ENW v Republic (Criminal Appeal E006 of 2023)
[2024] KEHC 9079 (KLR) (22 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9079 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CRIMINAL APPEAL E006 OF 2023

BM MUSYOKI, J

JULY 22, 2024

BETWEEN

ENW ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against conviction and sentence in Kikuyu Chief Magistrate's Court (C. Mburu RM) sexual offence case number 26 of 2017 dated 2nd August 2022)

JUDGMENT

1. The appellant has brought this appeal challenging both conviction and sentence meted on him by Honorable C. Mburu sitting in Kikuyu Chief Magistrate sexual offence case number 26 of 2017. The appellant was convicted of the offence of attempted defilement contrary to section 9(1)(2) of the *Sexual Offences Act* number 3 of 2006. He was sentenced to serve fourteen years imprisonment on 15-09-2022.

2. The appellant has raised 16 grounds of appeal in his petition dated 9th November 2022. However, in his submissions, the appellant has sought to amend the grounds in reliance on Section 350(2)(v) of the *Criminal Procedure Code*. A look at the grounds the appellant intends to introduce, they appear to me to be a consolidation and summary of the 16 grounds in the petition of appeal albeit in different words. I will consider the appeal based on the grounds in the petition of appeal since the appellant had not given the requisite notice. Those which are not covered in the submissions will be considered as dropped unless the same are on matters of law.

3. When the matter came before me on 7-06-2024, the parties consented that the appeal be canvassed by way of written submissions. The parties have filed their submissions. The appellant's submissions are dated 27th May 2024 and while those of the respondent are dated 5th June 2024. The respondent's submissions seem to be misplaced or mixed up. Although the heading of the same is indicative that they are for this matter, the contents therein bespeak of totally different matter. They are in respect of a rape

case whose victim was an 84-year-old woman while this appeal is in respect of attempted defilement of a child aged four years.

4. This is a first appeal and I am called upon to re-evaluate and re-examine the evidence produced before the lower court and come to my own independent conclusion. I will however bear in mind that I did not have the benefit of observing the demeanour of the witnesses or advantage of taking the first-hand proceedings. In that regard, I will reproduce abridged version of the proceedings as recorded in the lower court.

5. The complainant in this matter was at the time she testified 6 years old. The trial court conducted voire dire and came into conclusion that the child was not sufficiently knowledgeable to give sworn evidence. In her unsworn testimony, she told the court that on 25-06-2017, 'the man here' pointing to the dock Njaga did bad manners on me. She told the court that had been informed of his name by her grandmother. According to the complainant, the appellant did bad manners to her when she was in the house with her little brother when they were in the house alone. In her short testimony, she testified that the appellant put his fingers into her vagina and blocked her mouth with his hand and that she could not make noise because she was afraid. When her mother came, she told her what happened and she was taken to hospital where she was treated.

6. In cross examination, she stated that it was on a Monday and that the appellant removed all her clothes while in the house and her mother was away. She said that there were no neighbours. She then changed the day and stated that it was a Sunday and there were no neighbours. She maintained that they were alone with her brother as her parents and grandmother always went to church early. She finished by stating that Mama Njenga does not like the appellant. It is not clear from the proceedings who this Mama Njenga is.

7. In re-examination, she maintained that it was a Sunday and that she was in home clothes. She added that she was wearing a dress, trouser and a panty. She stated further that the appellant only removed her panty. She maintained that the appellant put his fingers in her vagina. She finished by stating that the appellant was not their friend but he was a friend to her brother J who is older than her.

8. Then came in to the witness box one Hellen Wangare Kinuthia. She stated that she was a casual worker in Nderi. On 25-06-2022, she left her house at 11.30 am and went to the shop leaving MN and SN. MN was then four years. She came back after ½ an hour and found MN's panty out of the house lying on the ground. When she asked her, the child told her that Njaaga had placed her on the seat and inserted fingers into her vagina. She described N as her nephew and that they were neighbours. She stated further that she took the child to Scanda Reli hospital where they were treated and sent to Kikuyu police station and later referred to Nairobi Women Hospital. She returned to the police and they had the P3 form filled at Wangige health center. She identified the P3 form as MFI1 and PRC form as MFI 2. She concluded by saying that the appellant's family and hers had no disagreements.

9. On cross examination, PW2 said that the appellant's aunt was not their friends and the appellant knew it. It is not clear what relevance this relationship with the appellant's aunt had in the matter. PW2 stated further that when the incident happened, she had gone to the shop and stopped at some point to chat with another woman. She said that the appellant and his people had offered to compensate them but she declined. She confirmed that in the neighbourhood, there are other people but she didn't know whether they were present during the incident. She also confirmed that the child did not exhibit bleeding. She also stated that the complainant's father carried her to Scanda where she was treated and that they moved out of the area as they were unable to pay rent.

10. Gerald Mutiso was the third witness. He was a medical officer at Tigoni hospital. He stated that he examined the complainant on 27-06-2017 on reference from Kikuyu police station. He told the court

that the child had been seen at Nairobi Women Hospital and upon examination, he found her to be well oriented in time and place, coherent in speech and walking without difficulty. Her outer genitalia had no visible injuries but she had a reddened vagina. She did not have abrasions or cut bruises in the vaginal area but there was white discharge flowing from the opening. Tests for sexual transmitted diseases were negative. According to the officer, the child had been 'indecently sexually assaulted'. He said that he personally filled the P3 form which he produced as exhibit. In cross examination, the doctor said that the vaginal discharge could be as a result of sexually transmitted diseases, sexual assault or changes in PH of the vagina.

11. PW4 was one John Njuguna who said he worked at Nairobi Women Hospital. He testified that the child went to their hospital on 26-06-2017 and reported that she was sexually assaulted by her cousin. Upon examination, there were no visible injuries on the child, her outer genital was normal, the vagina had no discharge, the hymen was intact and anus had no injuries. They did not find HIV or Hepatitis as well as syphilis. He produced PRC from as exhibit number 2. In cross examination, he confirmed that the child had no injuries anywhere and that the child's clothes were also not presented to the hospital.

12. The prosecution called their last witness on 26-09-2019. She was Corporal Beatrice Makokha based in Kikuyu police station. She narrated how she got the complaint, did investigations and summed up the prosecution witnesses' evidence. Of importance for purposes of this judgement is that PW5 stated that the complainant and PW2 told her that the accused inserted his fingers in the child's vagina. She advised the mother to take the child to the Nairobi Women Hospital. When they came from the hospital, she issued them with a P3 form which was filled at Wangige Health Centre. She confirmed that the appellant had told her that he had an alibi because at the time of the alleged offence, he had gone for football practice. She recorded the appellant's statement as he stated it. She concluded her evidence in chief by stating that the child was assessed for determination of age on 14-08-2019 and she was found to be between 6 and 7 years. She produced the assessment report as exhibit 4.

13. On cross examination, the said witness maintained her version of evidence and stated that she had no reason to frame the appellant. She added that she did not conduct an identification parade as it was not necessary since the complainant knew the appellant. She further stated that she was not aware of any malice or ill will between the appellant and the complainant's family. She explained that no finger prints were lifted from the child's vagina as it was not possible to do so since the child was expected to have passed urine.

14. The accused was put on his defence and gave a sworn statement where he denied committing the offence and said that the charges were trumped up because his uncle owed him Kshs 7,500.00 which he did not want to pay. He added that on the date he was arrested, he had gone home from his work place in Ngong to take some medicine to his mother who was sick and while they were in the house, they heard a knock on the door. Two men walked in, one of them being his uncle who started quarreling him and warned him not to visit his mother again. He also threatened to have him killed or jailed. At this point, he was told that he was being charged with defilement. He added that his grandmother died during the proceedings and she could have been his only witness. The appellant did not give his defence of alibi mentioned in his statement to PW5.

15. I have carefully gone through the proceedings and exhibits produced in the lower court. I have also read submissions filed by the appellant. I note that the prosecution decided to maintain the charge of attempted defilement despite there having been some indications that the same would be amended to what is recorded to be a sexual assault. The ingredients of the offence of attempted defilement are the same as a defilement safe for the act of penetration. These ingredients are, age of the child, attempted penetration or overt intention to penetrate and identification of the perpetrator.

16. Majority of cases of this nature usually have an alternative charge of committing an indecent act with a child. This particular case did not have such an alternative charge for reasons only the prosecution or the investigations officer could tell. This is a serious point of concern which the prosecution should agonize over. I say no more about this.

17. The appellant complains that the learned magistrate erred when he drew an inference of guilt without taking into account that the evidence of the complainant was unsworn evidence which needed thorough scrutiny and material corroboration. I have read through the judgement of the magistrate and I do not see anything missing in it in relation to the nature of the evidence adduced by the complainant.

18. The complainant was taken through a voire dire and the court made a finding that she was not sufficiently knowledgeable to give a sworn statement. The fact that a witness may not understand the nature of an oath does not mean that they were not telling the truth. Of course, such evidence like any other would require corroboration where the same is necessary. Faulting a court's decision just because the evidence given before it was through unsworn testimony is a wrong route to take unless such evidence is upon examination in comparison to the totality of the evidence before the court found wanting.

    In *KOO v Republic* [2020] eKLR, the court held that;

    'The evidence of a child under 14 may be received even if it is not on oath, provided that the court is satisfied, after conducting a voire dire examination, that the child possesses sufficient intelligence and understands the duty to tell the truth'.

19. That is the law. In this matter the court upon conducting voire dire stated that the child was not sufficiently knowledgeable to give sworn evidence. In the circumstances, the child's evidence was properly taken and its veracity would be judged depending on corroborative from evidence other prosecution witnesses.

20. The appellant has also challenged the court's decision on ground that the complainant's age was not proved and as such an important ingredient of the offence he was charged with was not proved. I agree with the appellant on the position that the age of the complainant is an important ingredient in proof of the offence he was facing. However, where it is apparent to the court that the complainant is below 18 years, there need not be hard proof of that fact. That said, the proceedings show that PW5 produced an age assessment report dated 14-08-2019 as exhibit 4 which the appellant did not challenge at the hearing. The report shows that the probable age of the complainant was between 6 and 7 years. In all possibilities, the child could not have been of 18 years and above. The age difference would be apparent to anyone. The report was done two years after the alleged offence. A simple calculation would show that she was as at the time of the alleged offence between 4 and 5 years. This ground of appeal lacks merits and I dismiss it.

21. The third limp of the appellant's appeal is that the magistrate erred by convicting him when the medical evidence produced before him did not support the charge. I have gone through the evidence of the doctor (PW3) who filled the P3 form and PW4 who produced the Post Rape Care forms prepared at the Nairobi Women's Hospital. They are all in agreement that the medical examination of the complainant showed that she did not have any injuries. However, it should be noted that the appellant was not facing a charge of defilement but attempted defilement. I do believe that the charge of attempted defilement was preferred because there was no evidence of penetration. Perhaps if there were injuries on other parts of the body which would have been geared to proving a struggle between the appellant and the complainant, the medical evidence would have been relevant. The appellant was

not convicted on the basis of the medical evidence but on the basis of evidence that he made an attempt to defile the complainant.

22. I now turn to the issue whether the act of attempt to defile was proved. Section 9 of the *Sexual Offences Act* provides that;

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

Section 2 of the Act defines penetration as;

'Means the partial or complete insertion of the genital organs of a person into the genital organ of another person'.

23. In view of the above, I hold that for the offence of attempted defilement to succeed, the prosecution must lead evidence to show that the alleged perpetrator made a move that would mean that he had intention of defiling the complainant. It is a common ground across the evidence of PW1, PW2 and PW5 that the appellant inserted his fingers into the complainant's vagina. There is no mention of the appellant attempting to insert his genital organ into the genital organ of the complainant. He allegedly inserted his fingers. It is not claimed and no evidence was led to show that the appellant made a move to have his genital organ penetrate the complainant's. He is not said to have removed his organ or made attempt to have it anywhere near the complaint's genitals. He is not said to have said anything that would have led anyone to believe that he had that intention.

24. In section 2 of the *Sexual Offences Act* a genital organ is defined as;

'To include the whole or part of male or female genital organs and for the purposes of this Act include anus.'

25. By all descriptions that I know, fingers cannot be described as genital organs. If at all the appellant inserted the fingers, into the vagina of the complainant, then that would fall under indecent act as defined in Section 2 of the said *Sexual Offences Act*. Having said so, I hold that the evidence produced by the prosecution was not in support of the charge as drawn. That would take anyone reading this judgment to my concern raised above as to why the prosecution and the investigations officer made a decision not to have an alternative charge of committing an indecent act with a child.

26. I am persuaded and I adopt the holding of Justice S.N. Riechi in *Peter Ndoli Adisa v Republic* [2018] eKLR where he held that;

'In the prove if an attempt to commit an offence, the prosecution must prove mens rea which is the intention and the actus reus which constitutes the overt act which is geared to execution of the intention. 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.....

From the evidence of the complainant, it is evident that what constituted the overt act by the appellant is the touching of her legs, which advance the complainant declined and the accused left her. Touching of the complainants cannot by itself alone be said to constitute 'an act which would cause penetration of a child' for it to amount to attempted defilement.'

27. There is a trend of use of colloquial words 'tabia mbaya' or bad manners in defilement cases. Whereas it is a common parlance in cases of this nature, I would like to state that not all 'tabia mbaya' or bad manners statements from a child should be automatically interpreted to mean that the accused committed an offence of defilement. Like in this case, may be the child meant 'tabia mbaya' to mean that she was inappropriately touched by the appellant. I say so because the evidence led by the

prosecution showed that there was no defilement. The prosecution should go further and make it clear to the court on what the child means with 'tabia mbaya' or bad manners.

28. I would have gone further to analyse some inconsistencies I found in the proceedings but I find it unnecessary owing to the fact that the I have already held that the evidence of the prosecution did not support the charge. If the appellant had been convicted of offence of committing an indecent act with a child, I would have extended this judgment to that line safe to say the following.

29. I am aware that the court has powers to convict an accused person for an offence other than the one he was charged with in the event the evidence leads and proves that offence as long as the accused person would not be prejudiced by such proceedings. However in this case, even if the court chose to go on that unpopular route, I still believe that the charge of committing an incent act with a child would not have been sustained. With the lack of clarity of what bad manners meant in the circumstances of this case, I would not be convinced to find the appellant guilty.

30. The fact that the doctor found white discharge from the vagina of the complainant does not mean that the discharge was caused by the insertion of fingers as the prosecution claimed. When the child was taken to hospital on 26-06-2017, the doctor did not see the white discharge. The white discharge is alleged to have been seen on 27-06-2017 when PW4 was examining her for filling of P3 form. The doctor could not be certain of the cause of the discharge. He told the court that there were three possible causes, that is, defilement, sexual assault or change of PH levels of the vagina. He did not elaborate what would be causes of PH levels. They could be caused by things other than what the appellant is alleged to have done. This would create doubt to the culpability of the appellant.

31. In conclusion I find that the conviction of the appellant was not safe and I proceed to quash it. The sentence meted on him is hereby set aside. The appellant shall be released from prison forthwith unless otherwise held.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JULY 2024.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.