Alawo v Republic (Criminal Appeal E052 of 2022)
[2023] KEHC 1669 (KLR) (13 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1669 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CRIMINAL APPEAL E052 OF 2022

TA ODERA, J

FEBRUARY 13, 2023

BETWEEN

DANIEL OKINYI ALAWO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against both the Conviction and Sentence dated 24.04.2022 in Criminal Case No. 35 of 2020 at Migori Law Court before Hon. P.N. Areri - PM)

JUDGMENT

The Charge

1. The appellant was charged with the offence of defilement contrary to Section 8(1) and 8(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the charge were that on the 30th day of November 2018 within [particulars withheld], Migori County he intentionally caused his penis to penetrate the Vagina of TA a girl child aged 4 years. 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 alternative charge are that on the same day, at the same place, the Appellant intentionally touched the vagina of TA, a child aged 4 years with his penis.

Background

2. This Appellant was initially charged in Migori Magistrate's court criminal case no. 45 of 2018 tried, convicted and sentenced to life imprisonment for the crime of defilement by Hon. M.M. Wachira SRM on the 29/05/2019.

3. He appealed this conviction and sentence at the High court at Migori which *vide* a judgment delivered on 22/5/2020 Justice Mrima quashed the conviction, set aside the sentence and ordered a retrial.

4. The file was thereafter placed before Hon P.N. Areri PM for hearing and determination. The hearing proceeded on various occasions and on the 11/4/2022 the accused was found to have a case to answer. He however elected to waive his rights to a defence and opted to wait for the judgment.

5. Vide a judgment delivered on 28/4/2022 Hon P.N Areri found the accused guilty of attempted defilement contrary to section 9(1) as read with section 9(2) of the *Sexual Offences Act* and convicted him to 10 years imprisonment.

6. Aggrieved by the conviction and sentence the appellant filed this appeal setting out the following grounds of appeal: -

    i. That he did not plead guilty to the charge herein

    ii. That the trial court erred in both law and fact by substituting the charge of defilement with attempted defilement in order to fill up the gaps which did not exist when a retrial was ordered.

    iii. That the trial court erred both in law and fact by not observing that the ingredients of the offence were not proved as required in law.

7. The appeal was admitted on 20/12/2022. The Appellant filed his submissions on 19/01/2023 and the Respondent did file their submissions on 13.1.23.

Appellants Submissions

8. It was his submission that the words "*Tabia Mbaya*"did not mean penetration. It was his further contention that the medical report presented to court was doctored in order to fix him. He concluded his submissions by calling on the court to either acquit him, reduce his sentence or give any other order it may deem fit to grant. Also that he did not testify though he was informed of his Right to testify as he was afraid.

9. Prosecution opposed the appeal and submitted that the appellate court has a duty to re-evaluate the evidence and make its own finding as was held in the case of *Okeno v Republic* [1973] EA 32. It was further submitted that the appellant pleaded not guilty and at the close of prosecution's case it was also submitted that the court was right in substituting the charge as it is within the ambit of Section 214 of *CPC*. The respondent submitted that penetration is an ingredient of the charge under Section 8 (2) of the *sexual offences Act*. The case of *Kyalo Kioko Vs Republic*(2016)eKLR was cited in that case it was held that the ingredients of defilement were highlighted in the case of *Charles Wamukoya karani vs Republic* Criminal Appeal -2103 that critical ingredients forming the offence of defilement are ; ''age of the complainant, proof of penetration and positive identification of the assailant".

10. On the age of the complainant, it was submitted that age assessment report ,P3 form and treatment notes indicate that the child was approximately 5 years old and this was supported by PW1 the clinical officer who treated her.

11. On penetration it was submitted that section 2 of the *sexual offences Act* defines penetration as '' the partial or complete insertion of the genital organs of a person into the genital organs of another person.'' also that in the case of *Mark Oiruri Mose vs Republic* it was held that so long as there is penetration whether only on the surface, the ingredients of the offence is demonstrated and penetration need not to be deep inside the girls organ". It was submitted that PW1 said appellant has carnal knowledge of her and that Pw3 the clinical officer supported her evidence and said the hymen was not broken but there were fresh bruises on external genitalia and both labia minora and labia majora . There were also that urinalysis revealed traces of blood in the urine .counsel submitted that the medical documents had evidence of penetration.

12. On identification it was submitted that the minor identified Dan as the person who did for her *tabia mbaya* and this was not controverted.

13. On whether defence of appellant was considered it was submitted that at the close of prosecution's case and upon appellant being placed on his defence Section 211 *CPC* was explained to him and this is captured on paragraph 14 at page 18 but he opted to remain silent. And it is this also indicated in paragraph 16 of the judgment. Respondent submitted that the issue of grudges raised in the appeal was never raised in the trial court and is thus and afterthought.

14. On the sentence respondent argued that section 8(2) of the *sexual offences Act* is couched in mandatory terms and that and courts are enjoined to pass mandatory sentences, and that in the case of *Francis Karioko Muruatetu and Another v Republic* eKLR the supreme court gave guidelines to the effect that that case cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with the *Constitution*. Also that the same position was applied in the case of *Onesmus Safari Ngao vs Republic* Criminal Appeal No. 5 of 2020. Prosecution sought enhancement of the sentence to meet the standard set out in section 8 (2) of the *sexual offences Act*.

Duty of the court.

15. Being the first appellate court the duty of this court was well established in the Court of Appeal case of *Mark Oiruri Mose v R* [2013]eKLR as follows;-

> " The appellate court of first instance is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bear in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that."

Issues for Determination

i. Whether the ingredients of defilement contrary to section 8(1) as read with section 8(2) were proved to the required standard.

ii. Whether the trial court was wrong in substituting the charge.

I have carefully re-evaluated the entire evidence on record,

16. On whether the ingredients of the offence of defilement contrary to section 8(1) as read with section 8 (2) of the *Sexual Offences Act* were proved. It is tire law that the ingredients of defilement are age of the victim, whether there was penetration and identification of the perpetrator.

17. On age of the victim the charge sheet indicates that she was aged 4. However the evidence of the investigating officer (PW4) and the Clinical officer (PW4) who examined her revealed that she was 5years old as per the age assessment report –Pexh 4. The learned trial magistrate also found that she was approximately 5 years old. I find that the victim was approximately 5 years old at the material time.

18. On penetration, PW1 said that Dan took her to the church and did for her *tabia mbaya*. PW4 examined PW1 and found that her hymen was not broken but she had It is evident from the evidence PW3 the clinical officer (PW3)that the victim's hymen was not broken but that her labia minora and labia majora had fresh bruises which were 1.5 centimetres each . The probable weapon used was found to be a penile organ. Similarly, in the post rape care form produced as Pexh 3 it is indicated that the outer part of the victim's genitalia which includes the fourchette, labia minora and labia majora had bruises. Section 2 of the *sexual offences Act* defines penetration as '' the partial or complete insertion of the genital organs of a person into the genital organs of another person." It is trite law the penetration whether partial

or full is sufficient to constitute an offence of rape or defilement. In this case there is no evidence of penetration as the hymen and vaginal walls were intact but bruises of the labia majora and minora.

19. On whether there was an attempt to defile the minor herein, in order to prove attempted defilement on the part of the Appellant it must be proved that the perpetrator took steps towards committing the act. . Whether there has been an attempt to commit an offence is a question of fact. The act alleged to constitute attempted defilement, must be sufficiently proximate to defilement to be properly described as an attempt to defile. In *Cross & Jones Introduction To Criminal Law, Butterworths, 8 th Edition, [1976], P. Asterley Jones and R. I. E. Card state page 354:* as referred to in the case of *Abdi Ali Bare v Republic* [2015] eKLR it was stated thus:

> " [A]n act is sufficiently proximate when the accused has done the last act which it is necessary for him to do in order to commit the specific offence attempted."

20. Section 388 of the *Penal Code* defines attempt as follows:

> " 388.
>
> (1) 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 deemed to attempt to commit the offence.
>
> (2) It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfilment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.
>
> (3) It is immaterial that by reason of circumstances not known to the offender it is impossible

In fact, to commit the offence.

> " The learned authors therein added that the court must answer the question whether the acts by the accused person were immediately or merely remotely connected with the commission of the specific offence attempted on the basis of common sense. Ultimately therefore, the real question is whether the acts by the accused person amounted to mere preparation to commit defilement or whether the accused had done more than mere preparatory acts. The medical evidence adduced herein is that the labia majora and minora had fresh bruises which taken together with the evidence of PW1 that the perpetrator went to her home carried her to the church, removed her panty and his trousers and proceeding to do to her tabia mbaya . Iam has satisfied all the ingredients of attempted defilement were revealed in the evidence adduced herein."

21. On the issue of identification of the Appellant,, PW1 said their neighbour Dan is the one who went to their home found her sleeping, carried her to the church compound and did for her tabia mbaya. She was able to identify appellant in the dock as Dan in the dock and this is not disputed. The appellant submitted that the case was a fabrication but this was not raised before the trial court and so I dismiss the same as an afterthought. Tabia mbaya or bad manners has been interpreted by the Kenyan courts

as language used by children to refer to sexual intercourse. It is clear that he was recognised by the victim, given that they were neighbours and the incident occurred in broad day light. The appellant was properly placed at the scene.

Whether the trial court was wrong in substituting the charge

22. In his Judgment the Learned trial Magistrate substituted the charge of defilement contrary to section 8(1) as read with section 8 (2) of the *Sexual Offences Act* with the charge of attempted defilement contrary to section 9 (1) as read with section 9 (2) of the same *Act* and proceeded to convict the appellant accordingly. In doing so it cannot be said that the trial magistrate's actions were wrongful. Section 180 of the *Criminal procedure Code* provides that;

> " When a person is charged with an offence, he may be convicted of having attempted to commit that offence although he was not charged with the attempt."

23. Similarly, section 186 of the *Criminal Procedure Code* provides that

> " When a person is charged with the defilement of a girl under the age of fourteen years and the court is of the opinion that he is not guilty of that offence but that he is guilty of an offence under the *Sexual Offences Act*, he may be convicted of that offence although he was not charged with it."

24. I find that it was upon finding that the offence of attempted defilement contrary to Section 9(1) as read with section 9 (2) of the *sexual offences Act* being revealed herein instead of defilement contrary to section 8(1) as read with Section 8 (2) of the same Act, that he proceeded to reduce the charge to attempted defilement and convicted accordingly. I agree with the trial magistrate on his said finding as per my reasoning on the issue of attempted defilement (*supra*).

25. I find that the conviction was sound and I proceed to uphold it.

26. On sentencing, appellant sought quashing of the same. Section 9(2) of the *sexual offences Act* provides for a sentence of 10 years imprisonment for attempted defilement. I have considered submissions of prosecution on this issue and I have also seen the decision by Justice Mativo (as he then was) and Justice Githinji in Petition No. 97 Of 2021 Mombasa *Edwin Wachira and 9 others vs Republic* consolidated with Petition number 88 of 2021 ,90 of 2021 and 57 of 2021 Mombasa where it was held that 'Lucky for me the Supreme Court in *Muruatetu one* was categorical that mitigation forms an intergyral part of a fair trial, so, the fact that an accused person is deprived the right to mitigate curtails his rights under Article 50(1). Similarly, taking away judicial discretion and the fact that the mandatory minimum sentences take deprive the court the discretion to prescribe a sentence taking into account the individual circumstances of the accused un fair to the accused and it impinges on the right to a fair trial. Sentencing is an integral part of a judicial function and an important element of a fair trial process. Similarly, the provisions under challenge deprive the accused person the benefit of a lesser sentence informed by the circumstances of each offence ''. The said decision emanates from the High court am persuaded by the reasoning in it. The sentences in *sexual offences Act* are couched in mandatory terms but it is trite law that any law which takes away the discretion of a Judge to sentence an offender upon hearing his mitigation violates the right to fair trial under Article 50 of *constitution*. However the court must balance mitigation with nature of the offence and any prevailing aggravating circumstances. The trial court indicated that it considered the nature of the offence and mitigation and sentenced the appellant to 10 years imprisonment. I find that the trial magistrate properly sentenced appellant to 10 years imprisonment considering tender age of the victim and the circumstances of the offence. I uphold the sentence.

27. Appeal is devoid of merit and I proceed to dismiss the same.

28. Right of Appeal.

DELIVERED IN VIRTUALLY VIA TEAMS PLATFORM IN THE PRESENCE OF;

Appellant Present In Person.

Miss Tanui For The Respondent.

Court Assistant; Emma Awuor.

T.A ODERA - JUDGE

13.2.23