Mwikamba v Republic (Criminal Appeal E032 of 2023)
[2024] KEHC 981 (KLR) (7 February 2024) (Judgment)

Neutral citation: [2024] KEHC 981 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL APPEAL E032 OF 2023

LM NJUGUNA, J

FEBRUARY 7, 2024

BETWEEN

PAUL MWIKAMBA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal arising from the Judgment of Hon. J.M. Gichimu SPM in Senior Principal Magistrate's Court at Runyenjes MCSO no. E014 of 2022 delivered on 21st June 2023)

JUDGMENT

1. Before the court is a petition of appeal dated 24th October 2023 through which the appellant is seeking orders that the appeal be allowed, the conviction be quashed, sentence be set aside and he be set at liberty. The grounds of appeal are that the learned trial magistrate erred in both law and fact by:

    a. Convicting the appellant based on evidence that was inadequate and unable to sustain a conviction;

    b. Convicting the appellant without considering that the prosecution's case was full of inconsistencies and lacked corroboration hence offending section 163(1) of the *Evidence Act*;

    c. Disregarding the appellant's defense without giving cogent reasons; and

    d. Relying on the evidence of the prosecution witnesses without considering that the same was insufficient and unsatisfactory.

2. The appellant was charged with the offence of attempted defilement contrary to Section 9(1) of the Sexual Offenses Act No. 3 of 2006. The particulars of the charge are that on 27th August 2022 in Embu East Sub-county within Embu County, the appellant attempted to cause his penis to penetrate the vagina of BSW, a child aged 12 years. He also faced the alternative charge of committing an indecent act

with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006, whose particulars are that on 27th August 2022 in Embu East Sub-county within Embu County, the appellant intentionally touched the vagina and breast of BSW, a child aged 12 years.

3. When he was arraigned, the appellant pleaded not guilty and the plea was duly entered. The prosecution called 7 witnesses in support of its case.

4. PW1, Dennis Mwenda, a Clinician at Embu Level 5 Hospital testified that he examined the complainant following a case that had been reported at Runyenjes Police Station. He stated that from his examination, the complainant did not have injuries on her vagina and her hymen was intact.

5. PW2, the complainant, stated that on the material day, she had returned from school and she was sent to the shop by her mother and she went in the company of her friend PM. That both of them went to the shop and on the way back, the appellant called PM to his house which comprised of 2 rooms separated by a curtain. That he led PM to his bed which was behind the curtain and she remained on the outer side. That she does not know what the appellant did to PM but when he had finished, he called PW2, removed her trouser and pressed his penis between her thighs and there was a discharge. That the appellant then gave them a total of Kshs. 20/=. That on another occasion, he called PM again to do 'tabia mbaya' with him. That they told their teacher about the ordeal and her mother took them to Runyenjes Level 4 Hospital and then they recorded statements at Runyenjes Police Station. On cross-examination, she stated that on that day, they had been released from school early and she had gone home and removed her uniform.

6. PW3, PM, after voire dire, testified that she was on the way to the shops in the company of PW2 when the appellant called her and did 'tabia mbaya' to both of them, although she did not see what he did to PW2. That afterwards, the appellant gave them Kshs. 10/= each, which they used to buy biscuits and they did not tell anyone about what had happened.

7. PW4, SI, mother to PW2 stated that she returned from work but did not find her daughter at home and was informed that she was at her aunt's place. That when she went to find her, the aunt told her that PW2 and PW3 had been called by the appellant. She stated that PW2 told her that the appellant had done 'tabia mbaya to her. That PW2 was taken to Runyenjes Level 4 Hospital for examination and the matter was reported at Runyenjes Police Station. On cross-examination, she stated that PW2 told her about the offence and that she was not aware that PW2's aunt had sexual relations with the appellant.

8. PW5, Daniel Ndwiga, chief of Kagaari South East location, stated that the incident was reported to him by 2 women and 2 children and he referred the matter to Runyenjes Police Station. That he arrested the appellant and took him to the said police station.

9. PW6, WM, the mother to PW3 stated that she sent her daughter in the company of Alfred Macharia, to collect some keys from his uncle at around 4PM but she did not return until 7PM. That the following day, the said Alfred Macharia informed her that PW3 had done 'tabia mbaya' with the appellant. That when she asked PW3, she said that they used to go to the appellant's house with PW2 and that the appellant gave them money. That when she went to the home of the appellant to confront him, he ran away and she reported the matter to the police. On cross-examination, she stated that she did not borrow farm implements from the appellant as alleged and she also did not receive any money from him.

10. PW7, P.C. Patricia Kiwela of Runyenjes Police Station was the investigating officer in the matter. She stated that 01st September 2022, PW4 reported the matter at the police station and PW2 and PW3 were examined at the hospital. That the appellant was arrested on 12th September 2022 and was charged with the offence. That PW2 was taken to Embu Level 5 Hospital for age assessment as her birth certificate

was unavailable. She produced the age assessment report and a letter from the chief's office verifying the birth of PW2.

11. Upon close of the prosecution's case, the court found that a prima facie case had been established and the appellant had a case to answer. He was placed on his defense.

12. DW1, the appellant stated that on the material date, he returned from work in the evening and was informed that some 2 ladies had closed his house. That one of the women was PW6, whom she had met the previous day and had borrowed Kshs. 200/= from him. That PW6 had a disagreement with her husband and she requested that he keep her clothes for her in his house but he refused. According to him, he was framed by PW6 because he refused her advances. On cross examination, he stated that PW6 and another lady demanded for Kshs. 200/= from him and were ready to sleep with him but he refused and that is when they locked his house. That he gave PW6 Kshs. 50/= for a church function. That on the said day, he was at work at Mama Murimi's farm the whole day.

13. The trial magistrate considered the evidence before him and convicted the appellant for attempted defilement. The appellant presented his mitigation and the same was considered before the court sentenced him to ten (10) years imprisonment.

14. This appeal was canvassed by way of written submissions.

15. The appellant in his submissions, challenged the fact that there was no penetration. That PW1 clearly stated that PW2 was a virgin and there were no injuries to her vagina. That in as much as PW2 narrated that there was discharge when the appellant put his penis between her thighs, PW1 did not testify of having seen any discharge. That the main and alternative charges were false and framed because PW2 did not testify that the appellant touched her breast or her vagina. It was his argument that the prosecution, to its detriment, focused on proving penetration and the testimony of PW1 was not sufficient to prove attempted defilement or the alternative charge. That the sentences meted out to him was harsh and excessive and he urged this court to review the same.

16. The respondent, on its part, submitted that the prosecution proved the offence beyond reasonable doubt. Reliance was placed on the provisions of section 9(1) of the *Sexual Offences Act*, Section 388 of the Penal Code and the case of Moses Kabue Karuoya v. Republic (2016) eKLR as cited in the case of Abraham Otieno v. Republic, Kisii HCCRA No. 53 of 2009. That the appellant was properly identified as he was known to PW2 and for this, reliance was placed on the case of Reuben Taabu Anjononi & 2 others v. Republic (1980) eKLR. It also argued that their evidence was well corroborated and satisfactory to sustain a conviction. On the argument that the sentence was harsh and excessive, it relied on the case of Republic v. Nicholas Wambogo (2022) eKLR where the court relied on the case of Shadrack Kipkoech Kogo v. Republic, HCCRA No. 253 of 2003. It urged the court to uphold the findings of the trial court on both conviction and sentence.

17. From the foregoing, the issue for determination is whether the offence of attempted defilement was proved beyond reasonable doubt.

18. The role of the appellate court is to re-examine the evidence and reach its own conclusion. In the case of David Njuguna Wairimu vs. Republic [2010] eKLR the Court of Appeal stated as follows:-

> " The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think

there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision."

19. Further, in the case of Okeno vs. Republic [1972] EA 32 I the court stated as follows regarding the role of the appellate court:

> " 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 the appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion. It must make its own finding and draw its own conclusions only then can it decide whether the magistrate's finding 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."

20. It is important to establish that the appellant had the intention to defile the victim and he set his intentions in motion through actions that if successful, would end up in defilement. 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.

(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.

(3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence.

21. The prosecution had the burden of proving beyond reasonable doubt that the appellant attempted to defile the victim. For a conviction to be upheld, it must be proved that the victim was a minor and the acts of the appellant were capable of causing penetration if successful. Under section 9(1) and (2) of the *Sexual Offences Act*, the offence herein is provided for as follows:

(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.

22. The court discussed the purview of this offence in the case of David Ochieng Aketch v Republic [2015] eKLR in which it observed as follows:

> " 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."

23. If defilement were to occur, it would have been paramount that the prosecution proves that the victim was a minor, penetration occurred and the perpetrator was positively identified. In attempted defilement it must be proved that the victim was a minor and the appellant did actions that would otherwise end up in defilement of the said minor. The identity of the appellant is not in dispute as he appears to be well known to PW2. The age of the victim was also correctly determined by the trial court through the age assessment report where she was indeed found to be a minor at the time of the incident.

24. It was the testimony of PW1 that upon examination, the victim did not have any injuries around her vagina and that her hymen was intact. He did not testify as to whether there was presence of any discharge around the genitals. PW2 testified that when the appellant put his penis between her thighs, there was a discharge. The testimony of PW1 did not ascertain if there was any discharge and if any, what kind of discharge it was. If this was to be established from evidence, it would have been sufficient to prove attempted defilement if the discharge contained sperm cells.

25. The prosecution is bound to prove beyond reasonable doubt that the appellant indeed had the intention to attempt to defile the victim and then he failed in his attempt. PW2 and PW3 narrated that they were called by the appellant to his house and he did 'tabia mbaya' with PW3 before calling PW2 behind the curtain to his bed. Intention for attempted defilement can be determined if for instance, the medical examination report proved that there were injuries around the vagina or in this case, as I have mentioned earlier, if sperm cells were found on the victim's private parts. Through the prosecution's evidence, this was not firmly established. In the case of Otieno v Republic (Criminal Appeal E006 of 2022) [2022] KEHC 10559 (KLR) the court stated:

> "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."

26. According to Section 124 of the *Evidence Act*, in sexual offences, the testimony of the victim is sufficient to convict an offender and the same does not need to be corroborated. It states

> "……..Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

27. In as much as the medical examination did not disclose any finding of a discharge of any sort, it is enough that PW2 stated that that the appellant pressed his penis between her thighs and a discharge came out. This may not be sufficient to prove attempted defilement but is enough to prove that the appellant committed an indecent act with the child, contrary to section 11(1) of the *Sexual Offences Act*. This provision states:

> "(1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years."

Section 2 of the *Sexual Offences Act* defines an indecent act as follows:

> " "indecent act" means any unlawful intentional act which causes-
>
> (a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration;
>
> (b) exposure or display of any pornographic material to any personagainst his or her will;"

28. It is evident that the appellant touched the private parts of the victim who is a child, in a manner that offends the above cited provisions. In my view, he is liable for the alternative charge that he faces. It is immaterial that the nature of the discharge was not ascertained, rather, what is important is that the minor positively identified the appellant as the assailant and stated that he touched her private parts with his penis.

29. I find that through the available evidence, the main charge fails but the alternative charge has been proved beyond reasonable doubt. The appellant is hereby acquitted of the main charge of attempted defilement contrary to section 9(1) of the *Sexual Offences Act* and the sentence of 10 years imprisonment is hereby set aside.

30. However, I find the appellant guilty of the alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* and is hereby convicted accordingly. For this offence, the appellant is hereby sentenced to 10 years imprisonment.

31. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 07TH DAY OF FEBRUARY, 2024.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the State