Bundi v Director of Public Prosecution (Criminal Appeal E137 of 2022) [2024] KEHC 8310 (KLR) (1 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8310 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL APPEAL E137 OF 2022

LW GITARI, J

JULY 1, 2024

BETWEEN

MARTIN MUTUMA BUNDI ..... APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTION ..... RESPONDENT

JUDGMENT

1. The appellant was charged with Defilement contrary to Section 8(1) (3) of the *Sexual Offences Act* No.3 of 2006. The particulars are that on 18/11/2020 at about 1330 Hours in Katheri Central Location in Imenti Central within Meru County intentionally caused his penis to penetrate the vagina of S.K. a child aged 13 years.

2. In the alternative, the appellant was charged with Committing Indecent Act with a child Contrary to Section 11(1) of the *Sexual Offences Act*.

3. The appellant also faced a charge of Personating a Public Officer Contrary to Section 105 of the Penal Code. The particulars of the charge are that on 3/12/2020 at about 2200 hours in Githongo Police Station Marathi Location in Imenti Central Sub-County within Meru County, personated army officer, a person employed in the public service on an occasion of visiting hours requesting to see Susan Karambu by virtue of his employment.

4. The appellant denied all the charges and a full trial was conducted. The appellant was acquitted on the charge of defilement as well as its alternative. The appellant was also acquitted on the second count. The appellant was convicted for the offence of attempted defilement Contrary to Section 9(1) as read with Section 9(2) of the *Sexual offences Act* pursuant to Section 186 of the Criminal Procedure Code. He was sentenced to serve Seven years imprisonment.

5. The appellant was dissatisfied with the conviction and sentence and filed this appeal based on the six grounds. He urged the court to quash the conviction, set aside the sentence and set him at liberty.

6. The appellant however, filed amended grounds of appeal raising the following grounds:

    1. That, the learned trial magistrate erred in both maters of law and facts by failing to note that the ingredients or attempted defilement were not proved in this case.

    2. That, the learned trial magistrate erred in maates of law and fact by failing to note that the key witnesses were not called to support the evidence of PW1 the complainant herein.

    3. That, the learned trial magistrate erred in both matters of law and facts by failing to note that the complainant age was not proved.

    4. That, the learned trial magistrate erred in both matters of law and facts by failing to take into account the defense of the appellant and his defense witnesses.

    5. That, the learned trial magistrate erred in both matters of law and facts by failing to take into account the period spent in custody (pre-trial) according to Section 333(2) of the Criminal Procedure Code.

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

8. The appeal was then canvassed by way of written submissions. The appellant filed his submissions while the respondent's submissions were filed by B. Nandwa for the Director of Public Prosecution.

The Prosecution's case

9. PW1: S.K. is the complainant. She testified on oath after a voire dire examination, PW1 stated on oath that she first met with the accused person in the month of June 2020 after he was introduced to him by her cousin K. The accused then gave her a piece of paper with his mobile number written on it. They met again on 18/11/2020 as she was going home from Katheri. A few days later, they met again when the accused person was on board his motor vehicle. PW1 was accompanied by her cousin P. The accused person told her that he had missed her. They boarded his vehicle towards Kinjo direction and stopped at a car wash. The accused person asked her to hug him but she refused. He drove near some shops on the roadside and PW1 told him that she had forgotten some items at Katheri and she needed to collect them. The accused person offered to take her back to pick the said items. The three proceeded to Katheri and on their way stopped near Katheri Boys School.

10. The accused person then joined them (PW1 and P) at the back seat while holding a condom. He lowered his trousers and underwear, wore the condom on his penis and asked PW1 to sit on her. PW1 refused and the accused threw the condom on the floor of the vehicle. The accused went back to his seat and they drove to Katheri market. The accused then gave her Kshs.100/- to board a boda boda and she left with her cousin. They met again when PW1 was accompanied by sussy. It was her evidence that she never had sex with the accused person or with anyone else.

11. PW2 stated that he went back home in the evening and found PW1, his daughter missing. He informed his wife that he had given money to PW1 and Cece that morning. His wife and two other daughters went to look for Cece to enquire about PW1's whereabouts. Cece replied that she did not know and PW2 proposed that they report the matter to the station. On their way, they found a sienta vehicle parked at Kionyo. Cece stated that PW1 was inside that vehicle and upon hearing them talk, the driver drove away very fast. They reported the matter to the police and through the intervention of other P.S.V conductors, PW1 was brought back at 3.00a.m. The conductors informed him that Ajabo was the person who was with her daughter.

12. PW3 stated that he was on night shift duty on 1/12/2020 when the accused person visited and introduced himself as an army officer attached to Soy Camp Isiolo. He asked to see his sister, a young girl aged 13 years who was in police custody and he was allowed. He returned on the following day but on the third day, during the police briefing in the morning, Senior Sergeant Lang'at disclosed to them that the accused person should be arrested with a case of defilement. They arrested him on the same day, 3/12/2020 when he had gone to the station.

13. PW4 investigated this case. He stated that a case of abduction had been reported at Githongo Police Station but the girl was produced the following day by members of public. The victim who was PW1 was referred to Githongo Hospital for treatment. Witness statement were recorded and they established that the accused person had been pursuing and seducing her.

14. PW5, a clinical officer attached to Githongo Hospital stated that PW1 was examined on 23/11/2020 with a history of defilement. She denied the history of sexual intercourse. On examination, she had minimal bleeding but PW1 confirmed she was on her menses. The hymen was broken. Pregnancy and H.I.V tests were negative. No spermatozoa or fungal infections were noted. V.D.R.L was also negative. The lab request form, treatment notes and P3 form were tendered as PEX 1 to 3 respectively.

15. The appellant stated that he was framed and denied committing the offences. He however admitted meeting PW1 and Stacy her friend whom he ferried from Meru Town to Katheri on a day he could not remember.

Submissions

16. The appellant submits that the prosecution did not proof the case against him beyond any reasonable doubts, as the evidence of PW1 was not sufficient. That the evidence adduced by the complainant does not in any way proof that he appellant tried to rape the complainant. That according to the complainant's evidence no attempt was proved by PW1. That according to the complainant she was not alone in the said vehicle but was with her niece P. That the complainant did not adduce evidence that the appellant touched her private parts.

17. On the question whether there was an attempt to cause penetration, he relies on the cases of Benson Musumbi vs. Republic (2019) eKLR, Daniel Daniel Simiyu Wanyonyi vs. Republic (2019) eKLR where it was stated that "The actus reus must be more than mere preparation to commit the act as there is a difference between mere preparation to commit an offence and attempting to commit an offence". Further, it was held "that in preparation to commit a certain crime that cannot justify a conviction on an attempt charge".

18. The appellant further submits that the prosecution failed to call any witness to support the evidence of the complainant. He relies on the case of Bukenya & Others vs. Uganda (1972) E.A 549.

19. Finally, the appellant submits that the trial magistrate erred in law and facts by failing to take into account the period spent in custody as provided under Section 333(2) of the Criminal Procedure Code and reduce the sentence proportionately with the period in custody.

    He relies on the court of appeal decision in Ahamad Abolfathi Mohammed & Another vs. Republic (2018) eKLR and Bethwel Wilson Kibor vs. Republic (2009) eKLR.

20. The respondent on the other hand submits that the prosecution in a charge of attempted defilement must prove the other ingredients of the offence of defilement except penetration. These they state includes the age and identification of the perpetrator. The respondent submits that age was proved with the production of the P3 form where the age of the complainant was indicated as 13 years.

That the complainant gave her age as 13 years and stated her date of birth as 15/11/2008. On the identification of the perpetrator, the respondent submits that the appellant was well known to the complainant and he himself admitted that they were neighbours with PW1. That the complainant testified that she had met with the appellant on several occasions as he carried her in his car and the incident occurred during daytime where there would be no cause of wrong identification. It is further submitted that the trial court stated that it was satisfied that the complainant was telling the truth. The respondent relies on the case of J.W.A vs. Republic 2014 eKLR where the court stated that under Section 124 of the *Evidence Act* in a sexual offence where the victim is a minor corroboration is not mandatory where the court is satisfied that the complainant was telling the truth. Reliance was also held in the case of Mohammed vs. Republic (2006) eKLR 138 where the court stated that it is now settled that the courts shall no longer be hamstrung by the requirements of corroboration when the victim of a sexual offence is a child of tender years if it is satisfied that the child is fruitful. The respondent submits that the appellant took steps to execute the defilement by putting on a condom on his penis and telling the complainant to sit on him.

21. The respondent submits that the trial magistrate considered the defence of the appellant and gave reasons for rejecting it.

22. On the sentence, he submits that the sentence was lenient considering the fact that the appellant almost defiled the complainant. He urges the court to dismiss the appeal.

23. It is the duty of the first appellate court to carefully examine and evaluate the evidence which was presented before the trial court and come up with its own independent decision. It is now well settled that an appellant on a first appeal is entitled to expect the evidence as a whole to be subject to a fresh and exhaustive examination and consideration, and to the appellate's court own decision on the evidence. The leading authority on this subject is Okeno-v- Republic (1972) E.A 32 where this duty was discussed. This was buttressed in the case of Kiilu & Another-v- Republic (2005) 1 KLR 174 where the Court of Appeal stated:-

> " 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 to the appellate court's own decision on the evidence. The first appellate court must itself weight conflicting evidence and draw its own conclusions.
>
> It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion. It must itself make its own finding. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had advantage of hearing and seeing the witnesses."

Analysis and Determination:

24. I have considered the appeal and the grounds in support, the proceedings before the trial court at the submissions. The issues which arose for determination are:

    1. Conviction for an offence other than the one charges.

    2. Whether the charge against the appellant was proved beyond any reasonable doubts

Conviction for an offence other than the one charged

25. Section 179 of the Criminal Procedure Code provides:

> "(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."

26. For a person to be convicted for an offence other than the one charged, the evidence tendered fails to disclose the offence charged but instead proves the commission of a lesser offence. Thus, the offence charged must be more serious but the evidence tendered fails to disclose it but proves that a lesser offence was committed. The Court of Appeal in the case of Mutungi Mumbi vs. Republic stated as follows:

> "An accused person charged with a major offence may be convicted of a minor offence if the main offence and the minor offence are cognate; that is to say both are offences that are related or alike, of the same genus or species. To sustain such a conviction the court must be satisfied on two things. "First that the circumstances embodied in the major charge constitute the minor offence. Secondly, that the major charge has given the accused person notice of all the circumstances constituting the minor offence of which he is convicted.
>
> The court further stated that the conclusion reached at stage of judgment when it is not practical to require the accused person to plead afresh to the minor offence. It is a decision premised on discretion of the court based on the evidence adduced at the end of the trial. That the second consideration arises out of necessity, precisely because the accused is not charged with and has not pleaded to the minor cognate offence. That the purpose of delving into this consideration is to satisfy the court that the accused person was not prejudiced and that by being charged with the major offence, he had sufficient notice of all the elements that constitute the minor offence. (See Republic vs. Cheya & another (1993) E.A 500".

27. The appellant was charged with the offence of defilement Contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*. He was acquitted on this charge as the trial magistrate stated in her judgment. In the alternative, he was charged with committing an indecent act with a child Contrary to Section 11 (1) of the *Sexual Offences Act*. In her judgment, the learned magistrate stated that there was no evidence of partial or complete insertion of the genital organs of a person into the genital organs of another person as required in cases of defilement. The learned trial magistrate further held that the alternative count was not established. The learned magistrate relied on Section 186 of the Criminal Procedure Code (Now repealed by Act 19/2023 which provided that the court could convict a person charged with defilement of a girl under the age of 14 years if the court is of the opinion that he was not guilty of that offence but guilty of an offence under the *Sexual Offences Act*, although he was not charged with it. She then concluded that the appellant ought to have been charged with attempted defilement Contrary to Section 9(1) as read with Section 9(2) of the *Sexual Offences Act*.

28. Section 8(1) (3) of the *Sexual Offences Act* provides:-

> "(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."
>
> (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."

29. On the other hand, Section 9(1) & (2) of the *Sexual Offences Act* provides 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."

30. The offence of attempted defilement Contrary to Section 9(1) and 9(2) of the *Sexual Offences Act* is a lesser cognate offence where it is revealed by the particulars of the charge and evidence adduced and also carries a lesser sentence than defilement, with a sentence of not less than ten years.

31. The learned trial magistrate was therefore right in convicting the appellant for attempted defilement.

32. The second issued is whether the charge was proved beyond any reasonable doubts Section 388 of the Penal Code (Cap 63 Laws of Kenya) provides:

> (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."

33. In Francis Mutuku Nzangi vs. Republic (2013) eKLR the court of appeal explained the provision as follows:

> "Our understanding of this provision is that if a person conceives an idea or plan to commit an offence and sets out to effectuate the intentions by taking definite steps or puts in motion a chain of events or state of things calculated to attain that objective as manifested by some open by discernible acts or acts to achieve his objective, he will be guilty only of an attempt to commit the offence. The attempt is proved whether or not that person did all the acts necessary to perfect the offence and quite irrespective act or change of heart may have aborted the fulfilment. It also matters not that circumstances did in fact exist, unbeknown to the person that would have rendered his success impossible."

34. The offence of attempted defilement is committed when a person attempts to cause penetration with his genital organs manifested by facts that point to an act of penetration. Thus, in attempted defilement, all other ingredients of defilement are the same but no penetration takes place. This is

what distinguishes the offence of defilement and attempted defilement. The evidence adduced by the prosecution is that the appellant moved from the driver's seat to the back seat, he removed his trouser; he then put a condom on his penis and asked the complainant to seat on him. These acts proves that the appellant did undertake acts with the objective of defiling the complainant. The complainant was a minor aged 13 years. The identity of the perpetrator was proved. The appellant admitted that he was well known to the complainant.

35. The possibility of mistake is ruled out.

36. I have considered the authorities cited by the appellant. The authority of the court of Appeal is binding on this court. The prosecution proved that the appellant committed acts which points to his intention to defile the complainant and no more. I have also noted the contention that key witnesses were not called. Section 143 of the *Evidence Act* provides:

> "No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."

37. The prosecution has the discretion to call the witnesses who are sufficient to prove its case. Furthermore, under Section 124 of the *Evidence Act* it is provided:

> "Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.
>
> 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."

38. The law is well settled that corroboration is not mandatory in Sexual Offences involving children of tender years if the court is satisfied that the child is telling the truth. In this case, the trial magistrate conducted voire dire examination of the complainant and formed the opinion that she understands the duty of telling the truth and the nature of the oath. The trial magistrate further stated in her judgment that she was satisfied that the complainant was telling the truth. This was a finding of fact by the learned trial magistrate who had the opportunity to see the complainant and assess her demenour. There was no requirement for corroboration as the court believed the complainant. I find that the charge of attempted defilement was proved. There was no other reason for the appellant to remove his clothes and fix a condom then invite a child to sit on him. This was clear evidence that the intention was to defile the complainant and there was an attempt and not the deed. I find that guided by the case of Mutungi Mumbi vs. Republic, (supra) I find that the charge of attempted defilement was proved against the appellant beyond any reasonable doubts.

39. The appellant contends that time spent in custody was not considered. Section 333(2) of the Criminal Procedure Code provides as follows:

"322

(2) If the accused person is convicted, the judge shall pass sentence on him according to law."

40. The time spent in custody awaiting trial as provided under the Section must be taken into account when passing sentence. Taking into account, the time spent in custody awaiting trial means that the sentence imposed must be reduced proportionately with the time spent in custody.

41. The appellant was arrested on 3/12/2020 and remanded in custody up to 13/10/2022 when the sentence was imposed. The appellant was in custody awaiting trial for a period of one year, ten months and eleven days. The sentence imposed should have been reduced by that period.

42. In conclusion:

I find that the appeal lacks merits and is dismissed. The sentence imposed on the appellant shall be reduced by one year, ten months and eleven days in compliance with Section 333(2) of the Criminal Procedure Code.

DATED, SIGNED AND DELIVERED AT MERU THIS 1ST DAY OF JULY 2024.

L.W. GITARI

JUDGE