Kiragu v Office of the Director of Public Prosecution (Criminal Appeal E008 of 2023) [2024] KEHC 8736 (KLR) (19 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8736 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MURANG'A

CRIMINAL APPEAL E008 OF 2023

S MBUNGI, J

JULY 19, 2024

BETWEEN

DAVID MACHARIA KIRAGU ..... APPELLANT

AND

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTION ..... RESPONDENT

JUDGMENT

1. This appeal arises from the original conviction and sentence in Sexual Offence Case No. 018 of 2019 at Kangema Law Courts before Hon. L. Gichobi- Principal Magistrate.

2. The appellant was charged with the offence of attempted defilement contrary to Section 9(1) as read with Section 9(2) of the *Sexual Offences Act* No. 3 of 2006.

   The particulars are that on the 15th day of June 2019 at around 1230 hours in Wanjegi location within Murang'a county, the appellant attempted to cause his penis to penetrate the vagina of F.M.W a child aged 8 years.

3. In the alternative count, the appellant was charged with committing an indecent act with a child, Contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006.

   The particulars were that on the 15th June, 2019 at around 1230 hours in Wanjegi location within Murang'a County, the appellant intentionally touched the vagina of F.M.W a child aged 8 years.

4. The appellant in his appeal requested that: -

   a. The appeal be allowed.

   b. The conviction and sentence passed against him be set aside.

5. The appellant lodged six (6) grounds of appeal as follows: -

i. That the learned trial Magistrate erred both in law and fact by failing to consider that essential ingredients /elements were not proved beyond reasonable doubt.

ii. That the learned trial Magistrate erred both in law and fact by failing to evaluate and analyze the evidence as whole and as a result reached a decision which was unsupportable having regard to entire evidence adduced.

iii. That the learned trial Magistrate erred both in law and fact by reaching conclusion based on its own opinion rather than on evidence.

iv. That the learned trial Magistrate erred both in law by dimming my defence which was strong and challenged.

v. That the learned trial Magistrate erred both in law and fact by failing to consider my mitigation.

vi. That the learned trial Magistrate erred both in law and fact by imposing a sentence that is harsh and excessive.

6. The court directed the appeal be disposed off by way of written submissions.

7. The parties filed their written submissions as below.

Appellants Submissions

Analysis

8. He submitted that the evidence adduced did not meet the threshold which proves the case beyond reasonable doubt and that the evidence used to convict him did not warrant the conviction and sentencing. He referred to the cases of; -

a. (a) *Francis Mutuku Nzangi v Republic* Criminal Appeal No. 358 of 2010.

b. *Pius ArapMaina v Republic* [2013] eKLR.

c. *Maitanyi v Republic* [1986] KLR 198.

9. He submitted that the learned trial Magistrate quickly brushed off his defence and did not pay attention to it despite the weight it bore concerning the case.

10. He submitted that his request for medical examination was granted.

11. He submitted that the learned trial Magistrate in his judgment shifted the burden of proof to him. He referred to the case of *Stephen Mungai Maina v. Republic* (2020).

12. On sentencing; he faulted the trial court for sentencing him to 15 years imprisonment; a sentence that he termed as harsh and excessive.

13. He identified two issues for determination.

a. Whether the prosecution proved their case beyond reasonable doubt against the appellant.

b. Whether the sentence passed was excessive, harsh and unfair.

Respondents Submission

14. Submitted that a prima facie case had been established and thus the appellant was placed on his defence.

15. Submitted that the case had been proved beyond reasonable doubt. That the three main ingredients were proved; that is: -

    a. Age of the complainant.

    b. Attempted penetration

    c. Identification of perpetrator

16. On the issue of sentencing the respondent submitted that the sentence was appropriate and commensurate to the crime.

    I have looked at the proceedings of the lower court plus the judgment, grounds of appeal and submissions.

Determination

17. This being the first appeal, it is the duty of the Honourabe court as the first appellant court, to re-examine, re-evaluate, and reconsider the evidence a fresh and make its own conclusion on it. This was the holding of the court of appeal in *Okeno v Republic* [1972] EA 32 as thus; An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v Republic*) [1957] EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion (*Shantilal M. Ruwala v Republic* [1957] EA 570.) It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's conclusions. It must make its own findings and draw its own conclusions. 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 the advantage of hearing and seeing the witnesses, (See. *Peter v Sunday Post*, [1958] EA 424)."

18. The prosecution called a total of four (4) witnesses. The accused gave unsworn statement in his defence.

19. I have looked at the evidence of each witness, I have also looked at the defence given by the appellant and the submissions.

20. The appellant was charged with the offence of attempted defilement contrary to Section 9(1) (2) of the *Sexual Offences Act*, the prosecution must prove the ingredients of defilement (age, positive identification) except penetration and the steps taken by the appellant to execute the defilement which did not succeed.

21. Section 388 of the penal code defines attempt in the following terms:

    i. Where a person intending to commit an offence begins to put his intentions into execution by means adopted to its fulfilment manifests his intentions by some avert act but does not fulfil his intensions to such an extent as to commit the offence, he is deemed to attempt to commit an offence.

    ii. It is immaterial except so far as regards punishment whether the offender does all that of necessary on his part for completing the commission of the offence or whether the complete is prevented by circumstances independent of his will or whether he desists of his own motion from further prosecution of his intention.

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

22. The offence of attempted murder with which the appellant was charged fall within the category of offences known as inchoate offences. These type of offences were dealt with by Mativo, J extensively in the case of *Moses Kabue Karuoya v Republic* [2016] eKLR where the learned judge expressed himself as follows:

> "In the case of Bernard K. Chege v Republic this court had the occasion to address it mind and to define in detail ingredients of incomplete offences also described as inchoate offences. Inchoate crimes are incomplete crimes which must be connected to a substantive crime to obtain a conviction. example of inchoate crimes are criminal conspiracy, criminal solicitation, and attempt to commit a crime, when the crime has not been completed. It refers to the act of preparing for or seeking to commit another crime. An inchoate offense requires that the accused have the specific intent to commit the underlying crime. An inchoate crime may be found when the substantive crime failed due to arrest, impossibility, or an accident preventing he crime from taking place. Strictly inchoate crimes are a unique class of criminal offences in the sense that they criminalize acts that precede harmful conduct but do not necessarily inflict harmful consequences in and of themselves. It can thus be appreciated that it could extend the criminal law too far to reach behind those acts and criminalize behavior that precedes those acts. Every inchoate crime of offense must have the mens rea of intent or of recklessness, but most typically intent. Specific intent may be inferred from circumstances. It may be proven by the doctrine of "dangerous proximity," and the presence of a "substantial step in a course of conduct." The dividing line between legal and illegal conduct is whether there is a "substantial step" towards committing a specific crime. 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 said to attempt or to prepare to commit the offence. The essential ingredients of an attempt to commit an offence have been laid down in the following words: -
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> "In every crime, there is first intention to commit it, secondly, preparation to commit it, thirdly to commit it. If the third, that is, attempt is successful, then the crime is complete. If the attempt fails, the crime is not complete but he law punishes the act. An 'attempt' it made punishable because every attempt, although it fails to success, must create an alarm, which, of itself, is an injury, and the moral guilt of the offender is the same as if he had succeeded"
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> For there to be an attempt to commit an offence by a person, that person must: -
>
> a. Intend to commit the offence;
>
> b. Begin to put his intention to commit the offence in execution by means which are adapted to its fulfilment. This means that he accused begins to carry out his intention to commit the offence in a way suitable to bring about what he intends to achieve;
>
> c. Do some overt act which manifests his intention; that is, the accused performs an ac which is capable of being observed by another (although it may not have been) and which in itself makes clear his intention to commit the offence,

23. For the offence of or attempting to commit an offence to be proved, the prosecutor must prove each of those three elements beyond reasonable doubt.

24. The act relied upon as constituting the attempt to commit an offence must be an act immediately, not merely remotely, connected with the contemplated offence. This was enunciated in the case of Williams, Ex parte The Minister for Justice and A-G. The act must go beyond mere preparation to commit the crime and must amount really to the beginning of the commission of the crime. But it is necessary that he accused should have done his best or taken the last steps towards the intended offence. There can be an attempt to commit an offence where the failure to complete the commission of it is due to ineptitude, inefficiency or insufficient means on the part of the accused person. In fact, the fact that the accused person, having done something which amounts to an attempt, then voluntarily desists from continuing the attempt, does not relief him from criminal responsibility for the attempt which he made before desisting. For the prosecution to prove the offence of preparation to commit a felony, they must establish that the accused had the intention to commit the offence. It must be shown that the appellant had put in motion his intention by preparing to commit the offence. The prosecution must establish that the appellant made the attempt to put into effect his intention. The question that calls for determination is whether or not the conduct of the appellant constituted an overt act sufficiently proximate to constitute preparation to commit an offence. Spry J (as he then was) put in more authoritatively when he stated: -

> " The principals of law involved are very simple but it is their application that is difficult.....the intention will, in the majority of cases, only be capable of proof by inference and it follows in such cases that an act must be of such a character as to be incompatible with another reasonable explanation. Secondly, if the intention is established, the act itself must not be too remove from the alleged intended offence" Criminal law seeks to restore order, decency and social equilibrium in society. It is aimed at curtailing or reducing to the minimum grave incidents of anti- social conduct. Punishment of an offender leis at the root of criminal law also seeks to punish those who intend to commit offences but could not successfully do so. That is, they merely attempted to commit an offence. The fact remains that they intended to commit an act which they know is unlawful and prohibited, but the completed offence was never accomplished. The offence remains inchoate because the accused could not accomplish his desires, or that the end result of his acts or omission is not what he envisaged. He has all the same, attempted to commit an offence. It is a criminal attempt and therefore an offence. Will an accused person be allowed to go scot- free because he could not finish his plans" No. He would be made to face some form of punishment even though he never completed the offence. In my view, any legal system would be defective if criminal liability only arose when substantive offences have actually been committed.

25. As was held in *Mwandikwa Mutisya v R* [1959] EA 18 and *Mussa Said v R* [1962] EA 454, in accordance with the definition of attempt in Section 388 of the penal code, the rest for attempt requires demonstration of an intention to commit the offence and overt act towards the commission of the offence which is sufficiently proximate or immediately connected to the attempted offence. According to Spry J. (as he then was) in *Mussa s/o said v R* [1962] EA 454, 455:

> " The principles of law involved are very simple but it is their application that is difficult. If the appellant intended to commit the offence of larceny and began to put his intention into effect and did some overt act which manifests that intention, he is guilty of attempted larceny. (Penal Code, s. 380). The burden of the prosecution is therefore first to prove the intention and secondly to prove an overt act sufficiently proximate to the intended offence.

On his part Madan Ag. CJ. (as he then was) in *Kateta v R*, [1972] EA 532, 54 opined that:

> "A mere intention to commit an offence which is in fact not committed cannot constitute an attempt to commit it. There must also be an overt act which is immediately and remotely connected with the offense intended to be committed and which manifests the intention to commit the offence. A remotely connected act will not do".

26. From the foregone, it is easily deducible that when a court is faced with any charge on an attempted nature, care must be taken to ensure that the attempt as opposed to mere acts or preparation, is proved. However strong the evidence is, if it only relates to actions in preparation to commit a certain crime, that evidence cannot justify a conviction on an attempted charge.

    For clarity purposes, evidence must be led which goes beyond the preparatory states 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. Likewise, the intention to commit the crime must also be proved.

27. Mativo, J in *Moses Kabue Karuoya v Republic* [2016] eKLR held that: "At the risk of repeating the position laid down in the above cited authorities, I reiterate that the key ingredients of the offence before me can be summarized as follows, namely (a) intent to commit the offence; from the evidence tendered, if I find that intent was established. The second requirement is the accused must (b) Begin to put his intention to commit the offence into execution by means which are adapted to its fulfilment. This means that the accused begins to carry out his intention to commit the offence in a way suitable to bring about what he intends to achieve. Evidence tendered is that the appellant knocked her down, lied on her, lowered her panty and forcefully opened her legs. Lastly the accused must (c) Do some overt act which manifests his intention; that is, the accused persons an act which is capable of being observed by another (although it may not have been) and which in itself makes clear his intention to commit the offence. It is said the appellant forced the complainant down, laid on her lowered her under wear to knee level, forced her thighs open and ejaculated after which he felt relieved and let her go. These were overt acts which viewed in the circumstances show a clear intention to commit the offence, but the appellant fell short of completing the offence owing to the circumstances explained, Justice Asike-Makhandia (as he then was) (in *Abraham Otieno Vs Republic*, High Court Criminal Appeal No. 53 of 200, Kisii) put it more succinctly when he said: -

> " For an offence of attempted rape to be deemed to have been committed under the section, the prosecution must prove that the culprit in such a manner that there were no doubt at all as to what his intention was. The intention must be to rape. It must be shown that he was about to rape the victim but was stopped in tracks and or in the nick of time. The intention to rape must be manifest. Such intention can be manifested for instances by word of mouth or conduct of the culprit if the culprit proclaims his intention to rape and directs his efforts towards that goal for instance, by holding the victims or pushing her to the ground , undressing her, removing her pants if at all and also unleashing his male genital organ in preparation thereof but for one reason or another something happens which compels him to stop, again that would be good evidence of attempted rape."

28. On the issue of attempted penetration, the complainant testified that: -

> " .....Accused called me by my name Faith and told me to go to where he was which I did. He told me to go his house. I agreed. I entered his house. It's a house made of/built with iron sheets. He then entered. He closed the door. He then removed his trousers and lowered it

to knee length. He removed my pantie up to knee length. He removed my pantie up to knee length. I was wearing a long red dress. He then did bad things to me. I was on bed when that was happening. We were both in bed. His bed was from the middle of the house and touches the iron sheet wall. His house is one roomed. Accused was on top of me. He laid on me and did bad things to me. He was using the thing he uses to urinates. He put his thing he uses to urinate on my middle part on the part I use to urinate..."

1. PW2 the mother testified ".....She was very terrified and told me you know Baba Kimotho called me inside his house, held my hand, laid me on bed, removed my clothes and then his clothes and did bad things to me and told me not to tell anybody. When she told me, he did bad things to her I understood she meant he had defiled her. We went inside the house. I took a mobile phone touch and checked her private and noted he hadn't fully penetrated her but had touched her private parts. I saw discharge but not blood on her private parts. I saw seminal fluids on her private parts, and thighs and pantie. I then went to accused's home and asked him. We are neighbours. It's about 5 minutes' walk from our home....."

2. The age of the victim was proved, I have seen a copy of birth certificate showing she was born on 10th June 2011. Therefore, on 15th June 2019 the date of the alleged offence she was 8 years old.

3. I have seen the P3 form, upon examination complainant private parts had no lacerations on the labia, mild tenderness, hymen broken. No bleeding, fluids on the thighs.

4. The P3 form notes taken together with the evidence of PW1 the complainant and PW2 especially that the labia had mild tenderness to show that there was an attempt to penetrate the complainant's vagina.

5. The question now is was the accused the person who attempted to penetrate.

6. The complainant in her evidence vividly recalled how the accused person called her and told her to enter into his house when they got into the house he removed his trousers and lowered them to the knee level, removed her pantie took out the bed and laid on top of her and did bad things to her using the thing he uses to urinate. He put his thing he uses to urinate into her middle part she uses to urinate.

7. The accused was well known to the complainant, in fact he called her by her name faith when he was calling her to go to where he was.

8. She told the court that the house was not far from the accused house a fact corroborated by the mother.

9. Complainant is aged 8 years, she is so young and innocent to think of framing anyone, when under cross examination by the appellant she was very firm and repeated what she told the court when she gave evidence in chief. So, I have no reason to doubt her evidence.

10. I am alive to the provisions of Section 124 of Evidence 124 of *Evidence Act*.

> "Notwithstanding the provisions of Section 19 of the oaths and Statutory Declarations Act, 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."

Therefore, what is required of the trial court is to be satisfied that the victim is telling the truth.

39. In his defence the appellant alleged that there was collusion between the PW1, PW2, his wife and PW4. The wife was not connected in any way with this case, she was not a witness.

40. Therefore, from the above analysis I am satisfied that the accused was positively identified by the complainant as the assailant.

41. The trail court correctly appreciated the evidence adduced by the witnesses and also extensively considered the evidence adduced by the accused in his defence. The appellant never sought for medical examination neither did he bring up the defence of alibi he only said that he was found in the house when he was arrested. There is nowhere in the proceedings where he says that he was not at the scene during the commission of the alleged offence.

42. Having re-assessed and reevaluated the evidence for the lower court I am satisfied that the lower court considered the evidence and properly arrived to the right conclusion that the appellant committed the offence. I therefore upheld the conviction.

43. On the issue of sentencing I find that the trial court considered the appellants mitigation. This is how he mitigated..." The idea of defilement started at home. Due to family wrangles. I separated with my wife. She used to beat me up. I put up my own house. We never used to have sex with my wife. Neighbours really wanted to know how we live at home. My family break up led me into committing the offence of defilement.

44. The court considered the appellants mitigation and sentenced the appellant to serve 15 years imprisonment. The law provides for a punishment of a minimum of 10 years imprisonment.

45. Given the age of the complainant and the circumstances under which the offence was committed it was by good luck that the appellant did not penetrate the general organ of the complainant, his intentions were very clear from his actions leading to the act. I find no reason to disturb the term of 15 years imprisonment imposed by the trial court. Therefore, the sentence is upheld.

46. The upshot of the above is that I find the appeal has no merit, the same is dismissed.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 19TH DAY OF JULY, 2024

HON. MR. JUSTICE S. MBUNGI

JUDGE OF THE HIGH COURT

In the presence of:

The Complainant/Advocate- Absent

The Appellant/Advocate- Present

Court Prosecutor- Waweru

The Court Assistant – Elizabeth Angong'a