Matayo v Republic (Criminal Appeal E098 of 2022)
[2025] KEHC 8213 (KLR) (Crim) (15 May 2025) (Judgment)

Neutral citation: [2025] KEHC 8213 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E098 OF 2022

CJ KENDAGOR, J

MAY 15, 2025

BETWEEN

GODFREY JUMA MATAYO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the conviction and sentence in Makadara Sexual Offences No. 102 of 2019 delivered on 4th October, 2022 by Hon. H.M. Nyaga (CM - as he then was)

JUDGMENT

1. The Appellant was charged with the offence of attempted defilement contrary to Section 9 (1) (2) of the *Sexual Offences Act*. The particulars of the offence are that on the 22nd of April, 2019 at [particulars withheld] within Nairobi County, the Appellant intentionally attempted to cause his penis to penetrate the vagina of one S. M. a child aged 8 years.

2. He faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act*, particulars of which are that on the 22nd of April, 2019 at [particulars withheld] within Nairobi County, he touched the vagina of S.M, a child aged 8 years.

3. After trial, he was found guilty and sentenced to twenty (20) years imprisonment on the main charge, whilst the alternative charge was held in abeyance.

4. The appellant, being aggrieved by the conviction and sentence, preferred the present appeal.

5. In the amended grounds of appeal, he contended that the trial magistrate made errors in both law and fact by upholding a fundamentally unfair trial, in violation of Articles 25 and 50 of *the Constitution*. He asserted that the medical evidence presented contradicted Sections 77 and 33 of the *Evidence Act*. Furthermore, he argued that the trial court relied on the evidence of an unreliable witness and failed to

acknowledge the absence of crucial witnesses. Additionally, he claimed that the sentence imposed on him was excessively harsh and disproportionate to the offence charged.

Written submissions

6. The Appellant in his submissions argues that, contrary to Section 33 of the *Evidence Act*, PW3 testified on behalf of her colleague and thereby produced the impugned documents, even though she was not the maker. Further, that the PCR report and medical certificates were not submitted by a government analyst but rather by the Sexual Recovery Centre and Médecins Sans Frontières Mathare and Eastleigh project, respectively.

7. He submitted that the trial Court relied on wrong principles, falling short of Article 47, 159 (1) (2) (d) and 160 (1) of *the Constitution*, where the Magistrate contradicted his findings where on one point, he stated that the acts did not amount to penetration and later stated that there was penetration as defined in Section 2 of the *Sexual Offences Act*.

8. He argued that the narratives by PW1 and PW2 were contradictory as at no point did PW1 (Complainant) state any role PW2 had in the material circumstances, yet PW2 insisted that she was the one who escorted the complainant from the Appellant to her mother.

9. Lastly, he submitted that despite his right to benefit from the least sentence, he was disproportionately sentenced to 20 years, yet the minimum sentence is 10 years. He relied on several authorities including S v Malgas 2001 (1) SACR 469 (SCA), Shadrack Kipkoech v R Eldoret Cr. Appeal No. 253 of 2003, Maina v Republic [1970] EACA, Pett v Greyhound Racing Association [1968] 2 ALL ER 545.

10. The Respondent submitted that the testimony of PW1 was not only coherent but also rich in detail, providing crucial insights into the events surrounding the case. The Respondent asserted that all the necessary elements of the offence had been proved. They invited the Court to hold that the evidence presented substantiated the case beyond a reasonable doubt.

Determination

11. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of Odhiambo v Republic Cr. App No. 280 of 2004 [2005] 1 KLR where the Court of Appeal held that: -

> "On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour".

12. This Court is enjoined to carefully and exhaustively scrutinize the evidence adduced before the trial court to arrive at my own independent conclusions regarding the validity or otherwise of the Appellant's conviction and sentence.

13. I find that the key issues arising for determination are as follows:

    I. Whether the appellant was accorded a fair trial;

    II. Whether the evidence presented before the trial court proved the guilt of the appellant as charged beyond any reasonable doubt;

    III. Whether the sentence was appropriate.

14. 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 what completes the offence of defilement. Section 9(1) of the *Sexual Offences Act* defines attempted defilement 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."

15. Under Section 9 (3), of the Act, the penalty for the offence is imprisonment for a term not less than 10 years.

16. The prosecution was required to establish that the victim falls within the definition of a child as outlined in the *Children Act*. Furthermore, it must provide positive identification of the assailant and demonstrate that the assailant engaged in clear and intentional actions aimed at committing the offence of defilement, even if the act of penetration was ultimately not completed.

17. An 'attempt to commit an offence' is defined in 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.
>
> 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.
>
> 3. It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence."

18. On proof of age, I wish to state at the outset that the importance of proving the age of a victim in sexual offences is paramount considering that under the *Sexual Offences Act*, the prescribed sentence is determined by the age of the victim.

19. In respect to age of the victim, in the case of Edwin Nyambogo Onsongo v Republic [2016] eKLR, the court had this to say in respect of proof of age of victim in cases under *Sexual offences Act*: -

> "... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable."

20. PW3, the Complainant's mother, testified and supported her testimony by presenting the child's birth certificate, which indicates that she was born on 25th September, 2012. The incident took place on 22nd April, 2019. Based on this information, it can be concluded that the victim was 6 years and 7 months old at the time of the incident.

21. The record before me, shows clearly that complainant was properly subjected to voire dire examination at the end of which, the learned Magistrate concluded that she was intelligent and understood the duty of speaking the truth and directed that she be affirmed. She was subjected to cross-examination.

22. PW1's testimony stated that on a particular day in April, the Appellant took her to his bed at his house and did what she described in Swahili word as 'tabia mbaya'. She described that he removed both his trousers and hers, then lay on top of her and inserted his 'thing' into her genital area, which she pointed out to the court. Additionally, she mentioned that he first put his fingers in her 'dudu'. She stated that he had turned on the radio, which was playing loud music and that after the act he gave her ten shillings and told her not to tell anyone.

23. PW2, a former neighbour of the appellant at the time of the incident, testified that she became curious when she heard the Appellant speaking to someone, saying in Kiswahili 'karibu hapa ndio kwangu' (English translation - welcome this is my place), and a child's voice responded 'nipee' (translation- give me). Then, the radio volume increased, and she heard the child's voice say in Kiswahili 'sijui kudance' (translation - I don't know how to dance).

24. She stated that, being a mother, she sought to understand what was happening after noticing little blue slippers outside the Appellant's door. She stated that a few minutes later, the Complainant, PW1, came out of the Appellant's house, followed by the Appellant shortly after. She told the Court that she attempted to inquire what PW1 was doing in the Appellant's house, but the Appellant turned hostile and threatened to beat her up. She then took the Complainant to her house and later fled to find the minor's mother.

25. PW3, a clinician produced the medical certificate (exh1) and PRC form (exh2) P3 Form, on behalf of her colleague Selina Nyambu, which assessment established PW1's external genitalia had reddened around the vulva wall, but her hymen was intact.

26. PW4, the Complainant's mother, took her to the hospital for medical examination.

27. The Appellant contented that the medical evidence was inadmissible by dint that PW3 was not the maker thereof, and that the testimony of PW1 as with that of PW2 was not cogent but contradictory.

28. In the case of Joshua Otieno Oguga v Republic [2009] eKLR, the Court of Appeal considered the issue of production of documents in court other than by the maker of the same and stated thus-

> " That in short means that if the appellant wanted the medical report to be produced by a doctor, he had to apply to the court to summon the doctor who prepared the report, otherwise there was nothing wrong in law in the P3 form being produced by PC Ann Wambui as she did."

29. I have perused the trial Court's record and I note that the Appellant was duly made aware that PW3 was not the maker of the medical documents, and he unequivocally stated that he had no objection as to their production.

30. The Complainant used descriptive words in her testimony that the assailant did 'tabia mbaya' and also used the words 'thing' and 'dudu'.

31. In Muganga Chilejo Saha v Republic [2017], eKLR the Court of Appeal analyzed various cases where descriptive terms had been used to narrate sexual abuse;

> " Naturally, children who are victims of sexual abuse are likely to be devastated by the experience, and given their innocence, they may feel shy, embarrassed, and ashamed to relate

that experience before people and more so in a courtrooms. If the trend in the decided cases is anything to go by, courts in this country have generally accepted the use of euphemisms like, "alinifanyia tabia mbaya" (IE V R, Kapenguria H.C Cr. Case No. 11 of 2016), "he pricked me with a thorn from the front part of this body.", (Samuel Mwangi Kinyati v R, Nanyuki HC.CR.A. NO. 48 of 2015), "he used his thing for peeing" (David Otieno Alex v R, Homa Bay H.C Cr Ap. No. 44 of 2015), "he inserted his "dudu" into my "mapaja", (Joses Kaburu v R, Meru H.C Cr. Case No. 196 of 2016), "he used his munyunyu", (Thomas Alugha Ndegwa, Nbi H.C. Cr. Appeal No. 116 of 2011), as apt description of acts of defilement."

32. In David Aketch Ochieng v R, [2015] eKLR, Makau J. held as follows on proof of offence of attempted defilement;

> "...For a successful prosecution of an offence of an 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 made discharge such as semen or spermatozoa outside the complainant's vagina or innerwear without there being penetration."

33. In the present case, the Complainant, in addition to using the descriptive words 'tabia mbaya', also stated that the assailant put his 'thing', which is understood to refer to his penis, into her dudu which is understood to refer to her vagina. She used the reference 'dudu' to also mean his penis when she stated that he saw his 'dudu'.

34. Put together, I have no doubt that the words 'tabia mbaya' referred to inappropriate behaviour and that the euphemisms specifying the body parts alluded to her vagina and the assailant's penis.

35. From the medical evidence, the hymen was intact and the vagina was reddened around the vulva wall and the complainant stated that the assailant put his 'thing'. The Appellant in this appeal questioned the findings of whether there was penetration or not, and the trial court also examined the same.

36. Penetration is defined under Section 2 of the *Sexual Offences Act* as follows:

> "Penetration means the partial or complete insertion of the genital organs of a person into the genital organs of another person."

37. The Appellant argues that his right to a fair hearing was infringed upon as the trial Court contradicted his findings, where on one point, he stated that the acts did not amount to penetration and later stated that there was penetration.

38. I have reviewed the challenged excerpt of the trial Court's judgment. I observe that the trial Court clarified its reasoning regarding whether the evidence could support penetration. Based on the testimony as narrated by PW1 and the medical documents, it can be safely concluded that there was an attempted defilement; the evidence as presented did not sufficiently support that there was penetration. I see no injustice in the trial court's assessment and consideration of this issue. The conclusion is that the offence proved is the one he was charged with: attempted defilement.

39. The actions described by the complainant, such as the assailant removing both his and her trousers and lying on top of her, along with the evidence presented in the preceding paragraphs, demonstrate his intentions.

40. In examining the identification of the appellant as the perpetrator, the evidence shows he was a familiar figure to both the complainant and PW2, who rescued the child. The appellant was brought to the police station on 23rd April, 2019, just one day after the incident. Throughout the investigation, as relayed by PW6, there was no mention of any other suspect. Furthermore, the child's parents, PW4 and PW5, corroborated this identification, affirming not only that he was their neighbour but also that the Complainant distinctly referred to him as the assailant, adding weight to the case against him.

41. The Appellant in his defence contended that he was being framed up by PW2, suggesting ulterior motives and a lack of credibility on her part. However, after careful examination of the evidence, the trial Court found these claims to be baseless and unconvincing, leading to the dismissal of the defence's arguments. I concur.

42. Section 124 of the *Evidence Act* allows the court to convict based solely on the Complainant's testimony, provided it is deemed reliable. In this case, the Complainant's account was convincing enough for the court to move forward with a conviction despite the defence's assertions.

43. For the foregoing reasons, I have come to the same conclusion as the learned trial magistrate that in this case, the prosecution proved its case against the Appellant, and the offence of attempted defilement was proven beyond reasonable doubt and that the Appellant was properly convicted.

Whether the sentence imposed on the Appellant was harsh and excessive?

44. It is trite that although sentencing is at the discretion of the trial Court, that discretion must be exercised judiciously in accordance with the law taking into account the facts and circumstances of each case. The strict principles guiding interference with sentencing by the appellate Court were set out in S v Malgas 2001 (1) SACR 469 (SCA), as cited with approval in Kigen v Republic [2023] KEHC 1173 (KLR). In this persuasive authority, the Supreme Court of Appeal of South Africa held that: -

> " A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court... However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate"

45. It is not lost to me that section 9 (3) of the Act, provides the penalty for the offence is imprisonment for a term not less than 10 years.

46. The Appellant contended that the sentence of twenty (20) years imprisonment was excessively harsh given the specific circumstances of the case, particularly emphasizing his entitlement to receive the least possible sentence as a first-time offender.

47. The trial Court carefully weighed several factors in its sentencing decision. It took into account the mitigating arguments presented by the Appellant. Additionally, the Court considered the aggravating factors, such as the child's age and the violation of her dignity. Furthermore, the Court referenced the established Sentencing *Policy Guidelines of 2016*, which aim to ensure that sentences are fair and proportionate.

48. I find that the sentence does not appear to be harsh or excessive. The trial Court took into consideration the period spent in custody and clearly indicated that the 20-year sentence runs from the 25th April, 2019.

49. I uphold the conviction and the sentence. The appeal stands dismissed.

50. It is so ordered.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 15TH DAY OF MAY, 2025.

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C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Appellant presnt

Mr. Chebii, ODPP for Respondent