Njau v Republic (Criminal Appeal E002 of 2024)
[2024] KEHC 13062 (KLR) (24 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13062 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL E002 OF 2024

JN ONYIEGO, J

OCTOBER 24, 2024

BETWEEN

JOHN MURIMI NJAU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against conviction and sentence by Hon. S. Mbungi in Sexual Offences Case No. E002 of 2024 at Garissa Law Court delivered on 16.01.2024)

JUDGMENT

1. 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 of the offence were that on 14.01.2023 at 0800hrs at [Particulars withheld], Madogo Location, Bangale Sub-County within Tana River County he intentionally and unlawfully attempted to cause his genital organ namely penis to penetrate the vagina of A.K. aged 15 years.
2. He also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No 3 of 2006. The particulars of the same being that on 14.01.2023 at 0800hrs at [Particulars withheld], Madogo Location, Bangale Sub-County within Tana River County he intentionally and unlawfully touched the vagina of A.K. aged 15 years.
3. Upon being arraigned in court, he pleaded not guilty and the matter proceeded to full trial.
4. The prosecution called four (4) witnesses and at the close of their case, the court found that the appellant had a case to answer and was consequently placed on his defence. He elected to give unsworn testimony and called no witnesses.
5. At the end of the trial, he was convicted of the main count offence and sentenced to serve 10 years' imprisonment.

6. Being dissatisfied with the conviction and sentence, he preferred the appeal herein via an undated petition of appeal citing the following grounds:

   i. That the prosecution's evidence was laced with contradictions and inconsistencies thus discrediting the prosecution's case.

   ii. That the prosecution did not prove its case beyond any reasonable doubt.

   iii. That the trial court failed to appreciate his defence which was not only cogent but also reliable.

   iv. That the trial court failed to properly analyze the evidence before him thus reaching a manifestly wrong decision.

7. The court directed that parties file their written submissions but the respondent chose to argue the appeal orally while the appellant elected on his written submissions.

8. The appellant submitted that prosecution did not prove the offence herein to the required standard as the evidence between the prosecution witnesses contradicted each other. Additionally, he contended that the alleged torn clothe belonging to the complainant was not presented before the court to support the allegation herein. It was his further contention that even prior to the alleged incident herein, the complainant's hymen was already broken and therefore it could not squarely be put on him that he was responsible for the offence herein. He argued that he was framed owing to the differences between him and PW1 his wife who was keen on taking his property. He urged this court to allow his appeal and thereafter set him free.

9. On the other hand, the learned prosecutor, Mr Bedan Kihara opposed the appeal by stating that the prosecution proved its case beyond any reasonable doubt. That the evidence was not only cogent but also admissible and therefore, conviction of the appellant was regular. He contended that the appeal herein is devoid of any merit as the evidence by the prosecution was overwhelming leading to a sound finding by the trial court. He urged this court to dismiss this appeal.

10. The duty of a first appellate court was explained by the Court of Appeal in Njoroge vs Republic (1987) KLR 19 at pg 22 as follows: -

> " As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of the first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and to make due allowance in this respect. [Also see Pandya vs R [1957] E.A 336and Ruwalla vs R. [1957] E.A 570].

11. Having perused the petition of appeal, the record of appeal and the respective parties' submissions, I am able to discern the following issues for determination:

   i. Whether the offence of attempted defilement was proven by the prosecution to the required standard.

   ii. Whether the sentence was legal and appropriate.

12. PW1, AMM testified that she is the mother of the complainant. She testified that the complainant was aged 15 years old and that the appellant was her husband and step father to the complainant. She recalled that on 14.02.2023 at about 8.00 a.m. as she left for Abdiwali's farm, the appellant together

with the complainant left to go buy bananas from a nearby farm at [Particulars Withheld]. About one hour later, the complainant found her way to where she was crying that while on the way, the appellant knocked her down and had sex with her.

13. That upon receiving the information, she took the complainant to Madogo Police station where she reported the incident. It was her evidence that in company of two officers, the complainant was taken to Madogo hospital where she received medical attention. She further stated that she examined the complainant's private parts and saw that the same was bruised.

14. PW2, A.K stated that she was 15 years at the material time and that PW1 was her mother and the appellant her step father. It was her case that the appellant sent her fare through her aunt in order to come to Garissa. That on the material day, the appellant informed her that they were to eat bananas and so, they left together to a farm at Kona Punda in order to get the said bananas. Along the way, the appellant branched to a different route stating that there was another farm with good bananas and therefore, they arrived at a place with so many mathenge trees.

15. It was her testimony that while in the bush, the appellant held her neck and knocked her down in an attempt to defile her while telling her that he wished her to mix with kikuyu blood. That the appellant tried to insert his penis into her vagina but it was not possible as she tightened her legs. She stated that she struggled with him and upon gaining freedom, rushed to inform her mother. It was her evidence that the appellant tried to thrust her penis into her vagina but she managed to wade him off. On cross examination, she stated that the appellant penetrated her but on re-examination, she said that he tried to penetrate her forcefully but he did not succeed.

16. PW3, Bryan Mwakoli, a clinical officer recalled that when the complainant was presented at the hospital, he examined her genitalia and saw fresh blood around her vulva minora and vaginal course. He stated that there were bruises around the vulva in as much as there was no vaginal discharge. He further stated that in as much as the hymen was broken, the same was not fresh but upon conducting urinalysis, spermatozoa was seen. He administered appropriate drugs to prevent her from contracting H.I.V. He produced the P3 Form and the treatment notes as Pex 2 and 3 respectively. On cross examination, he stated that the complainant was on her periods during the time in question.

17. PW4, No. 92578 PC Boniface Mutalai, the investigating officer reiterated the evidence of PW1, PW2 and PW3. It was his case that upon the report being made at the station, he issued the complainant a P3 Form and together with a colleague, took her to Madogo Health Centre where she was examined and further treated. He arrested the appellant and upon further investigations, he charged him with the offence herein.

18. At the close of the prosecution's case, the trial court found that the prosecution had made out a prima facie case against the appellant. He was consequently placed on his defence. He opted to give unsworn statement in his defence and did not call any witnesses.

19. The appellant (DW1) denied the alleged events of the day in question and explained that on the very day he woke up in the morning and proceeded to the market nearby to pick a parcel which had previously been sent from Nairobi. That he engaged in various tasks when he finally returned home at 11.00 p.m. He stated that while in the house, his wife called police officers who arrested him for unknown reasons. He further stated that one PC Kiptoo a police officer demanded from him Kes. 200,000 in order to set him free, a request he turned down. He pleaded with the court to release him as he was innocent.

20. The appellant is facing the offence of attempted defilement. The *Sexual Offences Act* provides for the offence of attempted defilement under section 9 as follows:-

> " 9. Attempted defilement
>
> (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.
>
> (3) The provisions of section 8(5), (6), (7) and (8) shall apply mutatis mutandis to this section."

21. In the case of John Gatheru Wanyoike vs Republic [2019] eKLR, the court held thus: -

> " It is clear that the elements of the offence of attempted defilement are similar to those of defilement save that there was no penetration. The prosecution must prove that the child was a minor, that there was an act to cause penetration, which was not successful, and that there was positive identification of the accused defiler."

22. Thus, this Court will analyse the evidence from the trial record to determine the following ingredients of the offence of attempted defilement: -

i. Whether the age of the complainant was proved.

ii. Whether there was an act to cause penetration, which was not successful.

iii. Whether the appellant was positively identified by the minor as the assailant.

23. It is an accepted principle that the age of a victim in sexual offences is a paramount ingredient which can be proven by documentary evidence, observation or common sense or, by the testimony of a parent or medical evidence (age assessment). This principle is pegged on the fact that, from the establishment of the age of a victim comes the requisite punishment prescribed by the law. In *Alfayo Gombe Okello vs Republic Cr App No 203 of 2009* (Kisumu) the Court of Appeal the court stated as follows: -

> " ...In its wisdom, Parliament chose to categorize the gravity of that offence on the basis of the age of the victim, and consequently the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1).?"[Also see the case of Kaingu Kasomo vs Republic Criminal Appeal No 504 of 2010].

24. In the present case, the prosecution adduced evidence of the age of the victim in the form of a birth certificate. The same showed that the complainant was born on 31.03.2007 while the offence herein allegedly occurred on 14.01.2023. It therefore follows that at the time when the offence was allegedly perpetrated, the complainant was 15 years, 11 months and 17 days. As such, she was a minor and therefore the ingredient of age was adequately proven.

25. On identification, the offence herein allegedly occurred during broad daylight and the same notwithstanding, the appellant is the complainant's father. The appellant did not deny that the complainant was a person known to him as he explained that she was the daughter to PW1 who is

his wife. In other words, the complainant is a step daughter to the appellant. It therefore follows that identification was by way of recognition and as such the same was also proved to the required standard. [See Nzaro vs Republic (1991) KAR 212 and Kiarie vs Republic (1984) KLR 739].

26. Turning to penetration, Section 2 of the *Sexual Offences Act* defines penetration as follows: -The partial or complete insertion of the genital organ of a person into the genital organ of another person. In the same breadth, penetration can be proved through the victim's sole testimony or through the victim's testimony corroborated by medical evidence. [See Bassita Hussein vs Uganda, Criminal Appeal No. 35 of 1995 and Kassim Ali vs Republic [2006] eKLR].

27. The offence of attempted defilement requires that there must be an unsuccessful act of penetration on the victim, or an attempt to penetrate. The term 'attempt' is defined under section 380 of the Penal Code as follows: -

    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 overt 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 analyzing the facts of this case, I have noted that the appellant was charged with an attempt to defile the complainant. At the same time, precedent has already demonstrated that the ingredients of this offence are similar to those of defilement save for the absence of penetration which is substituted by the ingredient of an attempt to commit an act of penetration.

29. In the instant case, PW1 testified that she examined the complainant's genitals and saw that the outer vaginal area was swollen. PW2 also testified that the appellant tried to thrust her penis into her vagina but she managed to wade him off. PW3 corroborated the evidence of PW1 and PW2 that upon examining the complainant's genitalia, he saw fresh blood around her vulva minora and vaginal cause. That there were bruises around the vulva but there was no vaginal discharge and upon conducting urinalysis, spermatozoa were seen.

30. Having in mind that penetration is defined as partial or complete insertion of the genital organ of a person into the genital organs of another person."; and flowing from the facts above, it is my considered view that the evidence adduced before the trial court did not reveal that there was an attempt to defile the complainant but rather the offence of defilement was committed.

31. In fact, the evidence of PW3 revealed that an act of penetration was committed against the complainant. This means that in an attempt to prove the second ingredient which is an unsuccessful act of penetration, the prosecution evidence instead proved penetration to the required standard.[Also see the case of George Owiti Raya vs Republic [2013] eKLR].

32. Like in the case herein, it matters not whether the complainant's hymen was found to be intact. Suffice to say that there was evidence of partial penetration.

33. In light of the definition of penetration and the principles in the cited case law above, coupled with the medical evidence from PW3 and the exhibits produced which demonstrated that there were

lacerations and bruises on the complainant's private parts, the evidence in this case proved that an act of penetration had occurred and not an attempt to penetrate. As such, it is my view that the appropriate charge in this case ought to have been defilement and not attempted defilement. This therefore solves the appellant's concern that there were contradictions and inconsistencies in the prosecution's case.

34. The claim that the evidence of the complainant was not corroborated does not arise. It is true that other than the complainant, nobody witnessed the act complainant. However, under section 124 of the *evidence Act*, corroboration is not mandatory in sexual offences as long as the court is satisfied that the witness is truthful.

35. In the instant case the trial court expressed itself as such. The learned magistrate stated that he believed in the evidence of the victim. Therefore, the evidence of the victim alone is sufficient to find the appellant liable.

36. In this regard, the Court of Appeal expressed itself thus in Kalu vs Republic (2010) 1 KLR: -

> "With the greatest respect to the learned Judge there was no law which would authorize a judge on appeal to convict a person with an offence with which that person was never charged. All the provisions of the Criminal Procedure Code which are under the heading: -'Convictions for Offences Other than those Charged' and beginning with Section 179 up to Section 190 deal with situations in which a court is entitled to convict on a minor and cognate offence where a person is charged with a more serious offence. Thus it is permissible to convict a person charged with capital robbery under Section 296(2) of the Penal Code for the offence of simple robbery contrary to Section 296(1) of the Code. It is also permissible to convict a person charged with murder under Section 203 of the Penal Code with manslaughter under Section 202 as read with Section 205 of the Penal Code. That is because the offence of manslaughter, for instance, is minor and cognate to that of murder. But where there is no charge of murder at all, and the only charge available on the record is that of manslaughter, it would be courageous for a trial court to convert that charge into murder simply because the evidence on record proves murder." (emphasis added).

37. In the instant case, the facts demonstrate that the offence in question was defilement which is more serious than attempted defilement. As already stated by the law above, this Court is barred from proceeding to convict the appellant of the more serious offence for which he was neither charged nor tried.

38. As a consequence of the above, all the grounds of appeal are found to be baseless thus this Court proceeds to uphold the conviction of the trial magistrate.

39. On sentence, it is trite that sentencing is an exercise of discretion by the trial court which should never be interfered with unless the trial court acted upon wrong principles or overlooked some material factors or took into account irrelevant factors or short of this, the sentence is illegal or is so inordinately excessive or patently lenient as to be an error of principle [See Shadrack Kipkoech Kogo vs R., and Wilson Waitegei v Republic [2021] eKLR].

40. 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 same further provides that 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.

41. In a nutshell, there is no proof that the trial magistrate erred in any way and it is my view after re-evaluating the entire evidence that this appeal lacks merit and the same is hereby dismissed. I confirm both conviction and sentence.

DATED, DELIVERED AND SIGNED VIRTUALLY THIS 24TH DAY OF OCTOBER 2024

J. N. ONYIEGO

JUDGE