Kiprotich alias Cheptaback v Republic (Criminal Appeal E122 of 2022)
[2024] KEHC 10898 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KEHC 10898 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL APPEAL E122 OF 2022

JRA WANANDA, J

SEPTEMBER 20, 2024

BETWEEN

JOEL KIPROTICH ALIAS CHEPTABACK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant was charged in Eldoret Chief Magistrate's Court Sexual Offence Case No. E098 of 2021 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 were that on 8/04/2021, at [Particulars withheld] of Turbo sub-County within Uasin Gishu County, he intentionally attempted to cause his penis to penetrate the vagina of FJ, a child aged 3 years.

2. The Appellant pleaded not guilty to the charge and the case then proceeded to full trial in which the prosecution called 5 witnesses. At the close of the prosecution's case, the Court found that the Appellant had a case to answer and placed him on his defence. The Appellant then gave a sworn statement and called no other witness. By the Judgment delivered on 17/10/2012, he was convicted and then sentenced to serve 10 years imprisonment.

3. Dissatisfied with the said decision of the trial Court, the Appellant, through Messrs Limo R.K. Advocates, instituted this appeal on 19/12/2022 against the conviction and sentence. The following 7 grounds were cited

    i. That the learned trial Magistrate erred in matters of law and fact by failing to observe that the mandatory sentence of 10 years imprisonment meted against the Appellant fails to conform to the tenet of fair trial that accrue to the accused under Article 25(C) of *the Constitution*.

    ii. That the learned trial Magistrate erred in law and in fact by failing to note that the prosecution witnesses gave inconsistent, contradictory and conflicting testimonies.

iii. That the learned trial Magistrate erred in both law and in fact by meting out harsh and excessive sentence on the Appellant without considering the facts adduced before Court.

iv. That the learned trial Magistrate erred in both and law and fact by failing to note that the investigation was shoddy and vital witnesses were not called to testify and to consider that there was a grudge with the witnesses.

v. That the learned trial Magistrate erred in matters of law by failing to note that the prosecution did not prove their case to the required standards as required by law.

vi. That the learned trial Magistrate erred in both law and fact by rejecting the Appellant's defence without giving cogent reasons.

vii. That the trial Magistrate erred in both law and fact by conducting the proceedings in a language that the Appellant never understood.

Prosecution evidence before the trial Court

4. PW1 was the child victim's mother. She stated that the child was 4 years old, that she had left her at home to go to work but before she could reach her workplace, a neighbour called her informing her that the child had been found in the Appellant's house and that the Appellant was also a neighbour. She testified further that when she returned, she found that the neighbour who had called her had rushed the child to the hospital, that the minor was unable to explain and that upon examining her, she did not find anything. She stated further that neighbours got suspicious when they saw the child in the Appellant's house, that the child was not given any medication and that she was walking well. PW1 further stated that the child usually talks to her and other children but she refused to narrate what happened with the Appellant and that she talks about other issues but not the one the subject hereof.

5. PW2 was the child victim. Because of her age, the learned trial Magistrate directed that she gives unsworn statement. However, the record indicates that as soon as the attempt was made to take her testimony, she broke down and refused to answer the questions put to her. According to the Prosecutor, attempts to use an intermediary too were not successful as the child refused co-operate. In the circumstances, upon the Prosecutor's application, the child was declared an unsuitable witness under Section 31 of the *Sexual Offences Act*.

6. PW3 was Dr. Michael Kibowen from Moi Teaching and Referral Hospital who came to testify on behalf of her colleague Dr. Taban whom, it was reported, was away for further studies. He stated that the child was seen at the facility, that she was 10 years old, and that her clothing was not availed. He stated that the history that he was given was that the child could not be seen where she was playing with other children, that the neighbours began looking for her and then heard her crying in the Appellant's house, that when they pushed the door, they found her there with the Appellant, that the Appellant had pulled down his trouser and inner wear and was trying to defile the child. He stated that upon examination, basically nothing abnormal was found on the child's genitals. He then produced the P3 Form as an exhibit.

7. PW4 was one NJ. She stated that she was the child's neighbour, that on 8/04/2021, she was in her house when one C came to ask her whether she had seen the child, that when she answered in the negative, the neighbours conducted a search but which did not bear fruit, that shortly, the said C came back with one Sheila who told PW4 that the Appellant was raping the child. PW4 then stated that she rushed to the Appellant's house where she found the child inside the house with her clothes removed and that the Appellant had covered her with a jacket. She stated that she slapped the accused thrice and who looked drunk, that she then directed the other neighbours to dress up the child and the child

was then taken to hospital and that since the child's mother was absent, they reported the incident to the police. According to her, the said Sheila was born in 1996 and was conversant with what was happening and that the child-victim was 4 years old as at 2021 when the incident took place. In cross-examination, PW4 admitted that the Appellant used to work with her and stated that the Appellant had stolen Kshs 1,000/- from her. She reiterated that she was called when the Appellant was in the act, and that she saw the Appellant had inserted his penis inside the child's legs on the rear side. She denied that she had any reason to "fix" the Appellant.

8. PW5 was Corporal Songok from Turbo Police Station. He testified that he was the Investigating Officer in the matter, that the child was brought to the station on 8/04/2021 by PW4, a neighbour, that the report made was that at about 7 pm on the same date, the child disappeared from home after she had gone out to play with others and that later, she was found in the Appellant's house where the Appellant had removed her clothes and was trying to defile her, that members of the public arrested the Appellant and the child was rushed to hospital. He stated that upon being examined, the doctor classified the child's injuries as attempted defilement. He then produced the birth notification which showed that the child was born on 6/11/2017 and stated that the child was therefore 3 years old at the time of the incident.

9. At the close of the prosecution case, the trial Magistrate found that a case to answer had been established against the Appellant and placed him on his defence.

Defence evidence

10. The Appellant testified as DW1. He stated that PW3 had "fixed" him because he found her with someone and that she feared the Appellant would tell her husband. He stated that they live in a 0.2 acres plot and wondered why nobody else was called to testify. He alleged further that he was involved in an accident and he cannot even use the toilet thus he could not have committed the offence. He alleged that he was admitted in hospital for 2 months and underwent an operation of the head, stomach and legs. He denied that the child was found in his house and stated that there were 4 children, including her sisters. According to him, PW3's husband is a police officer.

Hearing of the Appeal

11. The Appeal was directed to be canvassed by of written Submissions and the Appellant's Advocates filed their Submissions on 22/11/2023. Up to the time that I was concluding this Judgment, I had not come across any Submissions filed on behalf of State.

Appellant's Submissions

12. Counsel for the Appellant submitted that for the charge of attempted defilement, the Court needs to consider whether the relevant ingredients thereof have been fulfilled, namely, that the victim was a child, proof that there was intent to penetrate the private parts of the victim and lastly, positive identification of the assailant. He cited the case of Benson Musumbi v Republic [2019] eKLR and John Gatheru Wanyoike v Republic [2019] eKLR.

13. In respect to age, Counsel submitted that although the prosecution and the victim's mother (PW1) stated that the child was 4 years old, no identification document was produced. He observed that although the doctor (PW3) stated that the child was 10 years old, on its part, the charge sheet indicated the child's age as 3 years. According to Counsel therefore, the foregoing evidence was contradictory.

14. Regarding whether there was an act to cause penetration, which was not successful, Counsel cited the case of Daniel Simiyu Wanyonyi v Republic [2019] eKLR and also Section 388 of the Penal Code

on the definition of the phrase "attempt" and submitted that there are two main ingredients of an attempt offence, namely, the intention (mens rea) and the execution (actus reus). He added that in this case, of the 5 prosecution witnesses called, PW1 (the child's mother) did not witness anything and her evidence was all hearsay, PW2 (the minor) was unable to testify, and PW3 (the doctor) testified on what his colleague, whom he testified on behalf of, was told and that her Report also clearly showed no bruises in the child's thighs and/or anything hence it could not show the attempt. He submitted further that PW4 (the neighbour) who although claimed that she saw what happened, her evidence was not corroborated by any witness. Counsel pointed out that PW4's evidence was that she had been told by one Sheila that the accused was defiling the child in his house, and that the said Sheila was born in 1996 and hence aware of what was happening. According to Counsel, the said Sheila was a person of 25 years hence her evidence was crucial but the prosecution failed to call her. He cited the case of JMN vs Republic, Criminal Appeal No. 139, 140 and 141.

15. Counsel submitted further that the doctor indicated that all the relevant parts of the body were normal, the hymen was intact, no laceration was seen in her vagina and anus and no discharge was noted, and that no evidence of defilement was found. He pointed out further that the mother equally confirmed that the child was walking well and had no bruises on her thighs or private parts and that she examined the child and stated that she did not see anything. He cited the case of Daniel Ombasa Omwoyo v Republic [2016] eKLR and the case of David Aketch Ochieng v Republic [2015] eKLR.

16. Counsel contended further that the Appellant, in his defence, stated that PW4 "fixed" him since he had found PW4 with someone and she feared that the Appellant would tell PW4's husband, that the said statement shows that the Appellant and PW4 had a sort of grudge and so PW4's could not be relied upon. He submitted further that the Appellant also stated that he had been involved in an accident sometime before the date of alleged incident and he could not even use the toilet well, and that he underwent an operation hence he was not in a position to defile the child. Regarding identification, he argued that the child could not even identify the assailant and reiterated that the evidence of PW4 was never corroborated.

Determination

17. As a first appellate Court, this Court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial Court had the advantage of hearing and observing the demeanour of the witnesses (See Okeno vs. Republic [1972] E.A 32)

18. The issues for determination are evidently the following:

    a. Whether the attempted defilement charge against the Appellant was proved beyond reasonable doubt.

    b. Whether the sentence of 10 years imprisonment was proper.

19. I now proceed to analyze and determine the said issues.

a. Whether the charge was proved case beyond reasonable doubt

20. 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* which provide 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.

21. From the above definition, it is evident that the ingredients of the offence, save for "penetration", are the same usual ingredients for the offence of defilement generally, namely, age of the child-victim, and positive identification of the assailant. Instead of "penetration", the prosecution must prove the steps taken by the accused person to execute the defilement but which steps did not eventually succeed.

22. Regarding age, the manner of proof was well explained in the case of Francis Omuroni v Uganda Court of Appeal; Criminal Appeal No. 2 of 2000, as follows:

> " In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense ....."

23. It is therefore clear that age may be proved by way of Certificate of Birth or age assessment by a qualified doctor or through other credible evidence such as baptismal card, notification of birth or school records or the evidence of parents or guardian.

24. In this case, the Investigating Officer, Corporal Songok produced the birth notification which indicated that the child was born on 6/11/2017. The incident having been alleged to have occurred on 8/04/2021, there is no doubt that the victim was at the time of the incident about 3 years and 5 months old which fits well within the 3 years age indicated in the Charge Sheet. I therefore have no reason to fault the trial Magistrate for her finding that the age of the victim was proved.

25. On the issue of identification, the Court of Appeal in the case of Cleophas Wamunga v Republic [1989] eKLR expressed itself as follows:

> " Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant wholly depends or to a great extent on the correctness of more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification".

26. In this case, it is not denied that the Appellant was a neighbour of the victim, and also of PW1 and PW4 as they all lived in the same plot. Although the time that the incident is alleged to occurred was around 7 pm, it has not been alleged that there was no light. Among these witnesses, PW4 alleged that she saw the Appellant in the act. As such, the element of mistaken identity of the Appellant would be too remote. In the circumstances, identification of the Appellant was clearly one of recognition rather than one of identifying a stranger. I therefore, again, have no reason to fault the trial Magistrate for finding that identification of the Appellant was proved.

27. In respect to the "attempt to defile", the phrase "attempt" is defined in Section 388 of the Penal Code in the following terms:

(1) 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 intentions to such an extent as to commit the offence, he is deemed to attempt to commit an offence.

(2) 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.

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

28. In view of the above definition, it is generally agreed that to prove an offence of "attempt", the Prosecution is required to demonstrate an intention to commit the offence and the overt act executed towards the commission of that offence and which act is sufficiently proximate or immediately connected to the attempted offence (see Mwandikwa Mutisya vs. R (1959) EA 18 and also Mussa Said vs. R (1962) EA 454).

29. Further, the following was stated in the case of Mussa s/o Said vs. 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 on the prosecution is therefore first to prove the intention and secondly to prove an overt act sufficiently proximate to the intended offence.
>
> The intention will, in the majority of cases, only be capable of proof by inference and it follows in such cases that the act must be of such a character as to be incompatible with any other reasonable explanation. Secondly, even if the intention is established, the act itself must not be too remote from the alleged intended offence."

30. Similarly, in Keteta v. R, (1972) EA 532, 534, Madan Ag, CJ, stated as follows:

> " 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 offence intended to be committed and which manifests the intention to commit the offence. A remotely connected act will not do."

31. Clearly therefore, in a charge of the nature herein, the "attempt" itself, and not mere acts of preparation, must be proved. As was stated by Odunga J (as he then was) in the case of Stephen Mungai Maina v Republic [2020] eKLR, "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. Likewise, the intention to commit the crime must also be proved".

32. Considering the above factors, in this case, I have serious reservations on whether there was proof of the act intended to cause penetration, but which was not successful. In other words, I have serious doubts whether the two main ingredients of an "attempt" offence, namely, the intention (mens rea) and the execution (actus reus) were proved.

33. In this case, it is unfortunate that, although the child was herself brought to Court to testify as PW2, she was unable to so testify as she was reported to have broken down and totally refused to say anything about the incident. The reason for her refusal to talk was never ascertained. Although her refusal to talk could be as a result of the ordeal she went through and she may have therefore been too traumatized to "open up, this Court cannot engage in speculation. Although in this case the Court declared the

child to be a "vulnerable" witness under Section 31 of the *Sexual Offences Act*, no meaningful effort was made thereafter to actualize this declaration. Section 31 aforesaid provides as follows:

> "(1) A court, in criminal proceedings involving the alleged commission of a sexual offence, may declare a witness, other than the accused, who is to give evidence in those proceedings a vulnerable witness if such witness is -
>
> (a) the alleged victim in the proceedings pending before the court;
>
> (b) a child; or
>
> (c) a person with mental disabilities.
>
> (2) The court may, on its own initiative or on request of the prosecution or any witness other than a witness referred to in subsection (1) who is to give evidence in proceedings referred to in subsection (1), declare any such witness, other than the accused, a vulnerable witness if in the court's opinion he or she is likely to be vulnerable on account of —
>
> (a) age;
> .....
>
> (c) trauma;
> .....
>
> (e) the possibility of intimidation;
> .....;
>
> (i) the relationship of the witness to any party to the proceedings;
>
> (j) the nature of the subject matter of the evidence; or
>
> (k) any other factor the court considers relevant.
>
> (3) The court may, if it is in doubt as to whether a witness should be declared a vulnerable witness in terms of subsection (2), summon an intermediary to appear before the court and advise the court on the vulnerability of such witness.
>
> (4) Upon declaration of a witness as a vulnerable witness in terms of this section, the court shall, subject to the provisions of subsection (5), direct that such witness be protected by one or more of the following measures -
>
> (a) allowing such witness to give evidence under the protective cover of a witness protection box;
>
> (b) directing that the witness shall give evidence through an intermediary;
>
> (c) directing that the proceedings may not take place in open court;
>
> (d) prohibiting the publication of the identity of the complainant or of the complainant's family, including the publication of information that may lead to the identification of the complainant or the complainant's family; or
>
> (e) any other measure which the court deems just and appropriate.
>
> (5) Once a court declares any person a vulnerable witness, the court shall direct that an intermediary referred to in subsection (3), be appointed in respect of such witness unless the

interests of justice justify the non-appointment of an intermediary, in which case the court shall record the reasons for not appointing an intermediary.

.....”

34. Section 31 above was expounded upon by the Court of Appeal in the case of MM v Republic [2014] eKLR in the following terms:

> “ The role of an intermediary is provided for in subsection 7 of section 31 namely, to convey the substance of any question to the vulnerable witness, inform the court at any time that the witness is fatigued or stressed; and to request the court for a recess.
>
> It is difficult for a child or indeed a victim of a sexual attack to publicly relive the most traumatic and humiliating experience of their lives in order to get justice, more so, if they have to be subjected to the rigors of daunting and intimidating cross-examination. The thinking behind the enactment of section 31 was, in our view, to moderate these traumatic effects in criminal proceedings.
>
> It is clear from sections 31(2) and 32 that, first and foremost it is the duty of the prosecution to ascertain the vulnerability of the witness and to apply to the court to make that declaration before appointing an intermediary. In addition, the court, as we have earlier observed, can on its own motion, through voir dire examination, declare a witness vulnerable and proceed to appoint an intermediary. Any witness (other than the one to be declared vulnerable) can likewise apply to the court for the declaration. The application must not be granted merely because the victim is young or too old or appears to be suffering from mental disorder. The court itself must be satisfied that the victim or the witness would be exposed to undue mental stress and suffering before an intermediary can be appointed.
>
> It is clear from what we have said so far that the procedure of appointing an intermediary precedes the testimony of the intended vulnerable witness even where the court does so suo moto. It is also clear that an intermediary can be an expert in a specified field or a person, who through experience, possesses special knowledge in an area or a social worker, or a relative, a parent or a guardian of the witness ....”

35. The Court of Appeal further guided as follows:

> “ Because of the reality that a child of tender years, or an extremely old person, or a person affected by disease of the body or mind or even a lunatic may have difficulties relating to the trial court events in a crime, the role of an intermediary in such situations is imperative. Indeed, in jurisdictions such as South Africa, England and Wales, intermediaries are professionals whose services are sourced by the court when the need arises. Perhaps that is what the framers of section 2 of our *Sexual Offences Act* had in mind when they included experts, psychologists, counsellors and social workers in the definition of ‘intermediaries’.
>
> The whole object of the proceedings through an intermediary is to achieve fairness in the determination of the rights of all the people involved in a trial and to promote the welfare of a child or vulnerable witness.”

36. In view of the foregoing, I am of the opinion that there was abdication of duty by both the Prosecution and the learned trial Magistrate insofar as facilitating or assisting the child to testify was concerned. It is now generally agreed that where the evidence of a child of tender years involved in a sexual assault tends to be inconsistent or nonsensical or where there appears to be serious trauma, fear or intimidation because of the person who is allegedly the offender or generally, the Court or the justice

system environment, the prosecution ought to apply for the child to be declared a vulnerable witness, and for a trusted intermediary to communicate to the Court on her behalf. In my view, to actualize the spirit of Section 31 above, the Prosecution should have gone further and applied for orders that interventionary steps be taken to assist the child to first heal from the trauma before testifying. Such intervention would include, for instance, referring the child to counselling services. Alternatively, the Court could have itself initiated such process. Needless to state, in invoking this course suo motu, the Court should be cautious as it should not to deemed to appear to be assisting the prosecution in compiling evidence. In this case, apart from simply declaring the child a vulnerable witness, no further step was made to ensure that the child derived any benefit from such declaration such as would ensure that she was provided with a situation or environment that would have made it possible for her to testify.

37. In view of the above failure, in the absence of the child's own testimony, amongst all the witnesses who testified, it is only PW4 who alleged that she saw the Appellant attempting to sexually penetrate the child. None of the others gave eye-witnesses accounts. PW4 was the only witness who claimed that she saw what happened. However, her evidence was not corroborated by any other witness. PW4's evidence was that she had been told by one Sheila that the accused was defiling the child in his house and that she rushed there and indeed found the Appellant still in the act. The indication is that PW4 was not alone and that there was a crowd of neighbours also present. It is however strange that neither the said Sheila nor any other of the people who were in the crowd was called to corroborate PW4's evidence. Although there was no mandatory requirement for corroboration, in this case, the persons left out were crucial witnesses whom the prosecution ought to have called to bolster their case.

38. I find that the issue of corroboration was relevant in this case because I also observe that the Appellant alleged that PW4 was out to "fix" him since he had found PW4 in a compromising situation with another man and PW4 feared that the Appellant would disclose the same to her husband. In other words, the Appellant was advancing the defence that PW4 should not be believed because she had a grudge against the Appellant. The Record does not show that the Appellant was cross-examined on this allegation. The Appellant also alleged that he was incapable of having committed the offence because he had been involved in an accident sometime before the date of alleged incident and that he was so incapacitated to the extent that he could not even easily use the toilet. He claimed that he had undergone surgery and was thus not in a position to attempt to defile the child. Again, no cross-examination is recorded to have been made on this allegation. To put these doubts to rest, the Prosecution ought to have called the rest of the other potential witnesses to corroborate what PW4 stated.

39. A further reason for the need for corroboration was the fact that although in the P3 Form, the doctor (PW3) who examined the child made the opinion that there was attempted defilement, nothing in the Report lays a basis or supports such opinion or conclusion considering that all items of examination returned negative findings. All the examination findings being in the negative, one wonders how the conclusion of "attempted defilement" was reached by the doctor. The doctor who testified in Court was not the one who prepared the P3 Form and I note that he said nothing about whether in his own opinion there was "attempted defilement". The doctor also disclosed that the clothing that the child was wearing on the fateful day was not availed meaning that no tests was conducted thereon. I therefore find that there was no basis for the doctor's conclusion that there was attempted defilement.

40. Under the above circumstances, I find that it was unsafe to convict the Appellant on the testimony of the single eye-witness particularly when her neutrality had been questioned and her personal interest in the outcome of the case raised.

Final Order

41. In the circumstances, this Appeal succeeds and is allowed. I hereby order as follows:

    i. The conviction of the Appellant by the trial Court in Eldoret Chief Magistrate's Court Sexual Offence Case No. E098 of 2021 for the charge of attempted defilement is hereby quashed and the sentence imposed therein set aside.

    ii. The Appellant shall be set at liberty forthwith unless otherwise lawfully held.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 20TH DAY OF SEPTEMBER 2024

.....

WANANDA J.R. ANURO

JUDGE

Delivered in the presence of:

Appellant

Kibii for Appellant*

Okaka for State

Court Assistant: Brian Kimathi