



REPUBLIC OF KENYA



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**Recha v Republic (Criminal Appeal E032 of 2023)
[2024] KEHC 3704 (KLR) (5 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3704 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL APPEAL E032 OF 2023**

AC MRIMA, J

APRIL 5, 2024

BETWEEN

GEOFFREY NDIWA NDIEMA RECHA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal arising out of the conviction and sentence of Hon. T. Omono (Resident Magistrate) in Kitale Chief Magistrate's Court Criminal Case (S.O) No. 94 of 2022 delivered on 16th March, 2023)

JUDGMENT

Background:

1. Geoffrey Ndiwa Ndiema Recha, the Appellant herein, was charged with the offence of Attempted Defilement contrary to Section 9(1) and (2) of the *Sexual Offences Act*. The particulars of the offence were that on 11th May, 2022 at Liyavo Sub-Location in Kwanza Sub-County within Trans Nzoia County, the Appellant intentionally and unlawfully attempted to cause his penis to penetrate into the vagina of D.M., a child aged 15 years old.
2. The Appellant faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the offence were that on 11th May, 2022 at Liyavo Sub-Location in Kwanza Sub-County within Trans Nzoia County, the Appellant intentionally and unlawfully caused contact between his penis with the vagina of D.M., a child aged 15 years old.
3. When the Appellant was arraigned before the trial Court, he pleaded not guilty to the offences. After full trial, the Appellant was convicted on the main offence of attempted defilement. He was sentenced to serve 5-years' imprisonment. The sentence was to run as from 13th May, 2022 when the Appellant was first arraigned before the trial Court.



The Appeal:

4. The Appellant was aggrieved by the conviction and sentence, hence, this appeal. He raised a myriad of grounds mainly challenging the conviction and the sentence. He also contended that his defence was not properly considered and that the sentence was harsh.
5. In the premises, therefore, the Appellant prayed that the appeal be allowed by quashing the conviction, the sentence be set aside and that he be forthwith set free.
6. Parties disposed of the appeal by way of written submissions. According to the Appellant's undated submissions, the Appellant expounded on the above grounds and referred to several decisions in support of the arguments. For these reasons, the Appellant prayed that the appeal be allowed.
7. The Respondent on its part relied on its written submissions dated 6th November, 2023. It submitted that all the ingredients of the offence that the Appellant had been convicted of were proved to the required standard of proof.
8. Learned Counsel for the State then submitted that the sentencing was proper. For these reasons, the prosecution urged this Court to dismiss the appeal, uphold the conviction and affirm the sentence.

Analysis:

9. This being a first appeal, it's the duty of this Court to re-consider and to re-evaluate the evidence adduced before the trial Court with a view to arriving at its own independent conclusions and findings (See Okono vs. Republic [1972] EA 74). In doing so, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to give due regard in that respect as so held in Ajode v. Republic [2004] KLR 81.
10. Having carefully perused the record, this Court is now called upon to determine whether the offences of attempted defilement and assault were committed, and if so, whether by the Appellant.
11. It is established by law and settled judicial precedents that the offence of attempted defilement carries three components. They are the age of the victim, whether there was an attempt to penetrate the victim and identification of the assailant.
12. Before dealing with the said aspects of the offences, this Court will tender a brief summary of the evidence at trial.
13. The prosecution's case was rendered by five witnesses. The complainant, D.M. (testified as PW1) was a 15-year old Class 7 Student at [Particulars Withheld] Primary School. She lived with her parents.
14. On 15th May, 2022, PW1 did not go to School as she was unwell. At around 1500Hrs., PW1 went to look for her friend one F (not a witness), who was their neighbour. She had wanted F to accompany her to fetch some water. PW1 met F's father at their home. She learnt that F was not at home. By then PW1 was standing at the doorstep.
15. PW1 was suddenly caught by her hand and pulled inside the house. She was led into the bedroom. As she tried to scream, the assailant covered her mouth with one of his hands. PW1 was asked to climb unto the bed, but declined. Instead, the assailant pushed her to the wall and ordered her to remove her clothes. PW1 refused. She wore a skirt.
16. The predator then removed PW1's underpants and he also undressed his pair of trousers. He then held his penis and approached PW1. As he began pushing his penis into the vagina, there seemed to have



been some people outside who were talking. They were a Village Elder (Mukasa) one Mama Caleb and a Pastor (Baba Mary).

17. The attacker ordered PW1 to hide under the bed, which she readily did. The two persons entered inside the house and began looking for PW1. They found her under the bed and got PW1 outside. Other neighbours gathered and the assailant was arrested. Police were informed and rushed to the scene. They rescued the attacker and led him to the police station.
18. While on the way, one RMK, an Aunt to PW1, joined them and they all headed to the station. R testified as PW2. While at the station, PW2 examined PW1's vagina and found some injuries. PW1 was led to the hospital in the company of the police and PW2.
19. It was Dr. Sheillah Olunya, then attached at the Kitale County Referral Hospital, who examined PW1. She testified as PW3.
20. PW3 found that PW1's labia were normal and the hymen intact. There was, however, tenderness on palpitation which was attributed to the attempt to penetrate the vagina. PW3 filled in and produced a P3 Form and treatment notes as exhibits.
21. PW1's age was settled by one Pharis Silali (testified as PW4) who produced an Age Assessment Report which had been prepared by one Dr. Muyira, but who could not attend Court on that day. The Report opined that PW1 was 15 years old. The Report was produced as an exhibit.
22. PW5 was the investigating officer. She visited the scene, but found out that the accused's family had relocated elsewhere. She, nevertheless, recorded statements and formed the opinion, and, charged the Appellant with the present offences.
23. After close of the prosecution's case, the trial Court found that the Appellant had a case to answer and was placed on his defence.
24. His sworn testimony was that he was framed by the Village elder (Mama Caleb), whom he had worked for, but declined to pay his dues. He contended that his arrest was trumped up so as to avoid settling his dues. He urged that the case be dismissed.
25. On the basis of the above evidence, the Appellant was convicted as charged with attempted defilement and sentenced accordingly.
26. This Court will now consider whether the offence of attempted defilement was proved.

Age of complainant:

27. The prosecution in a bid to prove the age of the complainant in this matter produced an Age Assessment Report. The age was settled at 15 years old.
28. There are many ways in which a person's age can be proved. It may be by way documents including Certificate of Birth, Child Health Card, Age Assessment Report among others. Age may also be proved by way of non-documentary evidence for instance by parents, guardians, relatives among others.
29. In this case, the production of the Age Assessment Report was not challenged.
30. Accordingly, the complainant was a child within the meaning ascribed to the term under Section 2 of the Children's Act.

The assailant:

SUBDIVISION - Was the Appellant positively identified?



31. The prosecution relied on the evidence of the complainant as the sole identifying witness. Surprisingly, the two persons who found the assailant with PW1 did not testify and no reasons were given for such a lapse.
32. Be that as it may, by dint of the proviso to Section 124 of the Evidence Act, Cap. 80 of the Laws of Kenya, the sole evidence of PW1 is admissible without any corroboration as long as the Court is satisfied that the victim was truthful.
33. In *R -vs- Turnbull & Others* (1973) 3 ALL ER 549, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court stated thus: -

... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.
34. In *Wamunga vs Republic* (1989) KLR 426 the Court of Appeal stated as under: -

.... It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.
35. In *Anil Phukan vs. State of Assam* (1993) AIR 1462 the Court held as follows: -

A conviction can be based on the testimony of a single-eye witness and there is no rule of law or evidence which says to the contrary provided the sole eye witness passed the test of reliability in basing conviction on his testimony alone.
36. In the present case, PW1 testified that she knew the Appellant quite well as their immediate neighbour. She was even a friend to F, one of the Appellant's daughters. Likewise, the Appellant affirmed that he was a neighbour to the family of PW1. Further, the incident took place during daytime and there was ample opportunity for PW1 to see who her attacker was.
37. The trial Court had an opportunity of assessing the demeanor of PW1 when she testified. No adverse findings or remarks were made in respect of the testimony or PW1's conduct. The trial Court believed that PW1 was truthful.
38. There seems to be nothing which was put forth likely to make this Court depart from that finding. But what of the Appellant's defence? The issue of the grudge did not arise during the prosecution's case. It was only raised at the tail end of the proceedings. Be that as it may, even if the Appellant had an issue with the village elder, the Appellant instead had nothing with PW1 and her family. One, therefore, wonders why PW1 would take up the role of framing up the Appellant.



39. PW3 also testified that PW1 had pains around the vagina. The pain was explained to have been caused by an attempt to penetrate the vagina. That evidence corroborated the PW1's position that she was sexually assaulted and was about to be penetrated.
40. Looking at the evidence in totality, this Court finds that the defence did not dislodge the prosecution's case. This Court finds no reason to depart from the finding of the trial Court that it was the Appellant who had an encounter with PW1. It is, therefore, the finding of this Court that the Appellant was properly identified as the intruder.

Was there an attempt to defile?

41. Section 388 of the Penal Code defines "attempt" as follows: -

388 (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.

42. The above section brings out the two main ingredients of an attempted offence; the mens rea which constitutes the intention and the actus reus which constitutes the overt act towards the execution of the intention.

43. In *R vs. Whybrow* (1951) 35 CR App. Rep, 141, Lord Goddard C.J., had the following to say on mens rea when the Court dealt with the offence of attempted murder: -

..... But if the charge is one of attempted murder, the intent becomes the principal ingredients of the crime.

44. Eminent learned authors in criminal law, J. C. Smith and Brian Hogan in their book *Criminal Law*, Butterworths, 1998 (6th Edition) at page 288 while discussing the aspect of mens rea in an attempted murder had this to say: -

.... Nothing less than an intention to kill will do.

45. And in *Cheruiyot v Republic* (1976 - 1985) EA 47 Madan, JA, as he then was, while approving the holding in *R v. Gwempazi s/o Mukhonz* (1943) 10 EACA 101, *R v. Luseru Wandera* (1948) EACA 105 and *Mustafa Daga s/o Andu vs. R* (1950) EACA 140, stated as follows on mens rea in an attempted murder charge: -

In order to constitute an offence contrary to Section 220, it must be shown that the accused had a positive intention unlawfully to cause death.... The essence of the offence is the intention to murder as it is presented by the prosecution.



46. The Court of Appeal had yet another occasion to look at the aspect of the actus reus in attempted offences. In *Abdi Ali Bare vs. Republic* (2015) eKLR, Learned Honourable Justices Githinji, Mwilu and M'Inoti, had the following to say as they considered the offence of attempted murder: -

..... The more challenging question in a charge of attempted murder is the actus reus of the offence. Although a casual reading of Section 388 of the Penal Code may suggest that an attempt is committed immediately the accused person commits an overt act towards the execution of his intention, it has long been accepted that in a charge of attempting to commit an offence, a distinction must be drawn between mere preparation to commit the offence and attempting to commit the offence. In the work quoted above by Smith & Hogan, the authors give the following scenario at page 291 to illustrate the distinction:

D, intending to commit murder buys a gun and ammunition, does target practice, studies the habits of his intended victim, reconnoiters a suitable place to lie in ambush, puts on a disguise and sets out to take up his position. These are all acts of preparation but could scarcely be described as attempted murder. D takes up his position. loads the gun, sees his victim approaching, raises the gun, takes aim, puts his finger on the trigger and squeezes it. He has now certainly committed attempted murder....

In the present appeal, to prove attempted murder on the part of the appellant, he must be proved to have taken a step towards the commission of murder, which step is immediately and not remotely connected with commission of the murder. Whether there has been an attempt to commit an offence is a question of fact. The act alleged to constitute attempted murder, for example, must be sufficiently proximate to murder to be properly described as attempt to commit murder. In *Cross & Joines' Introduction To Criminal Law*, Butterworths, 8th Edition (1976), P. Asterley Jones and R. I. E. Card state as follows at page 354:

..[A]n act is sufficiently proximate when the accused has done the last act which it is necessary for him to do in order to commit the specific offence attempted....

The learned authors add that the court must answer the question whether the acts by the accused person were immediately or merely remotely connected with the commission of the specific offence attempted on the basis of common sense. Ultimately therefore, the real question is whether the acts by the accused person amounted to mere preparation to commit murder or whether the accused had done more than mere preparatory acts.

47. From the foregoing, it is easily deducible that when a Court is faced with any charge of an attempted nature, care must be taken to ensure that the attempt, as opposed to mere acts of preparation, is proved. Regardless of how strong the evidence is, if it only relates to acts in preparation to commit a certain crime, that evidence cannot justify a conviction on an attempted charge.
48. For clarity purposes, 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.
49. With the above exposition of the applicable legal principles in relation to commission of attempted offences, this Court will now apply the said principles to this case.
50. According to PW1, the Appellant pulled her inside his house into the bedroom, pushed her against a wall and undressed her. The Appellant also undressed and held his penis. He even started pushing it into PW1's vagina. As that happened, they were bursted.



51. There is no doubt that for the offence of defilement to be committed, there has to be penetration. Section 2(1) of the *Sexual Offences Act* defines “penetration” to mean “the partial or complete insertion of the genital organs of a person into the genital organs of another person.”
52. This position was fortified in *Mark Oiruri Mose vs R (2013) eKLR* when the Court of Appeal stated thus: -

.... Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl’s organ.... (emphasis added).
53. Later, the Court of Appeal, then differently constituted, in *Erick Onyango Ondeng v. Republic (2014) eKLR* held as such on the aspect of penetration: -

In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.
54. From the definition of penetration and the guidance by the Court of Appeal, it is the position that penetration may only be ‘slightest and to the surface’ to suffice in law. It, therefore, means that there may be instances where the slight penetration, depending on other factors including passage of time, may not be possible to be ascertained by way of medical evidence. Therefore, the failure to prove penetration by medical evidence does not ipso facto mean that there was no penetration. It all depends on the peculiar circumstances of a case and the extent to which the trial Court believes the victim. However, in such instances, the Court must exercise extreme caution as to weed out miscarriage of justice including instances where a victim is framed up for ulterior motives.
55. This Court has, with care and caution, reviewed the evidence on record. To this Court, there was indeed penetration into PW1’s vagina. The correct offence would have been defilement. This Court will, however, do no more than that since the issue was not among those argued in the instant appeal.
56. The Appellant was, therefore, lucky to be charged with a lesser offence.
57. With such a finding, the defence does not cast any doubt on the Appellant’s culpability.
58. There being nothing to stand on the way the Appellant was convicted, this Court finds and hold that the Appellant was properly so convicted.
59. The appeal against conviction cannot stand and is hereby dismissed.

Sentence:

60. The Appellant was sentenced to 5 years’ imprisonment. The Court relied on a Pre-sentence Report whose contents are duly noted.
61. It is imperative for parties to know that sentencing is a crucial part in the criminal process and the administration of justice and since sentencing Courts are called upon to exercise discretion, then parties are at liberty to even adduce evidence that may aid Courts reach most appropriate sentences (See the Supreme Court in *Petition No. 15 of 2015 Francis Karioko Muruatetu & another v Republic [2017] eKLR*).



62. In exercising its discretion, a sentencing Court is called upon to be guided by a raft of considerations. Such are discussed at length in the Sentencing Guidelines published on 29th April, 2016 vide Gazette Notice No. 2970 by the Hon. The Chief Justice of the Republic of Kenya who is also the Chairperson of the National Council on the Administration of Justice (NCAJ) and in case law including the Francis Karioko Muruatetu & another v Republic case (supra).
63. This Court is well abreast of the principles on sentencing and the 2016 Judiciary of Kenya Sentencing Policy Guidelines. As stated by the Supreme Court of Kenya in Francis Karioko Muruatetu & another case (supra), despite their importance, the guidelines do not replace judicial discretion. This is what the Apex Court stated: -
- (72) We wish to make it very clear that these guidelines in no way replace judicial discretion. They are advisory and not mandatory. They are geared to promoting consistency and transparency in sentencing hearings. They are also aimed at promoting public understanding of the sentencing process.
65. The purpose of sentencing is expounded in page 15, paragraph 4.1 of the Sentencing Policy Guidelines as follows: -
- Sentences are imposed to meet the following objectives:
1. Retribution: To punish the offender for his/her criminal conduct in a just manner.
 2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
 3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law-abiding person.
 4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demand that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.
 5. Community protection: To protect the community by incapacitating the offender.
 6. Denunciation: To communicate the community's condemnation of the criminal conduct.
66. In sentencing, the Court considers various mitigating factors. Some include: -
- (a) age of the offender;
 - (b) being a first offender;
 - (c) whether the offender pleaded guilty;
 - (d) character and record of the offender;
 - (e) commission of the offence in response to gender-based violence;



- (f) remorsefulness of the offender;
 - (g) the possibility of reform and social re-adaptation of the offender;
 - (h) any other factor that the Court considers relevant.
67. The Court in *Wanjema v. Republic* (1971) EA 493 laid down the general principles upon which the first appellate Court may act on when dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not consider a relevant fact or that it considered an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and if the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.
68. In this matter, the Appellant did not establish the infringement of any of the above parameters by the sentencing Court. The appeal on sentence too fails.

Disposition:

69. Having said as much, the appeal is now determined as follows: -
- a. The entire appeal is hereby dismissed.
 - b. The file is marked as closed.
- It is so ordered.

DELIVERED, DATED AND SIGNED AT KITALE THIS 5TH DAY OF APRIL, 2024.

A. C. MRIMA

JUDGE

Judgment delivered virtually and in the presence of: -

Geoffrey Ndiwa Ndiema Recha, the Appellant in person.

Miss Kiptoo, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Chemosop/Duke – Court Assistants.

