Otieno v Republic (Criminal Appeal E006 of 2022)
[2022] KEHC 10559 (KLR) (23 May 2022) (Judgment)

Neutral citation: [2022] KEHC 10559 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CRIMINAL APPEAL E006 OF 2022

RE ABURILI, J

MAY 23, 2022

BETWEEN

KENNEDY ODHIAMBO OTIENO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against sentence & conviction from the judgment in the Chief Magistrate's Court at Siaya in Criminal Case S.O. No. 66 of 2020 delivered on the 8.2.2022 by Hon M. Wambani Chief Magistrate)

JUDGMENT

1. The appellant Kennedy Odhiambo Otieno was charged, before Siaya Chief Magistrate's Court with the offence of attempted defilement contrary to section 9 (1) (2) of the *Sexual Offences Act* No. 3 of 2006 the particulars being that on the 25th November 2020 at around 1700hrs at Sinaga sub-location, Marenyo Location, Gem East Sub-County, within Siaya County, the accused intentionally attempted to cause his penis to penetrate the vagina of CA a child aged 8 years.

2. The appellant also faced the second count of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*. He denied the offence.

3. The trial Magistrate considered the evidence tendered by the 6 prosecution witnesses and the appellant's sworn testimony and found that the prosecution had proved their case against the appellant on the first count and convicted and sentenced the appellant to serve eight (8) years imprisonment.

4. Being aggrieved by his conviction and sentence, the appellant filed the instant appeal on the 15.9.2017 raising nine grounds of appeal as follows:

    a. The trial magistrate erred in fact and law by finding that the appellant was guilty yet the prosecution did not prove its case beyond reasonable doubt.

b. The trial magistrate erred in fact and law by failing to conduct a voire dire probe/hearing on the minor/complainant leading to a gross misapprehension of the law.

c. The trial magistrate erred in law by failing to find merit in otherwise watertight and believable evidence of the appellant which was incompatible with his guilt.

d. The learned magistrate erred in fact and law by failing to consider the believable evidence of PW3 who testified that the appellant had been taken to his office on an initial complaint of stealing a chicken and not attempted defilement.

e. The trial magistrate erred in fact and law by using the uncorroborated evidence of the minor to convict the appellant.

f. The trial magistrate erred in fact and law by failing to consider that there were no eye witnesses to the alleged offence and sustaining a conviction in such circumstances is dangerous and bad in law.

g. The learned magistrate failed in fact and law by failing to take note that there was no evidence of a single witness that showed that the appellant actually attempted to defile the complainant i.e. remove the complainant's own article(s) of clothing or his own.

h. The learned magistrate erred in fact and law by finding that the elements of the offence were proved beyond reasonable doubt yet the evidence tendered in summation was underwhelming and could not sustain a conviction.

i. Any other ground to be advance at the hearing hereof.

Submissions

5. The appeal was canvassed by way of written submissions with only the appellant filing his submissions through counsel Mr Odhiambo. It was submitted on behalf of the appellant vide his submissions dated 5th April 2022 that the failure by the trial court to conduct a voire dire examination on the minor who was the sole eye witness of the alleged offence was fatal to the conviction and as such the judgement was unsafe and not legally sound. Reliance was placed on the Court of Appeal case of *Japheth Mwambire Mbitha* (2019) e KLR.

6. The appellant further submitted that the prosecution failed to prove the actus reus and the mens rea of the alleged offence as no evidence was led to the effect that the appellant attempted to or actually removed his articles of clothing or the complainant's.

7. The appellant further submitted that the evidence of PW3, the sub Chief cast doubt on the prosecution evidence in whole as it was to the effect that the appellant was brought to him on accusations of having stolen a chicken and thus it was not clear how the same morphed into a case of attempted defilement.

8. The appellant submitted that his conviction was based purely on secondary/hearsay evidence which was uncorroborated and offended the provisions of section 124 of the *Evidence Act* and as such his conviction was unsafe and should be quashed.

Analysis of the evidence before the trial court

9. This being a first appeal, the duty of the first appellate court is to re-analyze and re-consider the evidence tendered before the trial court with a view to arriving at its own independent conclusions. See *Okeno v Republic* [1972] EA 32.

10. In *Kiilu & Another v Republic* [2005]1 KLR 174, the Court of Appeal stated that:

> " 1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.
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> 2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses."

11. The same holding was reiterated in the case of *David Njuguna Wairimu v Republic* [2010] eKLR.

12. The evidence before the trial court was as follows: PW1 Stephen Ogongo testified that on the 25.11.202 at 7pm he left work for his home at Sinaga where he stayed with the victim. He stated that he had left the victim with Mzee Isaac Masambo but he did not get the child at home when he arrived and was informed by Mzee Isaac's wife that the victim had been sent to the shop by her daughter and had not come back.

13. PW1 further testified that he called Mzee Isaac who had gone to the Chief with the victim and later met Mzee with the accused who told him that they were on their way to the Chief's office. He further testified that the matter was reported and the victim taken to Yala Hospital. He stated that the victim was 8 years old as she was born on the 4.4.2012 and he identified a birth certificate to that effect.

14. In cross-examination, PW1 stated that the victim did not know the name of the accused but just his appearance though he did not know whether the child gave the description of the attacker. He stated that he saw the appellant that night at 7pm and further stated that the victim pointed out at the appellant on the way to the police station. He further stated that the victim saw him and started crying then explained what had happened to her which was that the appellant held the victim by the neck and warned her not to shout.

15. PW2 Isaac Ochieng Migambo testified that on the 25.11.2020 at 5pm he was at home when he heard the child crying from the road and that she came running shouting that she had been raped. He testified that he asked her who had raped her but the child did not give a name or describe the clothes or appearance. PW2 further testified that he went immediately but did not find the attacker. He further stated that at 7pm, George Odhiambo, the sub-Chief of Lihanda told him to go with the child to his office where he found the accused-appellant herein as well as 6 youth wingers and that when the sub-Chief asked the girl to identify the appellant, she did after which they proceeded to Sinaga Police Post. He stated that he did not see the appellant attempting to rape the minor.

16. In cross-examination, PW2 stated that he had never seen the appellant in the village and did not know him but that he saw him that night at 7pm at the Chief's house.

17. PW3, George Odhiambo Salala testified that he had been the assistant Chief of the area since 2006. He stated that on the 25.11.2020 at about 4.30pm, he was approaching his home from work when he saw 4 people approaching him, who informed him that they had arrested someone running away into a thicket. It was his testimony that he took the accused/appellant herein into his office from where other people came, including a lady by the name Mercy Omollo who claimed that the incident took place at Sinaga village where someone attempted to defile a girl.

18. It was his testimony that he called the area clan elder who confirmed that a similar incident had happened and brought the victim to him, which victim informed him that she had been sent to the shop and found someone on the road and on her return she still found the person who asked for directions to Sinaga which she gave and left but the person started following her from behind and then grabbed her trying to take her to the nearby village.

19. PW3 testified that the victim informed him that she raised an alarm as a woman was approaching them and the person ran away. He further testified that the victim identified the appellant from a group of 9 persons after which they escorted him to Sinaga where he was booked. It was his testimony that the appellant was dragging the victim towards the bush. He further stated that the accused was among a line of 6 sitted men and that he admitted having talked to the victim.

20. In cross-examination, PW3 stated that the appellant was brought on suspicion of stealing chicken and that he called the Chief to confirm rumours by Mercy Omolo. He further stated that he put the appellant among 6 people so that the victim could identify him. He reiterated that what he said at the police station and the court were the same thing.

21. PW3 stated that the number of persons from whom the appellant was identified was 8 and not 6 as he had said which was a slip of the tongue. He further stated that he knew the appellant as he had arrested him in 2018 on the same offence of sexual offence, a case which was on-going in court.

22. PW4 CA a minor was taken through a voire dire examination and found understanding of the importance of telling the truth and thus able to be sworn. It was her testimony that on the 25.11.2020 she was returning home at about 5pm having gone to buy rice, potatoes and tomatoes when she met a man who asked her where Sinaga was. She stated that the person held her by the neck and took her to the bush and told her not to scream but she screamed.

23. PW4 further stated that when the appellant saw another woman, he ran away and the woman told another who also screamed. She stated that she left for home where her grandfather, Isaac, told her to go to the Chief to report. It was her testimony that the Chief told her to show him the person who had accosted her which she did after which she went to Sinaga Police Station and recorded a statement. It was her testimony that the appellant offended her by pressing her neck though he did not do anything else. PW4 identified the appellant in the dock.

24. In cross-examination, PW4 stated that she had no relationship with the appellant and had never seen him since birth and also did not know him.

25. PW5, Shadrack Kennedy Otieno a clinical officer from Yala testified that he had the victim's P3 form which was filled upon report of a case of attempted defilement where the child was strangled, cried loudly and was rescued before she was defiled.

26. On examination, PW5 noted that the victim had changed clothes and that she had neck pains but no bruises on the neck and head. He stated that everything else was normal and that the injuries had lasted a day. He further testified that the weapon used was a blunt object and that she was treated at nearby dispensary.

27. PW5 testified that the degree of injury was harm and that the offence was attempted. He further testified that the complainant was 8 years old and that her genitalia was intact as there was no indication of penetration, discharge or vaginal bleeding. He stated that HVS was normal and the HIV test was negative. He produced the P3 form as PE1 and the PRC as PE2.

28. In cross-examination, PW5 stated the patient did not know the person but was rescued by someone who knew the perpetrator. He stated that he did not know if this was true or not.

29. PW6 No. 85470 P.C. Zablon Nyesa from Siaya Police Station testified on behalf of P.C. Silas Nyamori of Sinaga Police Station. It was his testimony that on 25.11.2020 at around 2018hrs, P.C. Nyamori was called by P.C. Muloko who informed him that members of the public at the report office had been sent by Chief and that there was a juvenile aged 8 years old, CA.

30. PW6 testified that P.C. Nyamori recorded the report on the O.B. that the appellant had tried to defile the complainant who was going home from the shop but was rescued by members of the public. He testified that the accused was booked and later the victim was issued with a P3 form which was filled at Yala and statements recorded upon completion of investigations and the appellant charged.

31. Placed on his defence the appellant elected to give a sworn testimony in which he stated that he stayed at Wagai and that on the said date of the offence, he went to Yala and returned at around 4pm as he was hurrying up to catch up with the curfew hours.

32. He stated that he went to a homestead where he asked for drinking water as he was thirsty, which he was given by some lady. It was his testimony that some people who were drank went to the homestead and started talking anyhow to which he responded by telling them that he hailed from Uranga in Gem which prompted the lady to call the Chief and inform him that he was a stranger in the area after which they took him to the Chief where the Chief alleged that he was one of the chicken thieves in the area but he denied after which he was taken to the police and held in custody then brought before court. The appellant testified that he was not informed of the reason for his arrest and further denied committing the offence against the minor herein or having stolen chicken.

33. In cross-examination, the appellant stated that on 25.11.2020 he had returned from work at Yala. He stated that he was engaged in jua kali work and farming at Yala. He stated that on that particular day, he worked on a road and dug a trench. He stated that he used to work on different days not every day and that he entered some home and requested for water to drink. He further stated that home was at Sinaga.

34. The appellant further stated that he did not meet the child a girl aged 8 years old and that the charges against him were fabricated and false. He stated that he had been in custody since his arrest.

Determination

35. I have considered the evidence, grounds of appeal and the submissions by the appellant. The issue for determination is whether the case against the appellant was proved beyond reasonable doubt. In other words, were the ingredients of the offence of attempted defilement proved?

36. Section 9(1) and 9(2) of the *Sexual Offence Act* provides that:

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> (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"

37. There is a plethora of case law on this subject. In the case of *Benson Musumbi v Republic* [2019] eKLR the court stated as follows on the ingredients of the offence of attempted defilement:

> "21. 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 assailant, and then prove steps taken by the assailant to execute the defilement which did not succeed. Attempted defilement is as if it were a failed defilement, because there was no penetration."

38. In *John Gatheru Wanyoike v Republic* [2019] eKLR the court reiterated as follows:

> "It is clear that the elements of the offence of attempted defilement are similar to those of defilement save that there was no penetration. The prosecution must prove that the child was a minor, that there was an act to cause penetration, which was not successful, and that there was positive identification of the accused defiler."

39. Thus in determining this Appeal, this court has to establish the following elements if the offence of attempted defilement were proved beyond reasonable doubt:

a) Whether the age of the complainant was proved.

b) Whether there was an act to cause penetration, which was not successful.

c) Whether the appellant was positivity identified by the minor as her assailant.

40. On the first element of proof of age, in *Charles Nega v Republic* Criminal Appeal No. 38 of 2015 [2016] eKLR Mrima J stated that:

> "I however wish to further state that from the wording of Section 9 of the *Sexual Offences Act* (and unlike in the offences of defilement and rape where the exact age of the victim must be proved bearing the weight it has in sentencing), 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."

41. In *Daniel Ombasa Omwoyo v Republic* [2016] eKLR W. Okwany J observed that

> "On the issue of age of Complainant, my reading of Section 9(1) and (2) of the *Sexual Offences Act* show that age is not a factor for an offence under this Section other than the requirement that the victim of the offence be a child. To my mind, the only requirement of age is that the victim be under 18 years this being the definition of a child under the Kenyan Law. "

42. In the instant appeal, I find that the age of the complainant was proved by the testimony of PW1 who testified that the complainant was 8 years old and further corroborated by the testimony of PW6 who produced the complainant's Birth Certificate as PEx3 that showed that the complainant was born on

the 4.4.2012 and was therefore exactly 8 years 7 months at the time the alleged offence took place. It was thus established beyond reasonable doubt that the complainant was a minor. I so find.

43. As to whether there was an act to cause penetration that was not successful, in the case of Benson Musumbi v Republic [2019] eKLR it was stated that:

> " In order to prove an attempt to commit an offence, the prosecution must prove the mens rea which is the intention and the actus reus which constitute the overt act which is geared to the execution of the intention. The actus reus must be more than mere preparation to commit the act as there is a difference between mere preparation to commit an offence and attempting to commit an offence."

44. The above holding was reiterated in *Daniel Simiyu Wanyonyi v Republic* [2019] eKLR where Riechi J held that:

> " This Court when dealing with an appeal from a conviction of attempted defilement in Bungoma Hc. Cri. Appeal No. 176 of 2016 stated; when a court of law is faced with any charge on an attempted offence, care has to be taken to ensure that the attempt, as opposed to mere acts of preparation, is proved since however strong the evidence may be if it only relates to actions in preparation to commit a certain crime, that cannot justify a conviction on an attempted charge. In the circumstance or clarity purposes, the evidence must be led which goes beyond the preparatory stages and right to the doorstep of possible commission of the offence. It ought to be demonstrated that the accused had committed the last act to the actual commission of the specific offence attempted. Likewise, the intention to commit the crime must also be proved.

45. Section 388 of the *Penal Code* defines "attempt" as:-

> (1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfillment, and manifests his intention by some overt act, but does not fulfill 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 fulfillment 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.

46. The two main ingredients of an attempted offence are the intention (mens rea) and the execution of the intention (actus reus). The prosecution must thus among other things, prove the steps taken by the accused to execute the defilement which did not succeed.

47. In *David Ochieng Aketch v Republic* [2015] eKLR Makau J observed as follows on attempted defilement:

> " The appellant was charged and convicted with an attempted defilement contrary to Section 9 (1) of *Sexual Offences Act* No. 3 of 2006. What is attempted defilement? It can safely be stated to be the unsuccessful defilement. For a successful prosecution of an offence

of attempted defilement, the prosecution must adduce sufficient evidence to the required standard to prove an attempted penetration. This may in my view include bruises or lacerations from complainant's vagina and/or bruises or lacerations of culprit's genital organ and finding male discharge such as semen or spermatozoa outside the complainant's vagina or innerwear without there being penetration. There was absence of penetration or evidence linking the culprit with the offence of attempted defilement."

48. In the instant case, the complainant PW4 testified that the appellant grabbed her by the neck and led her to the bush where he told her not to scream but she still screamed and on seeing an oncoming woman, the appellant ran away.

49. One of the appellant's grounds of appeal was that the complainant was not taken through a voire dire examination and thus his conviction based on the sole evidence of the complainant was fatal and ought to be quashed. In the case of *Japheth Mwambire Mbitha v Republic* [2019] eKLR, the Court of Appeal discussed the issue of voire dire examination and stated:

> "Voire dire examination is a hearing to determine the admissibility of evidence or the competency or qualification of a witness or juror (See Duhaime, Lloyd. "Voire Dire definition" Duhaime's Legal Dictionary). With specific regard to the testimony of children, voir dire examination is essential to enable the court satisfy itself that the child is conscious of the truth. The purpose of voir dire was explained by this court in Johnson Muiruri vs Republic [1983] KLR 445 as follows:
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> 1. "Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a voire dire examination, whether the child understands the nature of an oath in which even his sworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him.
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> 2. It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided.
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> 3. When dealing with the taking of an oath by a child of tender years, the inquiry as to the child's ability to understand the solemnity of the oath and the nature of it must be recorded, so that the cause the court took is clearly understood.
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> 4. A child ought only to be sworn and deemed properly sworn if the child understands and appreciates the solemnity of the occasion and the responsibility to tell the truth involved in the oath apart from the ordinary social duty to tell the truth.
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> 5. The judge is under a duty to record the terms in which he was persuaded and satisfied that the child understood the nature of the oath. The failure to do so is fatal to conviction."

50. In this case, a perusal of the evidence on record reveals that prior to receiving the testimony of PW4, the minor who was the complainant, the learned trial magistrate went on an enquiry of whether the complainant understood the meaning of telling the truth and the consequences of lying. Having

satisfied herself that the minor understood the importance of telling the truth, the court went on to record her evidence on oath.

51. No objection was ever raised by the appellant regarding the voire dire examination or the subsequent admission of the minors' testimony. Again, it bears repeating that the purpose of voire dire is to ensure that the minor understands the solemnity of oath and if not, at the very least, the importance of telling the truth. In this case, the record shows that a brief interview was conducted in this regard on the complainant; to which the complainant even indicated to the court that those who tell the truth go to God while those who lie go to the devil. The complainant further stated that she would like to go to heaven as she tells the truth.

52. Having satisfied herself that the complainant understood the import of speaking the truth in court and the consequences of lying, the trial magistrate then admitted her evidence and from the record, there is no reason to interfere with that finding of fact.

53. For the above reason, I find that the complainant's evidence was properly before court having undergone a voire doire.

54. Turning back to the scrutiny of the evidence by the complainant on the appellant's attempted defilement, I note that at no point did the complainant say in her testimony that the appellant touched her private parts or her inner pants in an attempt to take them off. The complainant also never testified that she saw the appellant's penis.

55. The medical evidence produced by PW5, the clinical officer who examined the complainant was that the complainant had neck pains but no bruises and further that the complainant's genitalia was intact and there was no indication of penetration, discharge or vaginal bleeding.

56. From the evidence, it is clear that the appellant was preparing to commit the act but had not attempted to do so. Considering this evidence and the case law cited above, I find that there was no attempted penetration.

57. An examination of the appellant's other grounds of appeal clearly demonstrates that the appellant's chagrin with the trial court's finding was on the basis that the prosecution had failed to prove their case against him, on the charges brought, beyond reasonable doubt.

58. Having herein above opined that there was no attempted penetration, I am inclined to agree with the appellant that the prosecution failed to prove their case against him beyond reasonable doubt. There is thus no need to interrogate whether the complainant identified the appellant as the same would be an act in futility.

59. In the circumstances, I find and hold that the appellant's conviction was unsafe. I hereby quash the conviction of the appellant and set aside the sentence of eight (8) years imprisonment imposed on him. Therefore, unless otherwise lawfully held, the appellant Kennedy Odhiambo Otieno is hereby set at liberty forthwith.

60. I so order.

61. File closed

DATED, SIGNED AND DELIVERED AT SIAYA THIS 23RD DAY OF MAY, 2022

R.E. ABURILI

JUDGE