



**Kibet v Republic (Criminal Appeal E003 of 2022)
[2023] KEHC 19836 (KLR) (6 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19836 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPENGURIA
CRIMINAL APPEAL E003 OF 2022**

AC MRIMA, J

JULY 6, 2023

BETWEEN

BOAZ KIBET APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal arising out of the conviction and sentence of Hon. L.G.G.
Okwengu (Resident Magistrate) in Kapenguria Chief Magistrate's Court
Criminal Case (S.O) No. E004 of 2020 delivered on 14th January, 2022)*

JUDGMENT

Background:

1. Boaz Kibet, the Appellant herein, was charged with the offence of attempted defilement contrary to Section 9(1) and (2) of the *Sexual Offences Act*. The particulars of the offence were that on 2nd December 2020 within West Pokot County, the Appellant intentionally attempted to cause his penis to penetrate into the vagina of B.C. a child aged 7 years old.
2. The Appellant faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the offence were that on 2nd December 2020 within West Pokot County, the Appellant intentionally caused his penis to touch the vagina of B.C. a child aged 7 years old.
3. The Appellant was also charged with the offence of assault causing actual bodily harm contrary to Section 251 of the Penal Code. The particulars of the offence were that on 2nd December 2020 within West Pokot County, the Appellant assaulted B.C. thereby occasioning actual bodily harm.
4. When the Appellant was arraigned before the trial Court, he pleaded not guilty to the offences. After full trial, the Appellant was convicted on both counts. He was sentenced to serve 15-years'



imprisonment on the offence of attempted defilement and to 1-year' imprisonment on the offence of assault.

The Appeal:

5. The Appellant was aggrieved by the conviction and sentence, hence, this appeal. He raised several grounds impugning the decision of the trial Court. He decried that the evidence furnished by the prosecution was marred with contradictions and fabrications. He pitted out that the prosecution failed to discharge its burden of proof to the required standard. He lamented that the trial Court improperly rejected his defence.
6. In the premises, therefore, the Appellant prayed that the appeal be allowed by quashing the conviction, the sentence be set aside and that he be forthwith set free.
7. Parties disposed of the appeal by way of written submissions. According to the Appellant's undated submissions, the evidence PW2 exonerated him from the offences. He opined that the absence of crucial witnesses created loopholes in the evidence of the prosecution that ultimately would lead to an acquittal. He challenged that the medical evidence as submitted was at variance with the testimony of the Complainant. Finally, he submitted that his unsworn testimony was improperly rejected. For these reasons, the Appellant prayed that the Appeal be allowed.
8. The Respondent on its part relied on its written submissions dated 30th January, 2023. It submitted that all the ingredients to the offences that the Appellant had been convicted of were proved to the required standard of proof.
9. Learned Counsel for the State then submitted that the sentencing was proper. For these reasons, the prosecution urged this Court to dismiss the appeal, uphold the conviction and affirm the sentence.

Analysis:

10. This being a first appeal, it's the duty of this Court to re-consider and to re-evaluate the evidence adduced before the trial Court with a view to arriving at its own independent conclusions and findings (See Okono vs. Republic [1972] EA 74). In doing so, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to give due regard in that respect as so held in Ajode v. Republic [2004] KLR 81.
11. Having carefully perused the record, this Court is now called upon to determine whether the offences of attempted defilement and assault were committed, and if so, whether by the Appellant.
12. It is established by law and settled judicial precedents that the offence of attempted defilement carries three components. They are the age of the victim, whether there was an attempt to penetrate the victim and identification of the assailant. The offence of assault calls for proof that an assailant intentionally inflicted injuries on a victim without any legal justification.
13. Before dealing with the said aspects of the offences, this Court will tender a brief summary of the evidence at trial.
14. The prosecution's case was as follows: The complainant, B.C. (testified as PW2) was a 7-year old Class 2 student living in Kapkoris. PW1 was one JK, the complainant's father. He confirmed that his daughter was 7 years old at the time of the offence. He relied on her Birth Certificate which he tendered in evidence.
15. According to PW2, she was in a field with a child when the Appellant found them on 2nd December, 2020. He threw the child to the ground, grabbed PW2 and took him behind the complainant's home.



- He then removed her clothes, removed his penis, put on a condom and inserted it in her vagina. He then closed her mouth. She recalled that she felt pain in her vagina. Later on, the Appellant threw Kshs. 20/= that was collected by PW2's brother L and left the scene.
16. PW1 was on that very day called by his neighbours and informed what had happened. The complainant was seen on 3rd December, 2020 by Clement Kibet, PW3, a Clinical officer working at Kapenguria County Referral Hospital. He was informed by PW2 that she was rescued by another minor.
 17. PW3 observed that her clothes were normal. Her face had bruises and her neck had tenderness. The injuries sustained were 1-day old. They were caused by a blunt object. They were classified as harm. When observing her genitalia, PW3 found that it had no bruises or stains. PW3 found that there was an attempt to defile, but there was no proof of penetration.
 18. He treated the patient. He then filled the P3 Form. He produced both the treatment notes and P3 form in evidence.
 19. The Appellant was found by members of the public who threatened to lynch him. He was, however, rescued by police officers.
 20. The investigating officer, PW4, No. 92386 Eunice Achieng, conducted investigations. When the complainant was presented at the Police Station, PW4 discovered that she had a fresh bruise on the cheek and neck. She recorded statements and collected evidence. She formed the opinion, and, charged the Appellant with the present offences.
 21. After close of the prosecution's case, the trial Court found that the Appellant had a case to answer and was placed on his defence.
 22. His unsworn testimony was that he was accused of defilement, assaulted and taken to the Police Station. He suffered serious injuries occasioned from the assault. While denying that he committed the offences, the Appellant asked the trial Court for forgiveness and leniency.
 23. On the basis of the above evidence, the Appellant was convicted as charged and sentenced accordingly.
 24. This Court will now consider whether the offences were proved.
Attempted Defilement:
Age of complainant:
 25. The age of the complainant was properly settled in this matter by way of a Certificate of Birth No. xxxx. The complainant was born on 21st February, 2013. The production of the Certificate was not challenged.
 26. As the offences were allegedly committed on 2nd December, 2020, then the complainant was then aged about 7 years and 10 months old.
 27. Accordingly, the complainant was a child of tender age within the meaning ascribed to the term under Section 2 of the Children's Act. The assailant:
 28. Was the Appellant positively identified?
 29. The prosecution relied on the evidence of PW2 as the sole identifying witness.
 30. By dint of the proviso to Section 124 of the *Evidence Act*, Cap. 80 of the Laws of Kenya, such evidence is admissible without any corroboration as long as the Court is satisfied that the victim is telling the truth.



31. In the present case, the complainant gave an evocative account on what transpired on that day. She was not hesitant. She narrated that the Appellant found her with a child in a field on that fateful day. He then grabbed her, removed her clothes, removed his penis and inserted it in her vagina. He then threw a Kshs. 20/= as if to buy her silence.
32. Looking at the evidence in totality, this Court finds no reason to depart from the finding of the trial Court that the complainant was deliberate in telling the truth.
33. It is, therefore, the finding of this Court that the Appellant was properly identified as the culprit. Was there an attempt to defile?
34. 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 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.

35. The above section brings out the two main ingredients of an attempted offence; the mens rea which constitutes the intention and the actus reus which constitutes the overt act towards the execution of the intention.
36. In *R vs. Whybrow* (1951) 35 CR App. Rep, 141, Lord Goddard C.J., had the following to say on mens rea when the Court dealt with the offence of attempted murder: -

..... But if the charge is one of attempted murder, the intent becomes the principal ingredients of the crime.

37. Eminent learned authors in criminal law, J. C. Smith and Brian Hogan in their book *Criminal Law*, Butterworths, 1998 (6th Edition) at page 288 while discussing the aspect of mens rea in an attempted murder had this to say: -

.... Nothing less than an intention to kill will do.

38. And in *Cheruiyot v Republic* (1976 - 1985) EA 47 Madan, JA, as he then was, while approving the holding in *R v. Gwempazi s/o Mukhonzon* (1943) 10 EACA 101, *R v. Luseru Wandera* (1948) EACA 105 and *Mustafa Daga s/o Andu vs. R* (1950) EACA 140, stated as follows on mens rea in an attempted murder charge: -

In order to constitute an offence contrary to Section 220, it must be shown that the accused had a positive intention unlawfully to cause death.... The essence of the offence is the intention to murder as it is presented by the prosecution.



39. The Court of Appeal had yet another occasion to look at the aspect of the actus reus in attempted offences. In *Abdi Ali Bare vs. Republic* (2015) eKLR, Learned Honourable Justices Githinji, Mwilu and M'Inoti, had the following to say as they considered the offence of attempted murder: -

..... The more challenging question in a charge of attempted murder is the actus reus of the offence. Although a casual reading of Section 388 of the Penal Code may suggest that an attempt is committed immediately the accused person commits an overt act towards the execution of his intention, it has long been accepted that in a charge of attempting to commit an offence, a distinction must be drawn between mere preparation to commit the offence and attempting to commit the offence. In the work quoted above by Smith & Hogan, the authors give the following scenario at page 291 to illustrate the distinction:

D, intending to commit murder buys a gun and ammunition, does target practice, studies the habits of his intended victim, reconnoiters a suitable place to lie in ambush, puts on a disguise and sets out to take up his position. These are all acts of preparation but could scarcely be described as attempted murder. D takes up his position. loads the gun, sees his victim approaching, raises the gun, takes aim, puts his finger on the trigger and squeezes it. He has now certainly committed attempted murder....

In the present appeal, to prove attempted murder on the part of the appellant, he must be proved to have taken a step towards the commission of murder, which step is immediately and not remotely connected with commission of the murder. Whether there has been an attempt to commit an offence is a question of fact. The act alleged to constitute attempted murder, for example, must be sufficiently proximate to murder to be properly described as attempt to commit murder. In *Cross & Joines' Introduction To Criminal Law*, Butterworths, 8th Edition (1976), P. Asterley Jones and R. I. E. Card state as follows at page 354:

..[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....

The learned authors add 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 murder or whether the accused had done more than mere preparatory acts.

40. From the foregoing, it is easily deducible that when a Court is faced with any charge of an attempted nature, care must be taken to ensure that the attempt, as opposed to mere acts of preparation, is proved. Regardless of how strong the evidence is, if it only relates to acts in preparation to commit a certain crime, that evidence cannot justify a conviction on an attempted charge.
41. For clarity purposes, evidence must be led which goes beyond the preparatory stages and right to the doorstep of possible commission of the offence. It ought to be demonstrated that the accused had committed the last act to the actual commission of the specific offence attempted.
42. With the above exposition of the applicable legal principles in relation to commission of attempted offences, this Court will now apply the said principles to this case.
43. According to the complainant, the Appellant removed his penis, wore a condom and inserted it into her vagina. She felt pain. PW3 a Clinical officer observed the complainant's genitalia and established that there was no penetration but there were bruises on the vulva.



44. Therefore, the evidence of the complainant and PW3 were at variance. The complainant posited that there was penetration whereas PW3 hinted that there was no such penetration. As such, to be able to deal with this aspect appropriately, there is need to ascertain whether there was penetration in law.
45. Section 2(1) of the *Sexual Offences Act* defines “penetration” to mean “the partial or complete insertion of the genital organs of a person into the genital organs of another person.”
46. This position was fortified in *Mark Oiruri Mose vs R (2013) eKLR* when the Court of Appeal stated thus: -
- ... Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl’s organ.... (emphasis added).
47. Later, the Court of Appeal, then differently constituted, in *Erick Onyango Ondeng v. Republic (2014) eKLR* held as such on the aspect of penetration: -
- In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.
48. From the definition of penetration and the guidance by the Court of Appeal, it is the position that penetration may only be ‘slightest and to the surface’ to suffice in law. It, therefore, means that there may be instances where the slight penetration, depending on other factors including passage of time, may not be possible to be ascertained by way of medical evidence. Therefore, the failure to prove penetration by medical evidence does not ipso facto mean that there was no penetration. It all depends on the peculiar circumstances of a case and the extent to which the trial Court believes the victim. However, in such instances, the Court must exercise extreme caution as to weed out miscarriage of justice including instances where a victim is framed up for ulterior motives.
49. This Court has, with care and caution, reviewed the evidence on record. To this Court, penetration was proved. There is evidence that indeed the Appellant’s penis got into contact with and indeed cause bruises on the complainant’s vaginal vulva. That is penetration in law.
50. The Appellant was, hence, charged with a lesser offence whereas there was ample evidence that the Appellant had committed the offence of defilement.
51. Be that as it may, since the Appellant was not charged with the offence of defilement, which is obviously a more serious offence than the attempt, an appellate Court cannot find the appellant guilty of such a more serious offence. However, the converse is always the correct legal position.
52. To find an Appellant guilty of a more serious offence on appeal where the prosecution did not give notice of intention to seek such a finding, is tantamount to a flagrant breach of the constitutional right to a fair trial as enshrined in Article 50 of *the Constitution*.
53. In this case, therefore, this Court will not disturb the conviction on the attempted defilement. The Court finds that the Appellant was correctly convicted.

Assault:

54. From the record, it appears that the injuries on the face were inflicted during the ordeal that led to the defilement.



55. In such instances, there is really no need of finding the Appellant guilty of attempted defilement and assault at the same time. The assault was part of the acts of preparation that led to the eventual commission of the offence. Therefore, the conviction on the offence of assault and the sentence cannot stand.
56. Before I come to the end of this issue, I will address the issue of sentence. The Appellant was sentenced to 15 years' imprisonment on attempted defilement. The Court did not call for a Pre-sentence Report.
57. It is imperative for parties to know that sentencing is a crucial part in the criminal process and the administration of justice and since sentencing Courts are called upon to exercise discretion, then parties are at liberty to even adduce evidence that may aid Courts reach most appropriate sentences (See the Supreme Court in *Petition No. 15 of 2015 Francis Karioko Muruatetu & another v Republic* [2017] eKLR).
58. In exercising its discretion, a sentencing Court is called upon to be guided by a raft of considerations. Such are discussed at length in the Sentencing Guidelines published on 29th April, 2016 vide Gazette Notice No. 2970 by the Hon. The Chief Justice of the Republic of Kenya who is also the Chairperson of the National Council on the Administration of Justice (NCAJ) and in case law including the Supreme Court in *Petition No. 15 of 2015 Francis Karioko Muruatetu & another v Republic* [2017] eKLR.
59. This Court is well abreast of the principles on sentencing and the 2016 Judiciary of Kenya Sentencing Policy Guidelines. As stated by the Supreme Court of Kenya in *Francis Karioko Muruatetu & another case (supra)*, despite their importance, the guidelines do not replace judicial discretion. This is what the Apex Court stated: -
- (72) We wish to make it very clear that these guidelines in no way replace judicial discretion. They are advisory and not mandatory. They are geared to promoting consistency and transparency in sentencing hearings. They are also aimed at promoting public understanding of the sentencing process.
60. The purpose of sentencing is expounded in page 15, paragraph 4.1 of the Sentencing Policy Guidelines as follows: -
- Sentences are imposed to meet the following objectives:
1. Retribution: To punish the offender for his/her criminal conduct in a just manner.
 2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
 3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law-abiding person.
 4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demand that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.
 5. Community protection: To protect the community by incapacitating the offender.
 6. Denunciation: To communicate the community's condemnation of the criminal conduct.
61. In sentencing, the Court considers various mitigating factors. Some include: -



- (a) age of the offender;
 - (b) being a first offender;
 - (c) whether the offender pleaded guilty;
 - (d) character and record of the offender;
 - (e) commission of the offence in response to gender-based violence;
 - (f) remorsefulness of the offender;
 - (g) the possibility of reform and social re-adaptation of the offender;
 - (h) any other factor that the Court considers relevant.
62. In this matter, the Court would have greatly benefitted from a Pre-sentence Report. Be that as it may, the sentence of 15 years' imprisonment for a conviction of attempted defilement seems to be too harsh. Respectfully, this Court will interfere with the sentence and is hereby set-aside.
63. By considering the nature of the offence and the circumstances herein, this Court sentences the Appellant to a prison term of 10 years.

Disposition:

64. Having said as much, the appeal is now determined as follows: -
- a. The appeal against the conviction and sentence on the offence of assault is wholly allowed. The conviction is quashed and sentence of 1-year imprisonment set-aside.
 - b. The appeal against the conviction on the offence of attempted defilement is dismissed.
 - c. The appeal against the sentence is allowed. The sentenced of 15-years' imprisonment is hereby set-aside and is substituted with a term of 10-years imprisonment. The sentence shall run from 7th December, 2020 when the Appellant was charged.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAPENGURIA THIS 6TH DAY OF JULY, 2023.

A. C. MRIMA

JUDGE

Judgment delivered virtually and in the presence of: -

Boaz Kibet, the Appellant in person.

Mr. Makori, Learned Senior Assistant Director of Public Prosecutions instructed by the Office of the Director of Public Prosecutions for the Respondent.

Juma/Hellen – Court Assistants.

