Kailey v Republic (Criminal Appeal E032 of 2022)
[2023] KEHC 23551 (KLR) (28 July 2023) (Judgment)

Neutral citation: [2023] KEHC 23551 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL E032 OF 2022

JN ONYIEGO, J

JULY 28, 2023

BETWEEN

AHMED QURESHI KAILEY ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence of Hon Aganyo (P.M.) delivered on 28.06.2022 in Criminal Case No. E001 of 2022 at PM's Court at Wajir)

JUDGMENT

1. 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. The particulars of the offence were that on 14.01.2022 at about 1300hrs within Wajir County intentionally attempted to cause his penis to penetrate the vagina of A.N.M., a child aged 15 years.

2. He also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. Particulars were that on 14.01.2022 at about 1300hrs Wajir East Sub County within Wajir County intentionally touched the breasts of A.N.M., a child aged 15 years with his own hands.

3. He faced a second count to wit abducting in order to subject to defilement contrary to section 260 of the Penal Code. Particulars were that on 14.01.2022 at about 1300hrs to be likely that the said A.N.M. may be disposed of as to be put in danger of being subjected to defilement.

4. Having pleaded not guilty to the charges, prosecution lined up five witnesses to prove its case. Upon conclusion of the trial, he was convicted and sentenced to serve ten years imprisonment in each count and the said sentences to run concurrently. Aggrieved by his conviction and sentence, he preferred the instant appeal.

5. The appellant filed an amended petition of appeal on 24.12.2022 wherein he listed grounds of appeal summarized that; the prosecution did not prove its case beyond any reasonable doubt and further, that the sentence meted out was harsh and excessive.

6. By consent of both parties, the court gave directions for filing of submissions in disposition of the appeal.

7. The appellant relied on his submissions filed on 24.12.2022 wherein he submitted that the prosecution did not prove its case to the required standards and further, that his sentence was not only harsh but excessive in the given circumstances. He urged this court to reconsider the facts herein afresh and quash his conviction and thereafter set aside the impugned sentence.

8. The learned counsel, Mr. Bidan Kihara for the respondent submitted that the key ingredients that the prosecution was tasked to prove were: the age of the victim which according to him was established as 15 years old. To that end, he placed reliance on the cases of *Hadson Mwachongo v Republic* [2016] eKLR and *Francis Omuroni v Uganda*, CA No.2 of 2000 wherein it was stressed that apart from medical evidence, age may also be proved by a birth certificate, the victim's parents or guardian and by observation and common sense.

9. Regarding the identity of the perpetrator, it was contended that the victim was familiar with the appellant before having seen him previously within the town. That the appellant was arrested with the motor vehicle registration number KCT 467S which the victim had described to the police. It was stated that the owner of the said motor vehicle PW3, Halima Ibrahim Ali also confirmed that she had employed the appellant to drive her vehicle as a taxi driver.

10. It was counsel's submission that on the second count of abduction, the evidence availed by the prosecution witnesses proved that the appellant had forcefully taken the victim hostage with the sole purpose of defiling her. On sentence, Mr. Kihara submitted that the same was not only legal but also appropriate bearing in mind the circumstances of the case.

11. I have given due consideration to the grounds of appeal, the evidence on record written submissions filed by both parties. Having done so, I find that the key issue arising for my determination is whether the prosecution proved its case beyond reasonable doubt by establishing;

    i. The age of the complaint;

    ii. Attempt to penetrate into the complainant's vagina;

    iii. The identification of the perpetrator;

    iv. Whether the offence of abduction was proven; and

    v. Whether the sentence imposed was excessive.

12. This being a first appeal, parties are entitled to and expect the appellate court to conduct a re-hearing, re-evaluation and re-consideration of the evidence afresh and make an independent determination of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that. See *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal stated that;

> "[A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions

though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect"

13. PW1, A.N.M. testified that that she was born on 12.06.2006 and that she was in class eight at the time of the occurrence of the alleged offence. That on 14.01.2023 at around 1.00 p.m., as she was heading home from school, she met the appellant herein who was driving a white motor vehicle registration number KCT 467S. It was her evidence that the appellant stopped the motor vehicle and offered her a lift home. She stated that upon getting into the motor vehicle, the appellant drove off to his house where he ordered her to get out of the motor vehicle straight to his house.

14. It was her evidence that, once in the house, the appellant locked the door and then ordered her to take off her clothes which order she declined. That she refused to take off her clothes and therefore, the appellant started to forcefully remove them; She claimed that it was in the course of their struggle that the appellant touched her breasts. She testified that while inside the house, a lady came and knocked the door and upon the appellant opening, the lady picked her while the appellant ran away.

15. PW2, BAM testified that on 14.01.2022, she was called by a lady who informed her that there was a man who had brought in a young girl (complainant) to the premises within the premises where he was staying but thereafter ran away. She stated that the said lady had taken a photo of the said motor vehicle that was being driven by the said man and therefore, together with the said lady, she reported the matter to the police station. That the complainant was taken to the hospital wherein it was determined that she was well.

16. PW3, Halima Ibrahim Ali testified that she was called from Wajir Police Station that her vehicle registration number KCT 467S had been impounded and taken to the station. It was her evidence that she was told that the said motor vehicle had been used to carry a school girl to a house where the driver attempted to defile her. She stated that she had the log book to show that the said motor vehicle was hers and the same was thus produced as Pex 4. She identified the appellant as the driver of her motor vehicle.

17. PW4, Farhiya Yussuf Osman testified that on the material day, a lady neighbor went to her house and informed her that the appellant had brought into his house a school girl waering [Particulars withheld] school uniform. She stated that she knocked the door to the appellant's house and from inside the appellant opened the door. That when she enquired on what the complainant was doing at the appellant's house, the appellant had no explanation. It was her case that upon pulling the complainant from the said house, the appellant drove off in his car. That the girl remained with her when she called PW2 to inform her of the incident. She reiterated that she saw the appellant clearly when he opened his door on the material day. That the appellant was responsible for taking the complainant to his house.

18. PW5, Richard Kirui testified that he was the investigating officer. That while at the station, PW1 in the company of her mother and dad made a report on how the appellant had offered her a lift but instead, took her to his house. He reiterated the statement of PW1 and further stated that after the report had been made, together with Amran, they took the complainant to the hospital for examination. He produced a P3 Form and the birth certificate of the complainant. He further stated that he recorded the witness statements and thereafter charged the appellant herein.

19. The trial court via a ruling delivered on 31.03.2022, held that a prima facie case had been established against the appellant thereby placing him on his defence.

20. The appellant in his unsworn testimony admitted that indeed, he had offered a lift to the complainant but when the complainant alighted, another lady took her by hand and asked her what she was doing in his vehicle. That the lady insisted that he was trying to defile the complainant. That on 05.01.2022,

he got arrested as he was later to be informed that he had tried to defile the complainant herein. He denied committing the offence herein.

21. The appellant was charged with the offence of attempted defilement contrary to Section 9(1) (2) of the *sexual offences Act*. The section provides;

> " 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"

22. 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 existed.

23. As already mentioned above, it was incumbent upon the prosecution to prove the above elements to the standard of proof required which is beyond reasonable doubt. It is trite that the burden of proof always lies with the prosecution and that the same does not shift. See the case of *Sekitoliko v Uganda* (1967) EA 53:

> " The prosecution has a duty to prove all the elements of the offence beyond reasonable doubt and that the conviction of the accused is depended upon the strength of the prosecution case and not the weakness of the defence case."

24. The question therefore is whether the above elements were proved to the required standards.

25. On the age of the complainant, the *Sexual Offences Act* defines "Child" within the meaning of the Children's Act No. 8 of 2001 as "...any human being under the age of eighteen years."

26. It is trite that there are various ways through which a victim's age can be proved. In the *Charles Nega v Republic* [2016] KLR, the court stated as follows:

> " In an attempted defilement charge, the prosecution only has to tender evidence that the victim was below the age of eighteen years and not necessarily the specific age. Needless to say, if the specific age is availed to a trial court it equally has a bearing in sentencing upon conviction."

27. PW1, the complainant herein testified that she was aged 16 years. Additionally, PW5 produced PW1's birth certificate as Pex1 which showed that PW1's date of birth was 12.06.2006. Having looked at the said birth certificate, I find that indeed PW1 was born on 12.06.2006 while the offence herein was allegedly committed on 14.01.2022. As such, the same showed that the complainant was about 15 years and 7 months as at the time when she was allegedly sexually assaulted. As such, this court is convinced that indeed the complainant was a child.

28. The next issue is whether the act of attempted defilement was committed. To prove the offence of attempted defilement, it must be proved that the perpetrator must have put into motion steps or actions consistent with preparation to penetrate into the victim's genital organ.

29. An attempt to commit an offence is defined in Section 388 of the *Penal Code* as follows:

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

30. The above piece of legislation brings out the main ingredients of an attempted offence; to wit, the *mens rea* which constitutes the intention and the actus reus which constitutes the overt act towards execution of the intention. The *actus reus* must be more than mere preparation to commit an offence. In the case of *Mwandikwa Mutisya v Republic* (1959) EA 18 and *Musa Said v Republic* (1962) EA 454 it was held that; in accordance with the definition of attempt in section 388 of the *Penal Code*, the test for attempt requires a demonstration of an intention to commit the offence and overt act towards the commission of the offence which is sufficiently proximate or immediately connected to the attempted offence. According to Spry, J. (as he then was) in *Mussa s/o Said vs. R* (1962) EA 454, 455:

> " 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.
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> 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."

31. On his part Madan Ag. CJ. (as he then was) in *Keteta v. R*, (1972) EA 532, 534, opined that:

> " 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."

32. From the above, could it certainly be said that the appellant committed an overt act towards the execution of his intention? As already noted above, it is trite that a distinction must be drawn between mere preparation to commit the offence and attempting to commit the offence. In this case, preparation was accompanied with undressing the complainant and touching her breasts.

33. In sexual offences, however, where the minor is the victim of the offence, the evidence of that minor, if believed by the trial court, can, without corroboration, lead to a conviction. Section 124 of the *Evidence Act* makes this quite clear:

> "Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act*, where the evidence of alleged victim 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.
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> 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." [Emphasis added]

34. Further, as guided by the case of *Abdalla Bin Wendo v. R* [1953] 20 EACA 166, a conviction can safely be secured based on the evidence of a single witness as long as the court warns itself of the dangers of such reliance. The court went further to state as follows:

> "Subject to certain well-known exception it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility."

35. In the instant case, there is no dispute that the appellant had offered a lift to the complainant on the material day. In the same breadth, the complainant stated that upon reaching her destination, the appellant by passed the same and headed to a different direction to where his house was. That upon reaching the said house, he ordered her to get into his house wherein the appellant locked the door and ordered her to take off her clothes.

36. The appellant denied taking the complainant to his house. However, pw1 stated that she was taken to the house by the appellant who demanded to have sex with her by force. What business would the appellant have with the complainant in a locked house if not to assault her sexually? I say so for the reason that from the evidence of the complainant, it was well stated that the appellant bypassed the destination of the complainant, took her to his house and thereby ordered her to undress.

37. PW4 corroborated the evidence of PW1 to the effect that she saw the appellant clearly when he opened his door on the material day. That the appellant was responsible for taking the complainant to his house. It was stated that upon PW4 demanding to know what exactly was happening in the said house, the appellant ran away and thereafter drove off. As such, it is my considered view that had PW4 not interrupted the appellant, then he could successfully have completed his action.

38. Further, the evidence of PW1 that she had previously seen the appellant within town was corroborated with that of PW3 and PW4 who testified that it was the appellant who took the complainant to the said house with the intention of defiling her. The appellant did not deny being with the complainant on the material day as he equally stated that indeed he offered her a lift. As such, it is my humble view that the appellant herein was properly identified and therefore, his conviction was safe.

39. On the 2nd count, he was charged with abduction contrary to section 260 of the Penal Code, the same stipulates that:

> " Any person who kidnaps or abducts any person in order that the person may be subjected, or may be so disposed of as to be put in danger of being subjected, to grievous harm, or slavery, or to the unnatural lust of any person, or knowing it to be likely that such person will be so subjected or disposed of, is guilty of a felony and is liable to imprisonment for 10 years".

40. The complainant herein testified on how while headed home from school, she met the appellant herein who was driving a white KCT 467S motor vehicle. It was her evidence that the appellant stopped the motor vehicle and offered her a lift home. She continued that upon getting into the motor vehicle, the appellant drove off to his house where he ordered her to get out of the motor vehicle straight to his house. She stated that the appellant locked the door and then ordered her to take off her clothes which order she declined. The same was corroborated with the evidence of PW4 who reiterated that she saw the appellant clearly when he opened his door on the material day. That the appellant was responsible for taking the complainant to his house.

41. The question begging for an answer is whether, the victim voluntarily went to the appellant's house. Although the victim did not raise any alarm while going to the house, the intention was not to go to the house but her home. By whatever method employed the complainant was through trickery made to go to the house hence proof of abduction.

42. In regards to sentence, in Kenya, sentencing is governed by the Judiciary Sentencing Policy Guidelines 2016. In order to safeguard decisions made through the exercise of judicial discretion, the Guidelines 2016 exist to ensure that judicial officers do not, in a whimsical manner met out sentences that are not only disparate and inconsistent but also disproportionate and unjustified under the circumstances of each case. The guidelines outline the purposes of sentencing at page 15, paragraph 4.1. as follows:

> " Sentences are imposed to meet the following objectives:
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> (1) Retribution: To punish the offender for his/her criminal conduct in a just manner.
>
> (2) Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
>
> (3) Rehabilitation: To enable the offender reform from his criminal disposition and become a law-abiding person.
>
> (4) Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demand that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.
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> (5) Community protection: To protect the community by incapacitating the offender.
>
> (6) Denunciation: To communicate the community's condemnation of the criminal conduct.

43. In the case of *Francis Karioko Muruatetu & Another v Republic*, Petition Number 15 of 2015, the Court in considering the provisions of section 329 of the *Criminal Procedure Code* gave guidance on sentencing as follows:

> " The court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed...It is without a doubt that the court ought to take into account the evidence, the nature of the offence and the circumstances of the case in order to arrive at the appropriate sentence."

44. The trial court relied on the unfavourable pre-sentencing report that was filed by the probation officer while noting that such cases were rampant in the area and therefore, a deterrent sentence was necessary to prevent such occurrences.

45. In the case of *Rodgers Odhiambo Mangeni v Republic* [2022] eKLR, the trial court upon convicting the appellant sentenced him to serve 20 years imprisonment; upon appealing the same, Githua J substituted the said sentence with 10 years imprisonment while stating that:

> " Although sentences are intended, inter alia, to punish an offender for his wrong doing, they also aim to rehabilitate offenders to renounce their criminal tendencies and become law abiding citizens. I have no doubt that the sentence imposed by the trial court in this case was lawful but considering that the appellant was a first offender, I am satisfied that the sentence was harsh and manifestly excessive".

46. However, considering the mitigation on record and taking into account the victim's conduct of complicity to the act, am persuaded to believe that the sentence meted out was harsh and excessive in the circumstances. Accordingly, the appeal against conviction is dismissed and the sentence of 10 years for each count substituted with 5 years for each count. The same shall run concurrently from the date of arrest.

ROA 14 days.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 28TH DAY OF JULY 2023

J.N. ONYIEGO

SJUDGE