Kiplangat v Republic (Criminal Appeal E006 of 2022)
[2023] KEHC 1535 (KLR) (7 March 2023) (Judgment)

Neutral citation: [2023] KEHC 1535 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KILGORIS

CRIMINAL APPEAL E006 OF 2022

F GIKONYO, J

MARCH 7, 2023

BETWEEN

ANDREW KIPLANGAT ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the conviction and sentence of Hon. M.I.G. Moranga (SPM) in Kilgoris SOA No. E014 of 2021 on 4th July 2022)

JUDGMENT

Attempted defilement

1. This appeal is against the appellant's conviction, and sentence of 10 years' imprisonment imposed on 4th July 2022 for the attempted defilement of the complainant- a girl aged 14 years.

2. The specific grounds of appeal set out in the petition of appeal dated 14th July 2022 are as follows;

    i. That the learned magistrate erred in law and fact by failing to inform the appellant of his right to be represented by counsel thus violating his fundamental right to a fair trial under article 50(2) (g) of the *Constitution*.

    ii. That the learned magistrate erred both in law and fact by according undue weight to evidence of the prosecution and by evicting the appellant on account of underwhelming evidence by the prosecution which did not prove the case against the appellant beyond reasonable doubt.

    iii. That the learned magistrate erred both in law and fact by relying on extraneous facts in convicting the appellant.

iv. That the learned magistrate erred both in law and fact by drawing the conclusion that the mere presence of a high number of epithelial cells in the alleged victim's high vaginal swab was a conclusion of penetration.

v. That learned magistrate erred both in law and fact by disregarding and by rubbishing the appellant's defence.

vi. That the learned magistrate erred both in law and fact by harshly and unlawfully sentencing the appellant to the minimum sentence provided for under the law, which sentence does not, in any event, capture the mitigation adduced by the appellant.

Directions of the court

3. The appeal was canvassed by way of written submissions. Both parties filed submissions.

Appellant's submissions.

4. The appellant submitted that the trial magistrate relied on extraneous facts in convicting the appellant. That the trial court in its judgement described the appellant as being a nephew to PW1 although none of the witnesses described him as such. That the trial magistrate stated that PW1 was seen 2 days after the incident yet PW3 stated that he examined PW1 a day after the incident.

5. The appellant submitted that the trial magistrate was wrong to convict the accused person on account of untrue, inconsistent, contradictory, and unreliable evidence of the prosecution witnesses.

6. The appellant has relied on the following authorities to support his case;

i. Bonface Gubimilu v Republic [2020] eKLR

ii. *Francis Ochieng Osura v Republic* [2019] eKLR

iii. *Owuor v Republic* (Criminal Appeal 16 of 2019) [2022] KECA 18(KLR)

iv. *Simon Kipkurui Kimori v Republic* [2019] eKLR

v. *Kavoo Kimonyi v Republic* [2018] eKLR

vi. *PKW v Republic* [2012] eKLR

vii. South African Case Of *Fraser v Absa Bank Limited*(66/05)(2006) ZACC24 2007(3) SA 484(CC); 2007(3) BCLR 2199(CC)

viii. Supreme Court Petition No. 5 Of 2015 *Republic v Karisa Chengo & 2 Others* [2017] eKLR

ix. The *International Convection On Civil and Political Rights*(ICCPR)

x. The *Legal Aid Act* No. 6 of 2016

xi. *John Kiema Philip v Republic* 92019) eKLR.

xii. Court of Appeal in *Ndungu Kimani v Republic* [1979] eKLR as cited with approval in *Boniface Gubimilu v Republic* [2020] eKLR.

xiii. *Francis Karioko Murutetu & Another v Republic* [2017] eKLR as cited in *Simon Kipkurui Kimori v Republic* [2019] eKLR *R v Malgas* 2001(2) SA 1222 SCA 1235

The respondent's submissions.

7. The respondent has relied on the following authorities;

   i. *Moses Kabue Karuoya v Republic* [2016] eKLR.

   ii. *Mussa S/O Said v R* [1962] EA 455 quoted with approval in *Stephen Mungai Maina v Republic* [2020] eKLR

   iii. *Keteta v R* (1972) EA 532, 534

   iv. *Leonard Kipkemoi v Republic* quoted with approval in *Geoffrey Haggar Samuel v Republic* [2022] eKLR

   v. *Sheria Mtaani Na Shadrack Wambui Versus Attorney General & Another; Office of The Director of Public Prosecutions & Another (Interested Parties)* (2021) eKLR

Analysis and Determination.

Court's duty

8. As a first appellate court, this court is obligated to re-evaluate the evidence and make its own conclusions bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See *Okeno v. R* [1972] E.A 32

9. I have considered the grounds of appeal, the evidence adduced in the lower court, and the rival submissions of parties. I find the main issues for determination to be;

   i. Whether the appellant's right to a fair trial under article 50(2)(g) of the *Constitution* was violated.

   ii. Whether the prosecution proved its case beyond reasonable doubt.

   iii. Whether the appellant's defense was considered.

   iv. Whether the sentence was manifestly harsh and excessive

Right to fair trial (Art. 50(2)(g) of the *Constitution*)

10. The appellant submitted that the trial court denied the appellant the fundamental right to be represented by counsel during his trial in accordance with article 50(2) (g) of the *Constitution* of Kenya, thus, violating the appellant's constitutional right to a fair trial.

11. The appellants further submitted that the failure of the trial court to inform the appellants of his right to be represented by counsel violated his right to a fair trial. Consequently, urged this court to find that this regard rendered the trial a nullity.

12. The respondent submitted that in the event that this court finds that the appellant's right under article 50(2)(g) was violated, the court should be persuaded to adopt the directions recognized by Mrima J in *Sheria Mtaani Na Shadrack Wambui Versus Attorney General & Another; Office of the Director of Public Prosecutions & Another (Interested Parties)* [2021] eKLR and order for a retrial as opposed to a discharge of the appellant.

13. In this case, nothing shows the appellant was prejudiced especially looking at the manner he conducted the case. It is should however be desirable to inform the accused of right of representation.

The charge and particulars

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

15. It was alleged that on 17th May 2021 in Transmara East sub-county within Narok county intentionally and unlawfully attempted to cause his penis to penetrate the vagina of A.C.B. a child 14 years.

16. In the alternative charge, the appellant was charged with the offence of committing an indecent act contrary to Section 11 (1) of the *Sexual Offences Act* No. 3 of 2006.

17. It was alleged that 17th May 2021 in Transmara East sub county within Narok county intentionally and unlawfully touched the vagina of A.C.B. a child 14 years.

Elements of offence of attempted defilement

18. Section 9 (1) as read with Section 9(2) of the *Sexual Offences Act* establishes the offence of attempted defilement as follows:

> "9
>
> (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 (10) years."

19. To establish a charge of attempted defilement, the prosecution must prove beyond doubt: -

    i. That the victim was a child within the meaning of the Children's Act; (under the age of 18 years).

    ii. That the accused was positively identified as the assailant, and

    iii. The overt acts or steps taken by the accused towards the commission of the offence of defilement that was not completed.

The victim is a child

20. As attempted defilement is a sexual offence committed against a child, the prosecution must prove that the victim was a child in the meaning of the *Children Act*- a person under the age of eighteen years. This requirement was contrasted with the requirements in section 8 of *SOA* in Charles Nega v. R Criminal Appeal No. 38 OF 2015 [2016] eKLR where Mrima J stated that: -

> "I however wish to further state that from the wording of Section 9 of the *Sexual Offences Act* (and unlike in the offences of defilement and rape where the exact age of the victim must be proved bearing the weight it has in sentencing), in an attempted defilement charge the prosecution only has to tender evidence that the victim was below the age of eighteen years and not necessarily the specific age. Needless to say if the specific age is availed to a trial court it equally has a bearing in sentencing upon conviction."

21. Was it proved that the victim was a child?

22. The respondent submitted that the age of the minor/complainant was proved by way of oral evidence of PW1, PW2, and the certificate of birth (p exh6) to be 14 years at the time of the offence.

23. The trial court noted that the complainant was intelligent enough hence the complainant gave sworn evidence.

24. PW 1 told the court that she was 14 years old and was going to form one.

25. PW2- father to PW1 testified that PW1 is 14 years old.

26. PW4 produced the complainant's Certificate of Birth as p exh6 which shows that the complainant was born on 16/02/2006.

27. On the basis of evidence adduced by the prosecution, I find the age of the victim was 15 years at the time of the offence, i.e. 17th May 2021, and therefore a child.

The overt acts

28. An attempt to commit an offence is defined in Section 388 of the *Penal Code* as follows:

> " 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."

29. Attempted defilements is therefore a complete offence with mens rea and actus reus. The intention to commit the offence is the mens rea, and the overt acts towards execution of the offence is the actus reus. See *Michael Lokomar v. R* (2016) eKLR where Riechi J. observed as follows:

> " In proof of an attempted commission of an offence the prosecution must prove mens rea which is the intention and actus reus which is [the act which constitutes] the overt act which is geared to the execution of the intention. The actus reus must be more than the mere preparation to commit the act as there is a difference between preparations to commit an offence."

30. A key aspect of attempted defilement is the commencement of execution of the intended crime. This entails steps taken towards the accomplishment of the desired result or intended to consummation of the intended offence. In *Rex v. Sharpe* [1903] TS 868 the Court describes these as the beginning of the final series of acts which complete the crime. But, the beginning of the acts of the final series depends on the circumstances of each case. It also involves a value Judgment by the court.

31. The appellant submitted that the finding of PW3 and the trial court to the effect that there was defilement based on the alleged broken hymen in the absence of other parameters indicative of penetration of the victim's vagina was quite erroneous.

32. The prosecution submitted that there was the presence of overt action aimed towards the commission of the offense, namely the beckoning of the complainant and tearing of the undergarments and his ultimate defilement of her. The stipulated overt acts undoubtedly manifested his intentions.

33. PW1 testified that she was fetching firewood near her home at around 5 p.m. when the accused called her, pushed her away and threw her to the ground. He tore her red pant (P Exh1) and biker (P Exh2). He penetrated her using his penis. She screamed and the appellant's wife, Winnie Kirui came to her rescue. She reported the matter to her parents who took her to the hospital. She was treated and issued with a P3 form (P Exh3), treatment notes (P Exh5), PRC form (P Exh4).

34. PW2 stated that he was attracted to the scene of crime by the screams of the appellant's wife. He rushed and found that the appellant was assaulting his wife. He later learnt that the appellant was assaulting his wife because she had found him at the scene with the complainant who had then filed the scene.

35. PW3, the clinical officer testified that he examined PW1. PW1 had injuries on the body surfaces. The vaginal walls were warm, moist and hymen was broken, there was no discharge or bleeding. There were no lacerations. The clothing was clean. Her panty was torn. a high vaginal swab revealed numerous epithelial cells. He concluded that there was an attempted defilement. He produced a duly filled P3 form (P Exh3) and the PRC form (P Exh4).

36. PW4, the investigating officer testified that the matter was reported to the police station and booked in an OB. He produced the torn pant and biker as exhibits.

37. From the evidence adduced by PW1 and PW2, the complainant screamed after the appellant had hurled her onto the ground and tore her under pant and biker. Her screams were heard by the appellant's wife who rushed to the scene. The evidence show that the appellant started to assault his wife for she had found him at the scene with the complainant. I find that, by beckoning and throwing the complainant onto the ground and tearing her pant and biker, the appellant put his intention to defile the complainant into execution. These are clear overt acts towards execution of defilement; they went beyond mere preparation to commit an offence.

Was the appellant the perpetrator?

38. The respondent submitted that the identification of the appellant was watertight.

39. According to PW1, the offense occurred during the day at 5 p.m. there was sufficient light. The complainant and the appellant were in close proximity for a proper identification. She screamed after the appellant threw her down onto the ground, tore her pant and biker, and when the wife of the appellant arrived in answer to her screams, she found space to escape defilement by the appellant. This is a person she knew and also had considerable time in the struggle to make a positive identification of the assailant.

40. PW2 found the appellant at the scene as he was responding to the screams of the appellant's wife. Both PW1 and PW2 were able to recognize the appellant. The appellant, PW1, and PW2 are neighbours. Therefore, the appellant was not a stranger to them. The identification was therefore by recognition.

41. The pieces of evidence analyzed herein prove that there was no mistaken identity of the appellant as the perpetrator of the offence in question. The evidence by the prosecution leaves no doubt that the appellant attempted to caused the penetration of the complainant.

42. In the upshot, I find that the Appellant was positively identified as the assailant herein; there was no mistaken identity or error.

43. As the complainant was a child, I accordingly find that the prosecution proved beyond reasonable doubt that the appellant attempted to defile PW1- a child.

Whether the defense was considered.

44. The appellant denied having committed both the main charge and the alternative charge. He offered unsworn testimony. It was his testimony that he was suspected by the father of the complainant. That PW2 had heard that he had scolded his daughter for fetching firewood from his father's land. After 2 days PW2 asked him to accompany him to buy a cow and that is how he was arrested. He alleged that PW2 bribed the police for him to be arrested. He also alleged that the police asked him for Kshs. 50,000/= bribe which he did not have.

45. The appellant contested that the complainant was lying and that she sat for KCPE in 2021 but police recorded KCSE. He produced a document D Exh1. He accused PW5 of not visiting the scene.

46. In his defense he merely made allegations that PW2- the father of the complainant- framed him owing to a land dispute without offering anything substantial or of specific relevant to the allegation. He also alleged that the police asked for a bribe from him. He also did not make any effort to indicate the particular officer who asked for the bribe, or the report he made or attempts to report the matter to the police or anything of value thereto. These were just stories coming as afterthought in an attempt to contrive a defence for himself. I find the defense to be hollow and I reject it.

47. The trial court also took the appellant's defense into consideration and found that the evidence by the appellant did not shake the testimony of the complainant whose description of the events of the crime were so vivid and well corroborated by the testimony of PW2.

48. Accordingly, I find that the prosecution proved their case beyond reasonable doubt and that the trial court did not err in convicting the appellant for attempted defilement. The appeal on conviction, therefore, lacks merit and is hereby dismissed.

On sentence

49. The appellant submitted that the sentence imposed by the trial court was excessive, harsh, an abuse of court's discretion in respect of sentencing, and failed to capture the recent jurisprudence on the same.

50. The appellant submitted further that the trial court disregarded the appellant's mitigation and further failed to call for the appellant's criminal records from the prosecution.

51. The trial court offered the appellant an opportunity to provide his mitigation orally. The appellant offered mitigation.

52. The trial court applied Section 9 (2) of the *Sexual Offences Act* to sentence the appellant. The section provides:

> 9(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 (10) years."

53. But, despite the wording of the provision, the trial court stated the following in sentencing the appellant: -

> ...the court has considered the accused's mitigation. However, the offences are serious and call for a stiff penalty. A deterrent sentence is necessary. The accused is sentenced to 10 years....

54. The trial court sentenced the appellant to 10 years' imprisonment not as a minimum sentence provided by law, but as the appropriate sentence for the offense that he committed after factoring in his mitigation. There is nothing in the analysis or language of the trial court in sentencing the appellant which show that the trial court's discretion was constrained by the minimum sentence provided in the section.

55. It is not necessarily that the trial court believed only one sentence is prescribed in law or was constrained by the section in sentencing the appellant- which brings me to discuss mandatory minimum or minimum sentence.

Of mandatory or mandatory minimum sentence

56. Legislative sentencing schemes which have survived judicial scrutiny often provide for minimum- not mandatory minimum- sentence as expression of the seriousness of the offence. Some jurisdictions prescribe aggravating factors in the law to justify imposition of a minimum sentence but leaving discretion to the court to impose appropriate sentence depending on the circumstances of the case. Others prescribe minimum sentence but leaving discretion to court, for reason to be recorded, to depart from the minimum sentence. See Australia for instance.

57. Be that as it may, I have always posed as food for thought; whether, except section 8(2) of the *Sexual Offences Act*, all the other penalty clauses in *SOA* which have adopted the use of phraseology liable upon conviction to imprisonment prescribe mandatory or mandatory minimum sentence as it is widely- albeit erroneously- believed.

58. My view has always been that the erroneous belief arises from the incongruous use of the phrase 'liable upon conviction to imprisonment' together with 'not less than...'; an anomaly which courts should reconcile with the *Constitution* by interpreting the clauses to only prescribe a minimum sentence leaving discretion to the court to impose appropriate sentence which may be below or higher than or the minimum sentence as circumstances demand. But, a more permanent reconciliation should be legislative.

Appropriate sentence

59. I take into account that the accused was a first offender. But the offence is serious and the vicious manner and circumstances it was committed require real deterrent sentence.

60. In these circumstances, a sentence of 10 years was quite lenient. Nonetheless, it is capable of acting as a deterrent measure on these debauchery sexual attacks on children, yet, giving the appellant an opportunity to be reintegrated back into society and be a productive citizen. I, therefore, see nothing upon which I may interfere with the sentence imposed of 10 years' imprisonment. Accordingly, I dismiss the appeal on the sentence.

Of Section 333(2) CPC.

61. I have perused the trial court record and found that the appellant was first arraigned in court on 25/05/2021. He remained in custody till 28/05/2021 when surety was approved. I find that the appellant only spent three days in remand custody. Nothing substantial comes out of this.

Conclusion and orders

62. The appeal is dismissed. The appellant to serve sentence imposed by the trial court.

63. It is so ordered

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 7TH DAY OF MARCH, 2023.

.....

F. GIKONYO M.

JUDGE

In the Presence of:

Bore for the Appellant

Okeyo for the Respondent