Mohamed v Republic (Criminal Appeal E006 of 2020)
[2023] KEHC 27370 (KLR) (18 December 2023) (Judgment)

Neutral citation: [2023] KEHC 27370 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL E006 OF 2020

JN ONYIEGO, J

DECEMBER 18, 2023

BETWEEN

IBRAHIM MOHAMED ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence of Hon. J.J.Masiga (SRM) delivered on 10 - . 06 .2019 in sexual offences case No.20 of 2017 CM's Court at Garissa)

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. Particulars of the offence were that on 02.10.2017 at around 2100hrs at Madogo Location, Tana North Sub- County within Tana River County intentionally attempted to cause his genital organ namely penis to penetrate the vagina of S.F., a girl aged 12 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* with particulars being that on 02.10.2017 at around 2100hrs at Madogo Location, Tana North Sub- County within Tana River County intentionally and unlawfully touched the vagina of S.F., a child aged 12 years.

3. The appellant having pleaded not guilty to the charges, the prosecution call five witnesses to prove its case. Upon conviction, the appellant was sentenced to serve ten years imprisonment for the main count. Aggrieved by his conviction and sentence, he filed a petition of appeal on 05.11.2020 citing the following grounds:

    i. That the prosecution did not prove its case beyond any reasonable doubt.

    ii. That the trial magistrate did not warn itself before relying on section 124 of the *Evidence Act* to convict him.

iii. That the trial court did not consider his defence thus leading to his detriment.

4. During the hearing, both parties prosecuted the appeal by way of written submissions.

5. The appellant relied on his submissions filed on 07.07.2023 thus submitting that the prosecution did not prove its case to the required standards and further, that his sentence was not only harsh but severe in the given circumstances. He stated that the court did not consider the time already spent in remand custody when meting out the impugned sentence. Additionally, he urged this court to reconsider the facts herein afresh and quash his conviction and thereafter set aside the sentence in force.

6. The learned prosecution counsel, Mr. Bidan Kihara for the respondent submitted that among the key ingredients that the prosecution was tasked to prove was: the age of the victim which was ably established as 12 years old and the identification of the perpetrator. To that end, learned counsel placed reliance on the cases of Hadson Mwachongo v Republic [2016] eKLR and Francis Omuroni v Uganda, CA No.2 of 2000 where both courts stressed the position that; apart from medical evidence, age may also be proved by a birth certificate, the victim's parents or guardian and by observation or common sense.

7. On sentence, Mr. Kihara submitted that the same was not only legal but also appropriate bearing in mind the circumstances of the case.

8. I have given due consideration to the grounds of appeal, the evidence on record and the 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 complainant.

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

   iii. The identification of the perpetrator;

   iv. Whether the sentence imposed was excessive.

9. This being a first appeal, parties are entitled to and expect a rehearing, reevaluation and reconsideration of the evidence afresh and a determination of this court with reasons for such determination. However, I am duty bound to bear in mind that I did not see nor listen to witnesses testify to be able to assess their general demeanour. See Gitobu Imanyara & 2 others v Attorney General [2016] e KLR where the Court of Appeal stated that;

> " An 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"

10. PW1, S.F. testified that on 02.10.2017 at about 9.00 p.m., the appellant went to their home where she was with her two brothers and a sister. That the man went to where they were sleeping and sat next to S whom he told to keep quiet. She stated that the man went after S but thereafter went back to her in the said room. It was her evidence that the man undressed her and thereafter sat on her. That when she started struggling, the man ran away. She stated that the appellant tried to insert his penis into her vagina as he had already lifted up his kikoi.

11. PW2, KAH stated that on 02.10.2017 at 9.00 p.m., while out in a meeting, he heard noise coming from his house and upon reaching there, the complainant told him that the appellant had entered their house. That Liban was crying as his leg was paining and therefore the elders ran after the appellant and managed to arrest him. He stated that he stopped the public from lynching the appellant and thereafter handed him over to the police. On cross examination, he stated that he saw the appellant run away from the children's house. That the incident happened between 8 p.m. and 9.00 p.m.

12. PW3, SKA testified that on the material date, she was together with her siblings when the appellant entered the room where they were sleeping and sat next to her. It was her evidence that when she woke up into darkness, she realized there was somebody sitting next to her. That upon asking whom the person was, the man told them that he was Ibrahim and that they should keep quiet.

13. It was her case that she knew the voice of the man as he used to herd their goats for about three years. She stated that she ran to her aunty's house and later returned to the house where they found the complainant crying while stating that the appellant had attempted to defile her. She stated that before they could reach their house, the appellant had run away but later came back to sleep. On cross examination, she reiterated her evidence and further stated that she heard the voice of the appellant and recognized it as he had stayed with them for almost three years.

14. PW4, McDonald Mdembi testified that she medically examined the complainant and that she had no injuries detected. That the hymen was intact, no bruises and generally, there was no evidence of penetration. That the entire body was normal.

15. PW5, David Otieno testified that he was the investigating officer and that after receiving the complainant's report, together with his colleague, they accompanied her to the hospital where it was confirmed that there was evidence of attempted defilement. That he recorded statements from the witnesses and thereafter preferred the charges herein against the appellant.

16. The trial court via a ruling delivered on 05.03.2019, held that a prima facie case had been established against the appellant thereby placing him on his defence.

17. The appellant in his sworn testimony confirmed that he previously lived in the complainant's home for four years and five months. That the charges herein were preferred against him after a disagreement in terms of his unpaid dues. He denied the accusation herein.

18. The appellant herein was charged with the offence of attempted defilement contrary to Section 9(1)(2) of the *sexual offences Act* which 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"

19. 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 the act that completes the offence of defilement. The prosecution must therefore prove that the victim was a child at the material time 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.

20. 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. In the case of Sekitoliko v Uganda (1967) EA 53 the court held as follows:

> " 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."

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

22. 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."

23. Of importance to note is the fact that there are various ways which can be used to prove a victim's age. In the case of 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."

24. PW1, the complainant herein testified that she was aged 12 years. PW4 also testified that upon examining the complainant, it was his view that the complainant was aged twelve years. The trial magistrate who saw the complainant testify also noted that in as much as there was no birth certificate produced, the complainant could not be above twelve years old. That notwithstanding, the same was not controverted by the appellant. As such, this court is convinced that indeed the complainant was a child.

25. 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.

26. An attempt to commit an offence is defined under 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."

27. 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. As was held in Mwandikwa Mutisya v Republic (1959) EA 18 and Musa Said v Republic (1962) EA 454 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 he had this to say;

> " 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."

28. 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..."

29. 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.

30. 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 as hereunder:

> " 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]

31. In the case of Abdalla Bin Wendo v. R [1953] 20 EACA 166 the court had this to state on the requirements of identification by a single witness;

> " 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."

32. In the instant case and from the evidence by the prosecution witnesses, it was not controverted that the appellant herein used to work for the family, a statement which the appellant also confirmed by stating that he worked for the family for a period of four years and five months. PW2 confirmed that she recognized the voice of the appellant and thus ran out leaving the complainant in the said house. It is my humble view that identification in this case was by recognition of the voice of the appellant. [See Charles Wamukoya Karani v Republic, Criminal Appeal No. 72 of 2013].

33. Noting that it was in the middle of the night and given that he was living with the said family, what exactly took him to the children's' bedroom when their parents were away? In as much as he defended himself that the charges herein were as a result of his unpaid dues, I hold a contrary view. I say so for the reason that the evidence by the complainant and that of PW3 satisfactorily corroborates each other.

34. As such, it is my considered view that had PW3 not interrupted the appellant by running out to inform her aunty, he could successfully have completed his actions. Further, the conduct of the appellant in running away from the scene of the incident at such an odd hour is quite telling. It actually implies that there was something amiss hence his escape. In my view, section 124 of the *evidence Act* was properly applied hence no room for any doubt that the appellant had formed the intention to defile the complainant but was interrupted by the complainant and the siblings.

35. The averment by the appellant that the trial court did not consider his defence is misplaced as the trial court considered the same but found that the same had been displaced by the evidence by the prosecution. As such, the said ground fails.

36. As regards sentence, the appellant herein was sentenced to serve 10 years imprisonment being the maximum sentence provided for by Section 9(2) of the Act.

37. It is trite that sentencing is at the discretion of the trial court. Under the Judiciary Sentencing Policy Guidelines 2016, judicial officers are not expected to exercise such discretion in a whimsical manner by meting out sentences that are not only disparate and inconsistent but also disproportionate and unjustified under the circumstances of each case.

38. In the case of Rodgers Odhiambo Mangeni v Republic [2022] eKLR, the trial court upon convicting the appellant for the offence of defilement sentenced him to serve 20 years imprisonment; upon appealing, 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"

39. 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. Secondly, the period spent in remand custody ranging to 2years and 2 months was not considered pursuant to Section 333(2) of the CPC. Accordingly, the same should be taken into account when computing sentence.

40. Having reviewed the evidence on the record, I am inclined to uphold the finding on conviction and set aside the sentence of ten (10) years imprisonment and substitute the same with five (5) years imprisonment to run from the date of arrest. In computing sentence, the period of 2yrs and two months spent in remand custody from the date of arrest shall be considered.

ROA 14 days

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 18TH DAY OF DECEMBER 2023

J. N. ONYIEGO

JUDGE