



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 47 OF 2016

K K M.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the Original Conviction and Sentence in Criminal Case No. 417 of 2013 of the Senior Principal Magistrate's Court at Kilifi – L.N. Juma, RM)

JUDGEMENT

1. The Appellant, Kenga Kaloli Mraja, was charged, tried and convicted of the offence of attempted defilement contrary to Section 9(1) as read with Section 9(2) of the Sexual Offences Act, 2006 (S.O.A.). He was sentenced to ten years imprisonment.
2. Aggrieved by both conviction and sentence he has appealed to this court on the grounds that the trial court failed to take into account an existing grudge; that there were mass contradictions in the prosecution case; that the prosecution failed to prove the case to the required standard; and that the trial court failed to take his defence into account.
3. The parties disposed of the appeal by way of written submissions. The Appellant's submissions were mitigatory in nature. He urged this court to find that he was a first offender, remorseful, the sole breadwinner whose aging parents relied on, and that the trial magistrate had failed to consider the time spent in custody prior to the conviction and sentencing.
4. The Appellant further urged the court to consider the principles of sentencing which includes proportionality which requires consideration of the gravity of the offence and the principle of equality as per Article 27(1), (2) and (4) of the Constitution stating that denying him an opportunity to present his mitigation was unjust, discriminatory and unfair.
5. Although the Appellant did not submit on his grounds of appeal, he is entitled to the consideration of the same by this court.
6. The Republic through the Director of Public Prosecutions (DPP) submitted that the appeal should be dismissed for the reasons that the prosecution proved the ingredients of the offence beyond reasonable doubt, the evidence by the witnesses was consistent, and that the defence of an alleged grudge did not arise at the trial and is therefore an afterthought. Relying on the decision of John M. Mativo, J in **Bernard Kariuki Chege v Republic [2016] eKLR; Nyeri H.C. Criminal Appeal No. 120 of 2011**, it was urged for the Respondent that the offence with which the Appellant was charged being inchoate, intention to commit the crime had been proved.
7. Firstly, the onus of a first appellate court is to re-evaluate, reconsider, gauge and weigh the evidence afresh in order to reach its own conclusion whilst noting that the trial court had the advantage of observing the demeanour of the witnesses – see **Okeno v Republic [1972] E.A. 32**. Secondly, a first appellate court should be guided by the principle that a finding of fact made by the trial court should not be interfered with unless it was based on no evidence or on a misapprehension of the evidence or the trial court acted on the wrong principles – see **Gunga Baya & another v Republic [2015] eKLR**.
8. The particulars of the offence were that on 25th September, 2013 the Appellant attempted to defile S H K aged 9 years by grabbing and struggling her down.
9. The alleged victim testified as PW1 and stated that on the material day at about 10.00 p.m. the Appellant whom she identified as her uncle went to their home from a nearby club while drunk. He told her to switch off the lights and remove her panties but she ran out. She met PW3 Mwaringa Katana, a neighbor, and informed him of her encounter with the Appellant. They went back to the house where PW3 found the Appellant. PW1 informed the court that she was able to identify the Appellant as the lights were on. She also identified the Appellant in court. On cross-examination PW1 told the court that the Appellant did not touch her private parts but that he wanted to defile her but she ran away.

10. K K M., the mother of PW1 testified as PW2. She told the court that she left home in the morning and when she came back at night she found a large crowd outside her house who informed her of the attempted defilement. The Appellant, who is her brother-in-law, had been apprehended inside the house and was trying to fight off the crowd. She learned that PW1 had initially informed PW3 of the incident.

11. PW3 testified that on the material day he found the complainant crying. She reported the incident to him and he went and found the Appellant in the complainant's room. He raised alarm and people responded.

12. PW4 Sergeant Francis Rono told the court that he took over the case after investigations had been completed. He narrated how the incident occurred in the manner the witnesses had testified in court.

13. The Appellant opted to remain silent in his defence.

14. The trial court in finding the Appellant guilty relied on the decision in **High Court Criminal Appeal No. 136 of 2013 Omar Mohammed Ibrahim v Republic** and held that by demanding that the victim switches off the lights, remove her clothes and have sex with him the Appellant's acts constituted attempted defilement.

15. Section 9(1) of the S.O.A. provides that a person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed defilement.

16. It was thus incumbent upon the prosecution to adduce evidence to show that S H K was a human being aged under eighteen years. The complainant told the court that she was twelve years old. Before accepting the testimony of the complainant the trial magistrate subjected her to *voire dire* examination implying that the trial court formed the opinion that the complainant was a child of tender years. PW3 also talked of finding a child crying. In respect of the charge, the prosecution was simply required to prove that the complainant was a human being aged under the age of eighteen years. From the evidence on record, the prosecution discharged this duty.

17. Although not caught in the act, the Appellant was found in the house by PW3 confirming the evidence of the complainant who he had found stressed.

18. The law applicable to inchoate offences like that with which the Appellant was charged was stated by Spry, J in **Mussa s/o Saidi v Republic [1962] E.A. 454** as cited in **Bernard Kariuki Chege** (*supra*) thus:

“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. 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. The intention will, in the majority of cases, only be capable of proof by inference and it follows in such cases that an act must be of such a character as to be incompatible with another reasonable explanation. Secondly, if the intention is established, the act itself must not be too remote from the alleged intended offence.”

19. When a man tells a child to switch off the lights and remove her pants so that he can have sex with her, the only conclusion is that the man intends to defile the child. No other intention can be read into those words.

20. The Appellant submits that the trial court totally failed to consider his defence. It is not on record that the trial court took note of the Appellant's decision to offer a defence of silence. It must be remembered that the burden of proof never shifts as the onus to establish the guilt of an accused person always remains the prosecution.

21. In **Evans Wamalwa Simiyu v Republic [2016] eKLR; Criminal Appeal No. 118 of 2013 (Nairobi)** the Court of Appeal observed that:

“[24] The last issue for consideration is whether the trial court and the first appellate court failed to adequately consider the defence of the appellant....

[26] Clearly the trial magistrate misdirected himself. In his defence the appellant had stated that he knew nothing about the offence. Therefore his defence was a total denial, and the burden remained entirely upon the prosecution to prove its case. The appellant was not under any obligation to challenge the prosecution evidence. He could as well have opted to say nothing in his defence and no adverse inference could be drawn from that silence....”

22. Looking at the record, it is clear that the trial magistrate did not make any comment about the Appellant's decision not to say anything in his defence. The trial magistrate cannot therefore be accused of drawing any negative inference from the Appellant's decision to maintain silence in his defence.

23. Looking at the evidence adduced by the prosecution, it becomes apparent that the prosecution proved its case beyond reasonable doubt. The conviction of the Appellant is therefore safe.

24. On the issue of sentencing, the governing law is the one stated by the Court of Appeal in **Bernard Kimani Gacheru v Republic [2002] eKLR; Criminal Appeal No. 188 of 2000 (Nakuru)** where it was held that:

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court

will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, any one of the matters already stated is shown to exist.”

25. The trial court gave the Appellant an opportunity to offer his mitigation. He stated that he knew nothing about the charges and that they were false. The trial court then indicated that the Appellant was not remorseful and gave him ten years imprisonment to act as a deterrence. The sentence was within the provision of Section 9(2) of the S.O.A. which gives the minimum sentence for the offence charged as ten years. It is however noted that denial of an offence cannot be equated to lack of remorse. It was therefore erroneous for the trial magistrate to hold that the Appellant was not remorseful simply because he insisted that he knew nothing about the offence. However, the sentence imposed was the minimum sentence provided by the law and it cannot be said to be illegal, unlawful or manifestly unjust. The Appellant was therefore not prejudiced by the finding that he was not remorseful. He could only have been prejudiced if he was sentenced to a jail term longer than the minimum sentence.

26. Nevertheless, it is noted that in passing sentence the trial court failed to take into account the period spent in custody. The Appellant was arrested on 27th September, 2013 and was all along in custody up to 29th June, 2016 when he was sentenced. He was therefore in custody for 2 years and nine months prior to his sentencing and by virtue of Section 333(2) of the Criminal Procedure Code the period spent in custody ought to have been taken into account.

27. In summary, the appeal on conviction fails. However, the appeal on sentence succeeds to the extent that the same is reduced from ten years to seven years and three months to be served from 29th June, 2016 when the Appellant was sentenced.

Dated, signed and delivered at Malindi this 22nd day of November, 2018.

W. KORIR,

JUDGE OF THE HIGH COURT