Wambui v Republic (Criminal Appeal E016 of 2021)
[2023] KEHC 18030 (KLR) (16 March 2023) (Judgment)

Neutral citation: [2023] KEHC 18030 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E016 OF 2021

M MUYA, J

MARCH 16, 2023

BETWEEN

JOSEPH MWANGI WAMBUI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The appellant above named was on January 29, 2021 sentenced to 45 years imprisonment for the offence of attempted defilement c/s 9 (1) as read with Section 9 (2) of the *sexual offences Act* No 3 of 2006 Laws of Kenya.

2. The particulars are that on June 7, 2020 at around 15.30 hours in Mathira East sub-county within Nyeri County, unlawfully and intentionally attempted to cause his penis to penetrate the vagina of SK a child aged five years.

3. Being dissatisfied with the conviction and sentence the appellant lodged this appeal which is premised on the following grounds :-

    1. That the learned trial magistrate erred in both law and fact in conducting improper voire dire examination.

    2. That the learned trial magistrate erred in law and fact in proceeding to convict the appellant against the weight of evidence adduced by the prosecution.

3. That the learned trial magistrate erred in law and fact by failure to find that PW2 bore a grudge against him.

4. That the learned trial magistrate erred in law and fact by meting out a sentence that was harsh and excessive in the circumstance of the case.

5.

Duty of the court

This is the first appellate court. It has a solemn duty to re-evaluate a fresh the evidence on record so as to arrive at its own independent conclusion. These are guidelines established by case law and in particular the decisions in *Okeno Versus Republic* (1972) EA. 32 *Njoroge V.R* (1987) e KLR 19.

6.

Brief facts

The complainant in her evidence –in chief informed the court that she was a girl aged six years at the time and that on June 7, 2020 the appellant found them playing with other children and asked them if any of them wanted money.

He dragged her and took her to a coffee plantation. He took her to a banana plantation and touched her vagina using his hand. She had her clothes on and that she was wearing a trouser. She managed to disappear and went back leaving him at the banana plantation. She reported the matter to her brother and her grandmother. Her grandmother and her cousin went to the home of the appellant.

Later she was taken to Hospital. The appellant was arrested.

7. Apart from the complainant, no other witness was called to testify on seeing the appellant drag the complainant into some plantation. The evidence by the complainant is that the appellant touched her vagina though she was still wearing her trouser.

The doctor who examined her did not find any evidence of injuries to the genitalia

8. Section 9(1) and (2) of the *sexual offences Act* No 3 of 2006 provides:-

> (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.

The operative words in Section 9(1) is "attempt" and the words, "which would cause penetration"

The *Sexual Offences Act* itself does not define the word "attempt".

9. Section 388 of the *Penal Code* defines attempt 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 intention 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 the offence.
>
> (2) It is immaterial except so far as regards punishment whether the offender does all that is necessary on his commission of the offence or whether the completion 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.

10. The issues for this courts determination are:-

(1) Whether there was sufficient proof of attempt

(2) Whether the attempt if any was fashioned to cause penetration.

11. Whether there was sufficient proof of attempt.

The evidence by the complainant is that she was playing with other children when the appellant grabbed her by the hand and took her to a coffee plantation and touched her vagina with his hand though she was still wearing her trouser.

The prosecution did not call any of the other children the complainant was playing with who saw the appellant grab her by the hand and take her to some coffee plantation. No witness was called to testify to have seen the complainant emerge from the coffee plantation. No witness placed the appellant at the coffee plantation. It is only the evidence of a child of 4 years that the learned trial magistrate relied on to convict the appellant.

12. During cross-examination by the appellant, the complainant testified that she was told by PW2 (her grandmother) to say what she was telling the court. That evidence ought to have raised doubts in the mind of the court as to the veracity of the child's evidence. Further this was a small girl of 4 years of age, how did she manage to disappear" s she claims. This is another fact that ought to have raised doubts as to the veracity of the complainant's evidence.

13. Whether the attempt if any was fashioned to cause penetration?

Section 2 of the *Sexual Offences Act* defines 'penetration' thus: - "the partial or complete insertion of the genital organ of a person into the genital organ of another person".

14. The evidence by the complainant is that she was grabbed by the hand by the appellant and taken into a coffee plantation where he proceeded to touch with his hand her private parts. There is no evidence of attempt to insert his genital organ into hers. The hand is not a genital organ.

There is no evidence to the effect that the attempt if any was geared towards penetration.

15. A perusal of the sentencing notes indicates that the learned trial magistrate sentenced the appellant to 45 years imprisonment on the Substantive Court and 15 years Imprisonment on the alternative Court. That was manifestly a wrong procedure. After convicting on the main count a court cannot proceed to convict on the alternative court.

16. Having evaluated the evidence on record, I do not find merit in invoking the provisions of Section 179 (2) and 186 of the *Criminal Procedure Code*.

17. The prosecution did not prove this case beyond reasonable doubt. I find the appeal has merit and it is allowed. Both the convictions are quashed and the sentences set aside. The appellant is set at liberty unless otherwise lawfully held.

Judgment read, signed and delivered at Nyeri in open court this 16th day of March, 2023.

HON. JUSTICE M. MUYA

JUDGE

In the presence of:

Present.....Appellant

Mr. Mwangi ....Respondent

Court clerk: Kinyua

30 days R/A.