Macharia v Republic (DPP) (Criminal Appeal E011 of 2023)
[2023] KEHC 21994 (KLR) (24 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21994 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E011 OF 2023

PJO OTIENO, J

AUGUST 24, 2023

BETWEEN

JOSEPH WAMBUGU MACHARIA ..... APPELLANT

AND

REPUBLIC (DPP) ..... RESPONDENT

(Being an appeal from the Judgment, conviction and sentence of Hon T. Obutu SPM, in Mumias SPM's Court Criminal MCSO Case No. E024 of 2021 delivered on 17th February 2023)

JUDGMENT

1. By a judgment dated and delivered on the January 25, 2023 after reviewing and appraising evidence from the eight witnesses called by the prosecution and the sworn evidence tendered by the appellant, the court held that the prosecution had proved the case of attempted defilement against the appellant, to the requisite standards, convicted him as charged and after calling for and obtaining a pre-sentence report from the Probation officer, sentenced him to serve a jail term of ten (10) years, as the minimum sentence set by the Statute, but without any option of a fine.

2. That decision aggrieved the appellant who then filed the instant appeal by the petition and supplementary petition of appeal both raising an aggregate of nineteen grounds. Looked at holistically, the grounds challenged both conviction and sentence. The conviction is faulted for reasons that; it failed to find that the case was never proved to the requisite standards, was riddled with contradictory evidence; that the age of the complainant was not proved to be that of a minor; that the charge was accentuated by grudge and bad faith and that the defence evidence was dismissed in error. On the other hand, the sentence is faulted for its failure to apply but instead overlooking the decision by the High Court on the subject, which decisions were binding upon the trial court.

3. The appeal was directed to be canvassed by way of written submissions which were then directed to be highlighted, but on the date set for highlights, the appellant's Counsel chose not to highlight while

the respondent's Counsel gave a short but succinct highlight on what needs to be proved on attempted defilement. In essence the respondent/prosecution concedes to the appeal on the major ground that there was no other conduct beyond preparation to merit the conviction on the offence of attempted defilement.

Overview of Submissions by the Appellant

4. The appellant's submissions are structured in five broad grounds starting with the burden and standard of proof on whether the offence charged was proved and proved to the requisite standards, the appellant cites *David Ochieng Oketch v Republic* [2015] eKLR on what constitutes attempted defilement; *David Ombasa Omwoyo v Republic* [2016] eKLR and *Kennedy Odhiambo Otieno v Republic* [2022] KEHC 10559 (KLR) for the proposition that for the prosecution to succeed in a case of attempted defilement must prove a conduct beyond preparation to commit the offence. It is urged that since there was never any evidence that the Appellant did anything to effectuate his preparation, the offence had not been proved.

5. On the standard of proof, the appellant cites the decision by the Canadian Supreme Court in *Republic v Lifchus* [1997] 3SCR 320 as well as *Philip Ndaruga –vs- Republic* [2016] eKLR for the proposition that the onus remains resident on the prosecution and that if at the end of production of evidence, there is a reasonable doubt lingering in the mind of the court, the same is due for resolution in favour of the accused. *Boniface Mutisya Kalonzo v Republic* [2019] eKLR, *GOO v Republic* [2019] eKLR and *Peter Ndoli Adisa v Republic* [2019] eKLR were all cited for the same position that the preparation alone is not enough if not followed with an attempt at penetration.

6. On inconsistencies and contradictions in the prosecution's case, the appellant highlights the inconsistency on the age of the complainant stated in the charge sheet and the evidence led which put the age of the complainant variously at 15 and 16 years. There is also the question of the date of commission which was asserted by PW1 & 2 to be May 21, 2021 while PW4 put the same as May 24, 2021. Even where the complainant was left by the mother while the latter went to the market was raised as a consideration by the court to justify its interference with the conviction. It was added that section 211 was never observed and complied a failure appellant deems fatal.

7. The forth attack on the conviction was the alleged failure by the court to indicate the language in which the proceedings were taken and that proceedings of the court at pages 4, 5 & 6 of the record was pointed out to demonstrate that the language of the court was not disclosed. It is also pointed out that, in instances, the coram of the court is not recorded as much as the language employed to conduct the voir dire. That error was viewed to merit disturbing the outcome of the proceedings and the decision in *Samuel Kariuki v Republic* (whose citation was not given) and *Felix Odhiambo Ooko v Republic* [2011] eKLR were cited for the proposition of the law that the dictates of section 198 of the *Criminal Procedure Code* have the intention to ensure that the accused understands and follows the proceedings for purposes of meeting the constitutional demand for a fair hearing.

8. The other fault on the judgment on conviction was that there was superficial or perfunctory analysis and consideration of the evidence adduced by the defence, alleging and asserting the existence of bad blood between the appellant and the family of the complainant on the basis that the family dealt in illicit brew and had been repeatedly arrested by the appellant. The decision in *Benson Musumbi –vs- Republic* [2019] eKLR was cited for the finding that where there is alleged bad blood between the complainant and the accused, the Court has a duty to consider and erase any possibilities of the charge being improperly influenced by such bad blood.

9. The last challenge on the conviction was that he was never informed of his right to have an advocate to represent him in terms of article 50 (2) of the *Constitution of Kenya*. The decision by Lord Denning in *Pett –vs- Greyhound Racing Association* [1968) 2 All ER 545 and 549 was cited for the proposition of the law that there is always need to have an accused presented by a trained lawyer so that he is able to bring out the strength of his defence and bring out the weaknesses of the prosecution's case. The appellant equally cited Musyoka J in *Vincent Obulemere –vs- Republic* [2019] eKLR for the interpretation of article 50 (2) g and h of the *Constitution* to commend that the trial court informs the accused of his right to legal representation as the first obligation and that the consideration of the gravity of the charge and possible severity of the defence upon conviction and that failure to conform to the requirements of the *Constitution* negates the trial. On those submissions, therefore, the appellant prays that the conviction be quashed and sentence set aside even though no submissions was offered on the sentence.

10. For the prosecution, as said before, the appeal is conceded on the grounds that there was never proof of the charge of defilement for no evidence beyond preparation was availed to court and that the conviction was therefore unsafe and should not be left to stand. While so conceding, the Counsel pointed out, on the proof of age of the complainant, that irrespective of what witness said in oral evidence, there was a birth certificate which showed that the complainant was born on the August 1, 2016 and that the identification of the appellant was by recognition and there was no prospect of a mistake. It was thus the position of the respondent that the age of the complainant and the identification of the appellant were proved to the requisite standards but the offense was never proved.

11. On the proof of the ingredients of the offence, the prosecution relied on section 388 (1) and (2) of the *Penal Code* and the decision in *Rodgers Odhiambo Mangeni v Republic* [2020] eKLR for the proposition of the law that the act relied upon to constitute an attempted offence must be one that is immediately and not remotely connected to the contemplated offence, in this case, the penetration. To the prosecution, the evidence of the complainant, the only eye witness ever called, when analyzed shows that even though the accused took the complainant to his house, the accused undressed without putting on lights and the complainant took advantage of the darkness and his drunkenness to hid under his bed without the accused removing her clothes or making any moves towards penetrating her.

Analysis and Determination.

12. Being a first appeal, and even on the face of the concession by the prosecution, the court is duty bound to re-appraise and re-examine the record afresh and determine for itself if the conviction was sound and if the sentence was appropriate. In the circumstances of this matter however, once would only delve to consider the propriety of the sentence if the conviction is left to stand.

13. Having read the record at trial, the two sets of submissions filed and the two petitions of appeal, the issues that arise for determination stand out to be;Whether the offence of attempted defilement was proved to the requisite standards?Whether the trial court did observe the dictates of article 50(2) g & h?If the answer be in the negative, what is the effect of such failure?Was the trial court bound to mete out a sentence not less than the minimum prescribed by the statute?

Was the offence charged proved to merit a conviction?

14. Grounds 2 and 4 in the petition of appeal and all the grounds in the supplementary petition of appeal alleged inadequate evidence and failures to comply with the law, both statutory and stare decisis and therefore assert that the charge was not proved.

15. While a lot of weight has been placed on alleged inconsistence in the prosecution's evidence, I do find that the only material consideration worth considering, because it goes to the sufficiency of proof, is that on the date of the offence. The rest of the highlighted contradiction are flimsy and not substantial to be able to affect the general flow of the evidence. However, the contradiction on the date of the offence is quite substantial. When one gives regard to the fact that all prosecution's witnesses, save for PW3, who did not talk of any date, were adamant that the offence was in the month of May 2021. To this court if there was any offence committed as narrated by the PW1, 2, 4, 5, 6, 7 and 8 then the prosecution never preferred any charges on it and it is not due for consideration in this case.

16. It is the duty of the prosecution to prove the offence it prefers and not to seek to prove what is not before the court for consideration. It negated on the right of the appellant to fair trial to be informed of the offence alleged against him beforehand so that he prepares for his defence. By the charge sheet the appellant was warned to defend himself against an incident alleged to have happened on June 21, 2021 yet at trial he was confronted with happenings one month earlier. Such contradictions go to the route and questions if the incident ever occurred and when it indeed occurred. Such is grave and need an explanation if not an amendment of the charge by the prosecution[1].

17. The court itself had a duty, in satisfying itself that no reasonable doubt existed, to address the contradiction but it did not undertake that duty. In doing so he erred. On appeal and upon full analysis of the record, the court finds and holds that the offence charged was never proved and that the conviction was thus unsafe and must be upset. It is so upset and quashed.

Right to fair hearing and information to access counsel

18. It is not in doubt, after perusal of the record at trial, that the Appellant conducted his defence in person. Equally there is no record that he was, even though he was a police officer, expected to be conversant with court processes, informed of his right to legal representation at any stage by the court. The *Constitution* mandates the court to inform every accused person, whether literate or illiterate, whether informed or ignorant and whether established or vulnerable, to be informed of the right to legal counsel. The court takes the view that the drafter of the *Constitution* did not incorporate article 50 (2) h into our *Constitution* as some beautification endeavor with no substantive purpose. The purpose of that provision was to cure situations where an accused is wholly lost or confused with the court process and proceedings and end up unable to bring out to court what is important for its case by evidence as well as pointing out the weakness of the prosecution's case by way of cross-examination[2].

19. Even though the English Judge in *Pett vs Greyhoundracing* case (*supra*) spoke of that situation more than half century ago, the situation still reigns large in our judicial system in Kenya today. The court as the bastion of rights must take the lead in doing what the *Constitution* expects and demands. Where the court fails to pass the information to the accused, the outcome is by dint of article 2 (4), unconstitutional and must be declared to be invalid for all intents and purpose. Being invalid, the conviction in the judgment passed against the appellant, by reason of its invalidity, is hereby quashed.

1 In *Eric Onyango Ondeng' v R* [2014] eKLR, the Court of Appeal said; "...grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence being rejected"

2 *Pett vs Greyhoundracing Association* [1968] 2 All E Rat 549,

Was the trial court constrained to stay above the surface level of the minimum statutory sentence?

20. It is now established beyond per adventure that sentencing is a judicial function and not a legislative one[3] in line with the constitutional architecture on separation of powers. It has been held, innumerable times, by the superior courts of this Country, that statutory prescribed sentences never hamstring the courts and that judicial discretion remains to be exercise by the trial court.

21. It is never curtailed by the statute and at the behest of the legislature. In the words of the Supreme Court of Kenya in Francis K Muruatetu & others –vs- Republic [supra]

> " ...Section 204 of the Penal Code deprives the court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under articles 25 of the Constitution; an absolute right."

22. Put in the contexts of this appeal, the trial court in coming to its determination on sentence said:-

> " Section 9(11) of the Sexual Offence provides that if one is found guilty under this section he shall suffer a term of not less than 10 years. Considering the nature of the case, I see no reason why I should sentence the accused for more than the minimum provided. I do therefore proceed and sentence him to suffer 10 years' imprisonment with no option of fine."

23. It is clear the trial court proceeded from the stand point that it was constrained to only impose the minimum sentence or a term that was longer than the statutory minimum. In doing so the court felt unlawfully hamstrung. In this case had the appeal failed, the court would have been duty bound to consider an appropriate sentence. However, with the success of the appeal on conviction, the point becomes moot and it is enough to say that, any court retains the discretion in sentencing based on the circumstances of the case including any aggravating or extenuating facts as well as the mitigation offered by the accused.

24. In conclusion, the appeal on conviction succeeds in that the same is quashed with the inevitable consequence that the sentence is set aside. Let the appellant be released forthwith, if in prison, unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT KAKAMEGA, THIS 24TH DAY OF AUGUST, 2023.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Mr Ondieki for the Appellant

Ms chala for the Respondent/Prosecution

Court Assistant: Polycap Mukabwa

[3] *Francis K Muruatetu v AH*