Muchomba v Director of Public Prosecution (Criminal Appeal E083 of 2023) [2025] KEHC 1735 (KLR) (7 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1735 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL APPEAL E083 OF 2023

LW GITARI, J

FEBRUARY 7, 2025

BETWEEN

KENNETH MUCHOMBA ..... APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTION ..... RESPONDENT

JUDGMENT

1. The appellant was charged with the offence of attempted defilement Contrary to Section 9(1) as read with Section 9(2) of the *Sexual Offences Act* No.3 of 2006 in the Magistrate's court at Githongo S.O E017/2021. The particulars are that the 3rd day of December 2019 at about 1500 Hours at Kinja Location in Imenti Central Sub-County within Meru County he intentionally attempted to cause his penis to penetrate the vagina of A.K a child aged Five (5) years.

2. In the alternative, he was charged with committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*.

3. The appellant pleaded not guilty and after a full trial, he was found guilty and was sentenced to serve Fifty (50) years imprisonment on the main charge of attempted defilement.

4. The appellant was dissatisfied with the conviction and sentence and filed this appeal based on four grounds on the amended supplementary grounds of Appeal. The grounds are:-

    1. That, the learned Trial Magistrate erred in both matters of law ad fact by failing to note that prosecution testimony tendered were inconsistent, contradictory and paradoxical and not safe to hold a conviction.

    2. That, the learned Trial Magistrate erred in law and fact by failing to note that the prosecution case was not proved beyond reasonable doubt.

3. That, the learned Trial Magistrate erred in both law and fact by rejecting the appellant's plausible defense without giving cogent reasons.

4. That, the 50 years sentence preferred for the appellant to serve for attempted defilement is excessive, harsh and agonizing.

5. He prays that the appeal be allowed, sentence be set aside and he be set at liberty.

6. The respondent opposed the appeal and prayed that it be dismissed.

The Prosecution's Case

7. The complainant (PW1) was a child aged five years who gave usworn evidence after the court ruled that she did not understand the meaning of the oath. She told the court that on the material day she was sent by L (PW2) to go and pick a thorn to be used to undo her hair. The appellant called her and she went to his house. While there, the appellant placed her on his bed and removed her pant. The appellant removed his penis and inserted it in the complainant's vagina. L (PW2) went looking for PW1 and realized she was inside the appellant's house.

8. PW2 called PW1 and she answered from the house of the appellant. She pushed the widow. PW2 saw PW1 inside the house and the appellant was hiding a small red object branded sure. He was holding it on his left hand and he was naked. PW1 was lying on the bed.

9. PW2 asked him what he was doing and he said nothing. PW2 told the appellant to open. PW1 came out and they went and reported to their grandmother, PW3.

10. PW3 called the area manager who went and arrested the appellant.

11. The clinician at Kanyakine Hospital, PW4 examined the complainant and found that the Labia Minora was reddish and swollen and the hymen was broken. The high virginal swab showed numerous pus cells but no spermatozoa were seen. He concluded that the broken hymen was suggestive of penetrative sexual intercourse. He testified that the complainant was five years old. She produced the treatment notes, lab request form, Post Rape Care Form and a P3 form as exhibits.

12. PW5 testified that he was called by PW3 and he proceeded to her homestead. PW1 narrated to him what happened. He arrested the appellant and took him to the police station.

13. PW6 was the investigating officer. She testified that she interviewed the PW1 and referred her to hospital, she produced the complainant's birth certificate as exhibit 5 showing that she was five years old in 2019.

Defence Case

14. At the close of the prosecution case, the trial magistrate ruled that the appellant had a case to answer. The appellant opted to give his defence on Oath. He denied the charge and stated that he was framed by PW3 who is his uncle's wife. The learned trial magistrate then convicted the appellant and sentenced him.

The Appeal

15. The appeal was canvassed by way of written submissions.

Appellant's Submissions

16. The appellant submits that the evidence tendered was uncorroborated, contradicting and is inconsistent. The appellant submits that the sentence was harsh, inhumane and affords psychological torture to the appellant. He prays that it be set aside and he be set at liberty.

Respondent's Submissions

17. It is submitted that in a charge of attempted defilement the prosecution must prove all the ingredients of defilement except penetration, which completes the charge of defilement. That the prosecution must proof that, the victim was a child, that the perpetrator was positively identified and the steps taken towards committing the offence of defilement which was not complete. The respondent submits that the age of the victim was proved with the production of a birth certificate. He has relied on the case of David Aketch Ochieng –vs- Republic (2015) eKLR. It is further submitted that the facts disclose a charge of defilement and the learned magistrate convicted on the charge of attempted defilement. The respondent further submits that the appellant was identified as the perpetrator. On sentence, the respondent submits that it was lawful and should be upheld. He relies on the court of Appeal decision in Shadrack Kipkoech Kogo –vs- Republic Eldoret Criminal Appeal No.253/2003.

Analysis And Determination

18. I have considered the proceedings before the learned Trial Magistrate and the submissions. The issues which arise for determination are:

    1. Whether the charge was proved beyond any reasonable doubt.

    2. Whether the sentence was harsh and excessive.

19. This is a first appeal and this court has a duty to re-evaluate the evidence which was adduced before the trial court and come up with its own independent findings. See Okemo –vs- Republic (1972 E.A. 32. The appellant is charged with attempted defilement contrary to Section 9(1) as read with Section 9(2) of the *Sexual Offences Act*, which provides as follows:

> A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.
>
> 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 10 years."

20. The prosecution is supposed to prove the age of the victim and acts which constitute attempt but not the deed of the defilement, intention is the mensrea attempt the actus reus.

Proof of Age

21. The age of the complainant was proved to be five years at the time the offence was committed. This was proved by the prosecution of her birth certificate shows her date of birth is 2/11/2014. Age of the complainant was proved and with credible evidence. The court of Appeal in the case of Maripett Loon Komoth –vs- Republic, it stated that the definition of a child of tender years under the *Children Act* was held to apply under Section 19 of *Oaths and Statutory Declarations Act*.

22. The courts have held that a child of tender years is one under the age of fourteen years.

23. In Kibageny Arap Korir –vs- Republic, the court stated that where a child is fourteen years and below is called as a witness 'voire dire' examination should be conducted. The complainant who was aged five years is a child as defined under the Children's Act and a child of tender years at that.

Attempted defilement

24. The evidence tendered by the prosecution points to defilement and not attempted defilement. As submitted by the respondent, they did not amend the charge even after noting that the evidence did not support the charge of attempted defilement.

25. The ingredients of a charge of attempted defilement are the same as those of defilement apart from penetration. In this case the matter was reported to the police and the complainant was referred to hospital. A P3 form was filed showing that the complainant hymen was broken and there was redness on the genitalia and a discharge. The second ingredient of the offence of defilement requires that there must be unsuccessful act of penetration on the victim.

26. The term attempt is defined under Section 380 of the *Penal Code* which provides:

> No finding, sentence or order of a criminal court shall be set aside merely on the ground that the inquiry, trial or other proceeding in the course of which it was arrived at or passed took place in a wrong area, unless it appears that the error has occasioned a failure of justice."

27. In this case, there was evidence of defilement and the charge was attempt to defile. It is not sufficient for the prosecution to demonstrate that there was an intention to commit the act, they must also demonstrate that the accused had an intention to put his plan into action by some act. For there to be an attempt to commit an offence by a person that person must:Show the intent to commit the offence.Begin to put his intention to commit the offence into execution by means adapted to its fulfilment.

28. This means that the accused begins to carry out his intention to commit the offence in a way suitable to bring about what he intends to achieve.

29. Do the same act which manifests his intention, that is, he performs an act which is capable of being observed by another and which in itself makes clear his intention.

30. From the evidence presented by the prosecution, it is clear that what was proved was the charge of defilement. See the testimony of PW1 and PW2 as well as PW4 who confirmed that there was penetration.

31. The offence of defilement is not cognate to the offence of attempted defilement as it is not a minor offence.

32. Cognate offence is defined as:

> A lesser offence that is related to the greater offence because it shares several of the elements of the greater offence and is of the same class or category"

See Black's Law Dictionary 9th Edition at page 1186

33. Section 179 of the *Criminal Procedure Code* provides as follows:

(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but

the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it."

34. The section provides that a person may be convicted for a lesser offence which is disclosed by the evidence though it was not the offence he was charged with.

35. We have a dilemma here. There is no law that allows and appellate court to convict a person with a more serious offence for which he was not charged with. See Kalu –vs- Republic Court of Appeal (2010) IKLR.

36. The appellate court can convict on a minor and cognate offence.

37. See Court of Appeal in the case of Kalu –vs- Republic 2010 IKLR.

38. The court stated that a court cannot convict (convert) the charge because the evidence proves a more serious offence. So if a person is charged with attempt he cannot be convicted for the offence even if the facts disclose the offence.

39. In this case, the only open option is to let the conviction of the learned magistrate to stand. It is not clear why the charge sheet was not amended whether there were contradictions and inconsistences.

40. It is trite law that where contradictions are material and tend to show that the witnesses are not honest or truthful; the court will cast doubt on the evidence. However, where contradictions are minor, they are ignored. In the case of Twehangare Alfred –vs- Uganda court of Appeal No.139/2003 UGCA 6 cited with approval by the court of Appeal in the case of Erick Onyango Odeng –vs- Republic (2014) eKLR it was held:-

> With regard to contradictions in the prosecutions cases 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 case"

41. I have considered the evidence adduced by the prosecution witnesses.

42. I find that there were no material contradictions in the evidence of the witnesses.

43. Section 382 of *Criminal Procedure Code* provides:

> Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this ode, unless the error, omission or irregularity has occasioned a failure of justice:
>
> Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

44. The terms stated by witnesses did not prejudice the appellant in any way. The evidence of the witnesses was not challenged. It follows that the appellant cannot raise them at this stage. The test under Section

382 of the *Criminal Procedure Code* (Supra) is whether the appellant was prejudiced. I find that he was not and therefore the grounds must fail.

45. Looking at the evidence, starting with the charge sheet, the ofence is alleged to have been committed on 3/12/2019. As per part – 1 of the P3 form the offence was reported on 3/12/2010 at 17.30Hours and she was sent to hospital on 4/12/2019. The P3 form was filled on 31/1/2020. The treatment notes exhibit – 2 shows that she was attended in hospital on 4/12/2019. The Post Rape Care Form was filled on 4/12/2019.

46. All the witnesses testified that the incident happened on 3/12/2019. The evidence was consistent that the offence was committed on 3/12/2019 and it was reported to the police and complainant was examined in hospital.

47. On the ground that his defence was rejected for no good reason, I have perused the record of appeal. This is far from the truth. The learned magistrate considered the defence at length and stated that the appellant placed himself at the scene and admitted that PW1 was inside his locked house and she only opened the door for her when she was called by PW2 through the widow. That it was undisputed that the two were immediate neighbours. That she had no doubt in her mind that the appellant was the perpetrator. Based on the reasons given, the learned magistrate was right in reaching at that finding.

48. Finally, the appellant submits that the sentence was harsh and excessive. Section 9(1) as read with Section ((2) of the *Sexual Offences Act* provides for a sentence of not less than ten years. It is trite that sentencing is essentially an exercise of discretion of the trial judge and an appellant court will not normally interfere with the exercise of that discretion unless it shows that the court took into account same irrelevant matters or failed to take into account or short of that the sentence was manifestly harsh. In Shadrack Kipkoech Kogo –vs- Republic Eldoret Criminal Appeal No.253/2003, Court of Appeal, it was stated as follows:-

> Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principal and must be interfered."

49. The record shows that the appellant said he had chest problems and his eyes feel pain. The learned magistrate took into account relevant factors when passing the sentence. The appellant had defiled a child aged five years. His mitigation did not portray an offender who was remorseful. The likely ramifications of his actions on the child's future called for a deterrent sentence. I find no reason to interfere with the sentence imposed by the learned magistrate.

Conclusion

50. For the reasons stated in this Judgment, this appeal is without merits and fails. The appeal is dismissed.

DATED, SIGNED AND DELIVERED AT MERU THIS 7TH DAY OF FEBRUARY 2025.

L.W. GITARI

JUDGE