Ngunyi v Republic (Criminal Appeal 20 of 2019)
[2023] KEHC 2754 (KLR) (21 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2754 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MURANG'A

CRIMINAL APPEAL 20 OF 2019

SC CHIRCHIR, J

MARCH 21, 2023

BETWEEN

SAMUEL KANYI NGUNYI ALIAS SAMUEL KANGI NGANGI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

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

   The particulars are that on the 10th day of January 2018 at [Particulars Withheld] village in Mthioya sub-county within Murangá County intentionally attempted to cause his penis to penetrate the vagina of HWM a child aged 5 years

2. He faced an Alternative Count of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*.

3. He was convicted on the first charge and sentenced to 20 years in prison. He was dissatisfied with the findings of the trial court and consequently filed the present appeal.

Grounds of Appeal

4. In his amended petition, the appellant has set out four (4) grounds of appeal, which I have summarized as follows;

   a. That his identity was not proved

   b. That the evidence given did not tally with the charges he faced and the evidence do not point to the accused as the perpetrator

   c. That the case was not proved beyond reasonable doubt

d. The court erred in rejecting his sworn evidence which was not challenged.

Appellant's Submission

5. The appellant submits that his name was Samuel Kanyi Ngangi and not "Kanji" the name used by the complainant when she was reporting the incident to her mother; that in some instances, the prosecution gave his name as Samuel Kanyi Ngunyi; that he was only identified at the dock, and not before, and that no identification parade was held. It is further submitted that the person who allegedly found him with the complainant was never brought to court as a witness. That the complainant was too young for her testimony to have been reliable, particularly on the aspect of identification.

6. The appellant further submitted that the repeated amendment of the charge sheet was an attempt to craft an offence, as none existed in the first place. That the medical evidence did not meet the standard of proof required of criminal cases.

7. The appellant further took issue with the prosecution's failure to subject him to a medical examination; that the fact that there was no injury to the complainant's genitals is an indication that there was no defilement.

Respondent's Submissions

8. It is the respondent's submissions that the testimony of the complainant proved the offence of attempted defilement within the context of section 9(1) (2) of the *sexual offences Act* as read with section 388 of the *Penal Code*. That the appellant's actions were overt acts which in the circumstances, indicated an attempt to commit the offence of defilement. The prosecution relied on the judgment of Makhandia J in case of *Otieno Abraham v Republic* Kisii HCCRA No 53 of 2009 to buttress their submissions.

9. On the issue of identification, it is submitted that, the complainant previously knew the accused as they were neighbours. That the names Samuel Kanyi Ngunyi and Samuel Kangi Ngangi referred to one and the same person.

10. On the evidence of the complainant, whose age was given as 5 years, the prosecution relied on section 124 of the *Evidence Act* which no longer make corroboration necessary on Sexual Offences. The respondent further submits that the evidence of the complainant was nevertheless corroborated by the medical evidence as presented by PW3, the clinical officer.

11. On the prosecution's alleged failure to call crucial witnesses, the Respondent cites section 143 of the *Evidence Act*, which provides that no particular number of witnesses are required to prove a particular fact. The prosecution also relied on the case of *Mwangi v Republic* (1984) KLR 595 and *Keter v Republic* (2007)1EA135 where the summoning of witnesses is at the discretion of the prosecution and that it only need to summon such number as may be sufficient to establish its case beyond reasonable doubt.

12. On the appellant's defence of alibi, the prosecution states that the Appellant did not call any witness to back up his claims, and neither was this issue specifically addressed in the cross-examination of prosecution witnesses. That the appellant's defence focused on what transpired on the day of arrest and hardly on the day that the crime was said to have been committed.

13. On the sentence of 20 years, it is submitted that the child was 5 years old and that was an aggravating factor that the trial court took into consideration.

Analysis of the Evidence and Determination

14. I have considered the grounds of appeal and the parties' submissions. The role of this court as the first appellate court is to look at the Evidence afresh, re-evaluate it and arrive at its own conclusion, but while bearing in mind the fact that the trial court had the benefit of hearing and seeing witnesses first hand (see *Okeno v Republic* (1972) EA 32.)

Identification- Ground 1

15. The record shows that the plea was taken on February 13, 2018when the Appellant pleaded "not guilty" to both charges. The record does not indicate that the appellant raised any complain on the manner he was addressed or on the name used in the charge sheet.

16. It was only on July 16, 2018, when the 1st witness took the stand that the appellant told the court that he was Samuel Kangi Ngangi, and that as far as he was concerned he was not the accused person in the case. He then showed the court his National identity card. The card bore the names Samuel Kangi Ngangi. The prosecution protested that it was not the first time the accused was appearing in court yet he had never raised the issue before. Nevertheless, the prosecution applied for, and was allowed to amend the charge sheet. The amended charge sheet read "Samuel Kangi Ngunyi alias Samuel Kangi Ngangi". The plea was taken on the Amended Charge sheet and the Appellant pleaded "Not guilty" and the hearing proceeded. This court takes note of the fact that between the time of the plea and the commencement of the hearing, there had been about ten (10) mentions. The appellant did not raise the issue of mistaken identity during any of the mentions.

17. From the witnesses' accounts, the complainant, (PW1) told the court "I remember the person who did bad behavior on me. It's the accused in the dock" (the magistrate then records. "child points at the accused person in the dock)

18. PW2 was the complainant's mother. She told the court that the complainant reported that it was "Kanyi" who had defiled her. They came from the same village with the "Kanyi." That the said Kanyi had many cases. She identified the person in the dock as Kanyi. During cross examination, she addressed the appellant ".....Kanyi is you, it's you". That their homes, (that of the witness and the appellant are neighbouring each other)) and that the PW2 know the appellant's parents.

19. On 5.10.2018, the amended charge sheet, bearing the names Samuel Ngunyi alias Samuel Kannyi Ngangi was read to the accused, there was no protest from the Appellant on the manner he had been addressed. He simply responded to the charge.

20. PW4 the investigations officer told the court that the person who made the report gave the name Samuel Kanyi Ngunyi; that she later amended the appellant's name to Samuel Kanyi Ngangi when she later got to see theappellant's identity card. She told the court that both names belong to the accused. That it was the appellant who had initially confirmed his name as Samuel Kanyi Ngunyi.

21. In his sworn testimony, the appellant maintained that he was Samuel Kanyi Ngangi and not Samuel Kanyi Ngunyi. He denied ever being identified in the dock by the compliant or her mother contrary to what the record reflected.

22. In view of the aforegoing, it is evident that the appellant was identified by recognition by PW1 and PW2. They were neighbours, they knew the appellant as "Kanyi" and both identified him in the dock. PW2 also knew the appellant parents. I refuse the appellant's assertion that the child was too young for her evidence of identification to be relied on. The court took the child through voir dire examination and satisfied itself that the child was intelligent enough to testify. It is instructive that the issue of wrong

references was not raised the first time the plea was taken and it took theappellant ten court appearances to realize that "he was being mistaken for another person".

I find that the discrepancy in the names has been sufficiently explained. In this regard, I find support in the court's decision in the case of *Lengesio Lekupe & another v Republic* (2011) eKLR where the court upheld identification by recognition notwithstanding the discrepancy in the names of the accused person, who it transpired had provided false names to an employer, whom he was later charged of robbing.

It was also the investigation's officer's testimony that the appellant had been beaten up by mob. The record shows that plea could not be taken during the first two appearances as the court noted that he could not walk on his own due to the injuries he had sustained following the attack. For the appellant to turnaround during the defence hearing, and state that he was not the person that the court was referring to when it gave orders for treatment at the beginning of trial, depicts the appellant as being untruthful.

Am satisfied that theappellant was duly identified through recognition.

Ground 3 whether the prosecution's case was proved beyond reasonable doubt

23. What are the ingredients of the offence of attempted defilement?

Section 9(1)(2) of the *Sexual Offences Act* states as follows: -

> " a person who attempts to commit an act which would cause penetration with a child is guilty of an offence terms as defilement."

24. The prosecution must therefore prove beyond reasonable doubt that the victim was a child, within the context of the children's Act, the accused was positively identified as the assailant, and the overt acts towards the commission of the offence of defilement was not completed.

I have already found that the accused was positively identified and need not go back to it.

25. On the age of the child, a birth notification was produced showing that the complaint was born on April 20, 2012and was thus aged 5 years at the time of the attempted defilement.

26. On the overt acts,section 388 of the *Penal Code* defines attempt to commit an offence as follows.

(1) (1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfillment, and manifests his intention by some overt act, but does not fulfill 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 fulfillment 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"

27. The relevant portion of PW1's testimony went as follows. "I remember what happened. He removed his thing and did bad behavior on me..... he took me near a tree..... he removed out his thing on me..... he was wearing a pair of trousers, I was wearing clothes. He did not do anything with his clothes. (the Magistrate then makes a note: 'child breaks down in tears') he didn't do anything to my panties. He

laid me on the ground. He laid on top of me. My pantie became dirty somebody came to the scene and rescued me. Nothing else happened."

28. The narrative by the complainant, leaves no doubt as to what the appellant's intentions were, to defile the complainant. The Appellant was stopped on his tracks by the "somebody "referred to by PW1. Further according to PW3, the clinical officer, medical examination showed that the complainant had "bruises on the left side of the fore head, swollen and tender anterior neck visible bruised marks secondary to attempted strangulation. .....the probable type of weapon used was nothing but bare hands .....examination of genitals, major and minor labia were normal"

    Thus the evidence of PW3 corroborates PW1 evidence on attempted defilement.

29. The upshot of the two preceding paragraphs is that all the ingredients of attempted defilement were proved.

Whether the trial court rejected the Appellant's defence

30. The appellant's testimony focused on the day of his arrest, which was onJanuary 24, 2018. He stated that on that day, he had come back from escorting his cousin when he was arrested. He never made any attempt to respond directly to the accusations against him in respect to the events of January 10, 2018.

    I have found no reason to fault lower court's finding in this regard.

31. The appellant's responses to the prosecutions cross examination also cast doubts on his credibility. I wish to point out just two instances:

    a). The record shows that onJanuary 30, 2018he told the court he was unwell and could not take the plea, the court took note of his condition and postponed the plea.

    b). OnFebruary 13, 2018he said he was still unwell but ready to take plea.

    However, on being cross-examined during his defence, he completely turned around and denied having reported about his illness or the proceedings being adjourned on Account of his request.

    In a nutshell, the appellant came out as a dishonest person, and I cannot fault the trial court for choosing to disbelieve him

32. On sentencing, I note that this issue has not been specifically taken up on appeal. The appellant was sentenced to 20 years in prison. The court took into account the tender age of the child as an aggravating factor. I have no reason to fault the trial court finding in that regard.

33. However, the appellant had been in custody since January 25, 2018upto the time of his conviction. Pursuant to section 333(2) of the *Criminal Procedure Code*, this period ought to have been taken into account when meting out the sentence. section 365 of the *Criminal Procedure Code* mandates this court to interalia review sentences passed by the lower court either on its own motion or upon application by a party. Therefore, taking into Account the fact that the appellant had spent some time in custody, the accused will serve the 20 years meted out by the trial court less the one (1) year 4 months he had spent in custody.

34. In conclusion,

    1. The appeal is dismissed and the conviction is upheld

    2. The appellant's sentence of 20 years is reduced by one (1) year 4 months

DATED AND SIGNED AT KAKAMEGA VIRTUALLY THIS 21ST DAY OF MARCH 2023

S. CHIRCHIR

JUDGE.

In the presence of:-

Susan – Court Assistant

Appellant – present

Miss Mini for the Respondent