case then decisions like *Abdulla bin Wendo v. Rep* (1953) 20 EACA 166, *Roria v. Republic* [1967] EA 583, and *Charles Maitanyi v. Republic* (1986) 2 KAR 76, among others, which over the years have been accepted as correctly stating the law concerning the testimony of a single witness on identification will have no place in our jurisprudence. In those cases courts have emphasized the need to test with the greatest care such evidence to exclude the possibility of mistaken identification before such evidence is accepted and acted upon to found a conviction. We do not think that evidence will be rejected merely because it is dock identification evidence. The court might base a conviction on such evidence if satisfied that on the facts and circumstances of the case the evidence must be true and if prior thereto the court duly warns itself of the possible danger of mistaken identification.”

32. I have no reason to disregard the testimonies of PW1 and PW4 with regard to identifying the 2<sup>nd</sup> Appellant and I am satisfied that the Appellant was positively identified as the perpetrator of the offence.
33. The law on attempt is provided under Section 388 of the *Penal Code* which defines attempt in the following terms: -
- (1) Where a person intending to commit an offence begins to put his intentions into execution by means adopted to its fulfilment manifests his intentions by some overt act but does not fulfil his intentions to such an extent as to commit the offence, he is deemed to attempt to commit an offence.
  - (2) It is immaterial except so far as regards punishment whether the offender does all that of necessary on his part for completing the commission of the offence or whether the complete is prevented by circumstances independent of his will or whether he desists of his own motion from 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.
34. The principles of law on attempt have been discussed at length in various authorities. In the case of *Mussa s/o Said v. R* (1962) EA 454, 455, Spry, J. (as he then was) said:-

“The principles of law involved are very simple but it is their application that is difficult. If the Appellant intended to commit the offence of larceny and began to put his intention into effect and did some overt act which manifests that intention, he is guilty of attempted



larceny. (*Penal Code*, s. 380). The burden on the prosecution is therefore first to prove the intention and secondly to prove an overt act sufficiently proximate to the intended offence.

The intention will, in the majority of cases, only be capable of proof by inference and it follows in such cases that the act must be of such a character as to be incompatible with any other reasonable explanation. Secondly, even if the intention is established, the act itself must not be too remote from the alleged intended offence.”

35. In *Keteta v. R.*, (1972) EA 532, 534, Madan J. (as he then was) put the matter succinctly as follows: -

“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.”

36. Mativo J. (as he then was) dealt extensively with inchoate or incomplete offences. In the case of *Moses Kabue Karuoya v. Republic* (2016) eKLR, he expressed himself as follows:-

“In the case of *Bernard K. Chege v Republic* this court had the occasion to address its mind and to define in detail ingredients of incomplete offences also described as inchoate offences. Inchoate crimes are incomplete crimes which must be connected to a substantive crime to obtain a conviction. Examples of inchoate crimes are criminal conspiracy, criminal solicitation, and attempt to commit a crime, when the crime has not been completed. It refers to the act of preparing for or seeking to commit another crime. An inchoate offense requires that the accused have the specific intent to commit the underlying crime. An inchoate crime may be found when the substantive crime failed due to arrest, impossibility, or an accident preventing the crime from taking place. Strictly inchoate crimes are a unique class of criminal offences in the sense that they criminalize acts that precede harmful conduct but do not necessarily inflict harmful consequences in and of themselves. It can thus be appreciated that it could extend the criminal law too far to reach behind those acts and criminalize behaviour that precedes those acts. Every inchoate crime or offense must have the mens rea of intent or of recklessness, but most typically intent. Specific intent may be inferred from circumstances. It may be proven by the doctrine of “dangerous proximity”, and the presence of a “substantial step in a course of conduct”. The dividing line between legal and illegal conduct is whether there is a “substantial step” towards committing a specific crime. 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 said to attempt or to prepare to commit the offence. The essential ingredients of an attempt to commit an offence have been laid down in the following words:-

“In every crime, there is first intention to commit it, secondly, preparation to commit it, thirdly to commit it. If the third, that is, attempt is successful, then the crime is complete. If the attempt fails, the crime is not complete but the law punishes the act. An ‘attempt’ is made punishable because every attempt, although it fails of success, must create an alarm, which, of itself, is an injury, and the moral guilt of the offender is the same as if he had succeeded”

Thus, for there to be an attempt to commit an offence by a person, that person must:-

a. Intend to commit the offence;



- 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;
- 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.....”

37. In trying to establish whether there was an attempt by the Appellant to defile PW1, I have gone back to the evidence on record. PW1 testified that the Appellant pulled her into the tea bushes and began to undress her. This evidence was corroborated by PW4. Daniel Too (PW6) testified that upon examination, PW1 had soft tissue injuries on the head and neck and he concluded that the injuries were a result of a struggle. This testimony coupled with the testimonies of PW1 and PW4 are sufficient enough to demonstrate that the Appellant had the intent to defile PW1.
38. Proof was also required of an overt act that will provide the nexus between the intent and the possible commission of the offence. From the testimony of PW1 and PW4, the Appellant removed his male genital organ and inserted it into PW1’s female genital organ. It is salient to note that in the offence of attempted defilement, penetration need not be proved. It ceases to be an attempt if penetration is achieved. I say this because PW6’s findings contradicted the testimonies of PW1 and PW4 as PW1 hymen was found intact and there were no lacerations found.
39. That said, the Appellant did not cross examine PW1 and PW4 when they stated that he unzipped and removed his penis. There is no doubt in my mind that the Appellant’s actions were intended to result in defilement and I agree with the trial court which stated that the Appellant was only repulsed by PW1’s screams thereby causing him to abandon that venture and flee. I am satisfied that the Prosecution proved the Appellant’s attempt.
40. Having established the age of the complainant, proof of identification and attempt, it is my finding that the Prosecution proved its case against the Appellant beyond reasonable doubt.

**ii. Whether the Defence places doubt on the prosecution case.**

41. I have considered the Appellant’s defence in which he denied committing the offence. The Appellant (DW1) stated that he knew PW1 and that he did not have a grudge with her or her family.
42. The Appellant’s defence was a mere denial. He did not lead any evidence or produce any witness. I have considered his defence and I find that it did not place any doubt on the Prosecution’s case.

**iii. Whether the Sentence was harsh and excessive**

43. The principles guiding interference with sentencing by the appellate Court were set out in *S.v. Malgas* 2001 (1) SACR 469 (SCA). In this persuasive authority, the Supreme Court of Appeal of South Africa held that:-

“A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court...However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court



and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as “shocking”, “startling” or “disturbingly inappropriate”

44. The penal section for attempted defilement is provided under Section 9(2) of the *Sexual Offences Act*. It provides:-

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

45. The aforementioned Section is couched in mandatory terms as it provided for a mandatory minimum sentence in the event of a conviction. Mandatory minimum sentences are not illegal as clarified by the Supreme Court in the case of *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae)* (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions) where it was held that:-

“We therefore reiterate that, this Court’s decision in Muruatetu did not invalidate mandatory sentences or minimum sentences in the *Penal Code*, the *Sexual Offences Act* or any other statute”.

46. Sentencing is at the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The trial court must be guided by the evidence and sound legal principles. An appellate court would be entitled to interfere with the sentence imposed by the trial court if it is demonstrated that the sentence imposed is not legal or is so harsh and excessive as to amount to miscarriage of justice, and or that the court acted upon a wrong principle. The above position was enunciated by the Court of Appeal in the case of *Ogolla s/o Owuor v. Republic*, (1954) EACA 270, where it stated:-

“The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors.”

47. The Appellant in this case was sentenced to 10 years which is the mandatory minimum sentence.

48. I have considered the mitigation offered by the Accused in the trial court and noted that he expressed remorse and asked to be forgiven. On this appeal, the Appellant has continued to express remorse and pleaded for a second chance in life to be reintegrated in society and to start a family. I have taken into consideration that the offence though abhorrent was not aggravated as the Appellant was stopped dead in his tracks. It is my conclusion that the principle of proportionality demands that the Appellant ought to benefit from a lesser sentence.

49. In the end, I uphold the conviction. I substitute the 10-year sentence with 7 years’ imprisonment and in accordance with Section 333 (2) of the *Criminal Procedure Code*, the sentence shall be deemed to run from the date of arrest and pre-trial custody being 20<sup>th</sup> August 2020.

50. Orders accordingly.

**JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 29<sup>TH</sup> DAY OF JUNE, 2023.**

.....

**R. LAGAT-KORIR**

**JUDGE**



Judgement delivered in the presence of the Appellant acting in person, Mr. Njeru for the Respondent and Siele (Court Assistant)

