Odera v Republic (Criminal Appeal 68 of 2019)
[2022] KEHC 17033 (KLR) (4 April 2022) (Judgment)

Neutral citation: [2022] KEHC 17033 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRIMINAL APPEAL 68 OF 2019

MN MWANGI, J

APRIL 4, 2022

BETWEEN

VICTOR ONYANGO ODERA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal from the original conviction and sentence by Hon L N Wasige, Senior Resident Magistrate, delivered on April 15, 2019 in Kaloleni Principal Magistrate's Court Sexual Offence Case No 21 of 2017)

JUDGMENT

1. The appellant was convicted for the offence of attempted defilement of a child contrary to Section 9(1) as read with Section 9(2) of the *Sexual Offences Act* No 3 of 2006. The particulars of the charge were that on October 3, 2017 at [Particulars Withheld] village, [Particulars Withheld] Location, Kaloleni Sub-County in Kilifi County within Coast region, intentionally and unlawfully attempted to cause his male genital organ namely penis to penetrate the female genital organ namely vagina of MPF [name withheld] a child aged 15 years. He was sentenced to 10 years imprisonment.

2. The appellant being aggrieved by the said decision filed the appeal herein. On December 27, 2019 he filed amended grounds of appeal, with leave of the Court. He raised the following grounds of appeal-

    i. That the Trial Magistrate erred in law and fact by not considering that the prosecution did not prove the case to the required standard of law; and

    ii. That the Trial Magistrate erred in law and fact by not considering that the prosecution (sic) was governed by material contradictions and variances.

3. Several witnesses testified before the Trial Court. PW1 was the complainant, MPF [name withheld]. She was a minor aged 15 years as per her birth certificate which was produced before the said Court.

She was taken through a *voir dire* examination and gave sworn evidence. She stated that she knew the appellant as Victor Onyango and that they met in October 2017, when the appellant went to do some work at their home. It was her evidence that on Octoberv 3, 2017 at around 7.00 p m, she was sent to the shop and along the way, she saw the appellant who told her to accompany him to Kajionea area and she agreed to follow him.

4. It was her evidence that in a certain house, the appellant pushed her towards the bed but she got scared and told him that she would scream. He let her leave and she went to the shop. She stated that on her way therefrom, she saw the appellant again and he called her, but she refused to go to the place he was. That the appellant told her to go and see him and at around 11.00 p m. She testified that at around the said time, she went to Kajionea area to meet the appellant who accompanied her behind a house where he kissed her and they proceeded to walk where there was a cashewnut tree. She stated that the appellant proceeded to spread a leso and asked her to sit down. He then caressed her.

5. PW1's evidence was that she had worn a blouse and skirt and that the appellant removed her pantie and undressed himself by lowering his trouser and placed his penis on top of her vagina. She asserted that the appellant did not insert his penis into her vagina but placed it on top. She indicated that she asked the appellant to let her go but he refused. She stated that she was later assisted by M (PW3), who had gone to look for her. She stated that after being found by PW3, the appellant tried to bribe him with Kshs 500/=. She indicated that she ran away into the forest and went to their home the following morning at 6.00 a m, and that in the company of PW2 and PW3, they then went to the appellant's home where she pointed him out.

6. PW2, JK [name withheld], was the grandfather to PW1. He stated that he knew the appellant physically as he had seen him at Kajionea where he was doing electrical work within the area. PW2 indicated that at around 12.30 a m, he was woken up by PW1's Aunt, who informed him that PW1 was not at home. He stated that he woke up the men at the home and they proceeded to look for PW1. That after 30 minutes, PW3 went back home and informed him that PW1 was having sex outside a house at the Trading Centre with a certain boy and that she had run away after he found them.

7. It was PW2's evidence that he reported the incident to the village elder and the chief. That PW1 went back home in the morning and took them to the Trading Centre where she identified the appellant as the man she was caught with.

8. PW3, MK an employee of PW2 stated that he knew the appellant physically as he had seen him around Kajionea area. It was his evidence that on October 3, 2017 before midnight, he felt thirsty and went to the main house to look for some water when he found that PW1 was not in the house. PW3 indicated that he informed PW1's Aunt, who in turn informed PW2 and they decided to look for PW1.

9. PW3 stated that as he walked around the Shopping Centre he found PW1 lying down naked, while the appellant who had lowered his trouser up to his knees lay on top of her. PW3 stated that he heard PW1 screaming and that when he moved closer to where they were, he questioned PW1 on what they were doing and the appellant offered him Kshs 500/= so that he could keep quiet but he refused to take the money. PW3 further stated that PW1 ran away while the appellant remained behind and asked for forgiveness. It was the evidence of PW3 that he informed PW2 that he had found PW1 with a boy and that she had run away to the forest. He stated that PW1 went back home at 6.00 a m. That they took her to the appellant's house and she identified him. PW3 stated that the appellant was later arrested and taken to Kaloleni Police Station.

10. PW4, CP a village elder, indicated that PW1 was his niece and that he had been informed that a boy and a girl had been found at Kajionea area at night and that he got to meet the appellant at 6.00 a m, on October 3, 2017 when PW1 was taken to him. It was his evidence that they went to Kajionea area

for her to identify the boy she had been caught with. PW4 said that PW1 identified the appellant as the man she was with the previous night and that he requested for the issue be settled at home. PW4 testified that PW2 refused and they proceeded to report the incident at Kaloleni Police Station.

11. The Investigating Officer (PW5), was No 95368, PC Rukia Guyo attached to Kaloleni Police Station, Gender Desk. She stated that she was in the said Police Station when PW1 and the appellant were escorted there by PW2 and PW4. That PW2 reported that PW1 had been defiled by the appellant.

12. PW5 indicated that she questioned PW1 who stated that she left home and went to the appellant's house. That the appellant left the house and they sat under a tree, where the appellant caressed her and touched her breast. That as they were about to have sex, PW3 found them and the complainant ran away and retuned home in the morning.

13. PW5 stated that she took PW1 to the Mariakani Hospital for examination and that PW1 said that she had not been defiled. It was PW5's evidence that the P3 form indicated that PW1 had been defiled and on questioning the complainant further, she discovered that PW1 was not a virgin as previously, she has had 3 boyfriends. PW5 concluded that the appellant had attempted to defile PW1 and she charged him accordingly.

14. PW6, Barrington Charo, a Clinical Officer at Mariakani County Hospital examined PW1 and filled a P3 form on October 3, 2017. He noted that PW1's hymen was broken and she had a mucoid discharge. He filled the P3 form and formed the view that PW1 had been defiled.

15. The appellant gave sworn defence and denied having had sex with PW1. He stated that he was arrested by a mob, which instead of beating him up, reported to the Police Station. He was then arrested and charged with the offence herein.

16. In his submissions, the appellant indicated that the prosecution had not proved its case beyond reasonable doubt. He submitted that PW5 raised doubt in PW1's evidence and it was established that she was not a person of integrity and that her evidence should not be considered as truthful. He further submitted that *mens rea* and the *actus rea* for the offence of attempted defilement were lacking in the case against him.

17. He urged the Court to disregard the evidence of PW3 who alleged to have found PW1 at the scene of crime. He stated that it was too dark for PW3 to identify him as the perpetrator. He further submitted that PW1 did not know his name or give a physical description of him at the Police Station. He stated that PW1 in her evidence said that she found five men in the house and pointed out the appellant, thus she was not given a proper opportunity to pick out who the perpetrator of the offence was before his arrest. He equated the said mode of identification to dock identification which is generally worthless.

18. The appellant relied on the decisions in *Anjononi & others v Republic* [1976-1980] 1 KLR 1566, *R v Turnbull and others* [1973] 3 ALL ER 549 and *Titus Wambua v Republic* [2016] eKLR, where it was held that recognition is more reliable than identification. The appellant submitted that the prosecution failed to prove its case beyond reasonable doubt, as his identification as the assailant was in question.

19. On the issue of contractions and variances, the appellant contended that PW1 and PW2 gave contradictory evidence. He submitted that PW1's account of the events was contradictory as to the time that she went to the shop and met him, which she alleged to be at 7.00 p m, whereas in her statement the time she talked of was 12.00 noon. The appellant relied on the case *Philip Nzaka Watu v Republic* [2016] eKLR, where the Court held that the magnitude of inconsistencies and contradictions determine if the conviction of an accused person is unsafe. He prayed for his appeal to be allowed.

20. The Office of the Director of Public Prosecutions (ODPP) through Ms Barbara Sombo, Prosecution Counsel, filed its written submission on March 11, 2020. She stated that they had proved their case beyond reasonable doubt. She relied on the case of *Peter Ndoli Adisa v Republic* [2018] eKLR, where the Court held that for the prosecution to sufficiently prove a case in an offence of defilement, they must prove the age of the complainant, there must be positive identification of the assailant and the steps taken by the perpetrator to execute the defilement which did not succeed. She indicated that the only ingredient that need not be proved in a case of attempted defilement is penetration.

21. On the issue of age, she stated that PW1 was 15 years old as her birth certificate produced before Court confirmed her age at the time the offence was committed. She relied on the case of *Hadson Ali Mwachongo v Republic* [2016] eKLR, where the Court held that the age of the complainant was an essential ingredient for the offence of defilement.

22. The Prosecution Counsel submitted that PW1 positively identified the appellant and that her evidence was corroborated by PW3 who also identified him. She relied on the case of *Donald Atemia Sipendi v Republic* [2019] eKLR, where the Court held that positive identification of an accused person is an essential element of any offence.

23. On the issue of attempted penetration, she submitted that PW1's evidence was sufficient to confirm that the appellant attempted to defile her. She further stated that PW1's evidence was corroborated by that of PW3. She submitted that the offence of attempted defilement had been proved beyond reasonable doubt. She urged this Court to uphold the conviction and sentence against the appellant.

Analysis And Determination

24. This being the first appeal, this Court has the duty to re-evaluate and analyze the evidence adduced before the lower Court in detail and come up with its own conclusion, while bearing in mind that it neither saw nor heard the witnesses testifying. See Court of Appeal cases in *Mark Oiruri Mose v Republic* [2013] eKLR and *Okeno v Republic* (1972) EA 32.

25. The issues for determination in this appeal are-

    i. Whether the prosecution's case was marred with contradictions and variances;

    ii. Whether the prosecution proved its case beyond reasonable doubt; and

    iii. If the sentence imposed on the appellant can be regarded as being either harsh or excessive.

    Whether the prosecution's case was marred with contradictions and variances.

26. It is farfetched for the appellant to state that there were inconstancies in his identification by PW1, yet in his sworn defence he acknowledged having been with PW1 on October 3, 2017. The appellant's submission that there was an inconsistency in PW1's evidence with regard to the time she went to the shop was admitted by PW1 in cross-examination. Courts have however held time and again the due to human nature, inconsistencies and contradictions do occur at times. A case in point is *Erick Onyango Ondeng' v R* [2014] eKLR, cited with approval the Ugandan Court of Appeal case of *Twehangane Alfred v Uganda*, Crim App No 139 of 2001, [2003] UGCA, 6, which stated as follows-

> "...With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor

contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case..."

27. This Court's view after analyzing the evidence adduced by prosecution witnesses is that inconsistency in the prosecution's case is not of the nature that would vitiate the conviction against the appellant.

Whether the prosecution proved its case beyond reasonable doubt.

28. Section 9(1) of the *Sexual Offences Act* provides that a person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement. In *Keteta v R* (1972) EA 532 and 534, Madan Ag CJ, 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." (emphasis added).

29. The ingredients of attempted defilement were defined in the decision in *Michael Lokomar v Republic* [2017] eKLR, in the following terms –

> " ...The prosecution in an offence of attempted defilement must prove the other ingredients of the offence of defilement except penetration; it must prove the age of the complainant, positive identification of the accused, and then prove steps taken by the accused to execute the defilement which did not succeed. Attempted defilement is as if it were a failed defilement, failed because there was no penetration..." (emphasis added).

30. The age of PW2 was not in contention. A copy of her birth certificate was produced before the Trial Court by PW2. It showed that she was born on 30th August 2002. She was 15 years old at the time of the alleged offence.

31. On the issue of identification, PW1 met with the appellant on the date in issue on her way to the shops. He persuaded her and she agreed to accompany him to a certain house. When they reached there, he tried to push her onto a bed. She informed him that she would scream and he let her go. Later that night, PW1 sneaked from their home at around 11.00 p.m., and went to Kajionea area for the 2nd time with the intention of meeting with the appellant who had asked her to go back. She inquired about his whereabouts from the driver of a lorry and since she did not know the appellant's name, she told him that she was looking for the man whom she had seen earlier in the day. That the said driver called the appellant from a house at Kajionea area and left the two together.

32. In his sworn defence, the appellant confirmed that he knew PW1 as he used to see her around the site where he was working and that he would at times fetch water from her homestead. He stated that he was with PW1 on the night of October 3, 2017 but indicated that they were just talking outside the house when PW3 appeared. From the information given by the appellant in his defence, his submission that he was not known to PW1 cannot therefore stand as he admitted in his defence that he was found by PW3 in the company of PW1 on the night in issue. When the appellant was found with PW1, he was lying on top of her and he had pulled his trousers down. He was even willing to buy PW3's silence by giving him Kshs. 500/=. This Court's finding is that the appellant was properly identified by PW1 and PW3.

33. This Court's finding is that the actions of the appellant, when he guided PW1 under a tree, proceeded to remove her panties, then lowered his trouser and placed his penis on top of her vagina were geared

towards defiling PW1. It leaves little to the imagination what the appellant's intention was. Mens rea was thus proved. Actus rea was proved by the very act of the appellant placing his penis on PW1's vagina. The sudden appearance of PW3 interrupted the steps that the appellant had put in motion towards achieving his intended purpose of defiling PW1. PW1's evidence was corroborated by PW3 who stated that the appellant had lowered his trouser to his knees and was lying on top of PW1.

34. The appellant contended that the evidence of PW6, the Clinical Officer who produced PW1's P3 form before the Trial Court confirmed that she had been defiled. The P3 form indicated that her hymen was broken and she had a mucoid discharge. The appellant was right in submitting that the observation made and captured on the P3 form did not tally with an offence of attempted defilement. In order to understand the report by PW6, one must read it alongside the evidence of PW5, the Investigating Officer. She stated that on interrogating PW1, she found out that she was not a virgin as she had had sexual encounters with three (3) boyfriends before her encounter with the appellant. It was not therefore strange for the Clinical Officer to note that PW1's hymen was not intact.

35. PW1 further told PW5 that the appellant did not penetrate her, but that he placed his penis on top of her vagina. PW5 indicated that was the reason as to why he charged the appellant with the offence of attempted defilement. This Court is satisfied from the totality of the evidence adduced that the prosecution proved the case of attempted defilement against the appellant beyond reasonable doubt. I uphold the conviction.

    If the sentence imposed on the appellant can be regarded as being either harsh or excessive.

36. On the issue of the sentence meted out on the appellant, this Court notes that PW1 was 15 years old when the appellant attempted to defile her. He was aged 30 years old. Since he knew her abode as he used to fetch water from the homestead, he must have known that PW1 was a minor. He should not have attempted to have sex with her. This Court's finding is that the sentence of 10 years imprisonment imposed on the appellant cannot be said to be either harsh or excessive. The appellant was released on bail pending appeal during the pendency of the case before the lower Court. His sentence will therefore run from April 15, 2019 being the date he was sentenced. The sentence of 10 (ten) years imprisonment is hereby upheld. The appeal is dismissed in its entirety.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 4TH DAY OF APRIL, 2022.

In view of the declaration of measures restricting Court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on April 17, 2020 and subsequent directions, the Judgment herein has been delivered through Teams Online Platform.

NJOKI MWANGI

JUDGE

Appellant present in person

Ms Keya for the DPP

Mr Oliver Musundi - Court Assistant.