Abdirahman v Republic (Criminal Appeal E051 of 2022)
[2023] KEHC 23640 (KLR) (22 September 2023) (Judgment)

Neutral citation: [2023] KEHC 23640 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL E051 OF 2022

JN ONYIEGO, J

SEPTEMBER 22, 2023

BETWEEN

OSCAR ISHMAEL ABDIRAHMAN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence of Hon R.Aganyo (P.M.) delivered on 15.08.2022 in S.O. Case.No. E003 of 2022 at SPM's Court at Wajir)

JUDGMENT

1. The brief background of the appeal herein is that 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.

2. The particulars of the offence were that on 07.02.2022 at Buna Sub County within Wajir County intentionally attempted to cause his penis to penetrate the vagina of DM a child aged 14 years.

3. He also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* with particulars being that on 07.02.2022 at Buna Sub County within Wajir County intentionally touched the buttocks and breasts of DM, a child aged 14 years with his hand.

4. Upon conviction, the appellant was sentenced to serve twenty years imprisonment. Aggrieved by his conviction and sentence, he filed his undated appeal in person citing five grounds of appeal. However, upon engaging the firm of Stephen Wanyoike & Company Advocates, he filed an amended petition on 03.10.2022 citing the following grounds; that the learned magistrate relied on extraneous matters to convict; the learned magistrate failed to take into account that the complainant and appellant were in company of some people who were not called out as witnesses; the learned magistrate failed to take judicial notice that the alleged offence was insinuated to have been committed during the day in a public place and in the presence of many people; the investigating officer failed to carry out independent investigation but chose to rely on hearsay evidence; that the contradictory evidence by the complainant

was not sufficient to convict; the charges were malicious; the trial court failed to consider the evidence of the accused; that the prosecution had failed to prove its case beyond reasonable doubt.

5. At the hearing, parties by consent prosecuted the appeal by way of written submissions.

6. The appellant through his advocates relied on his submissions filed on 22.05.2023 in which he submitted that there was no evidence to indicate that under the circumstances herein, in broad day light, the appellant could attempt to defile PW1. That none of the witnesses testified that they saw the appellant attempt to remove his trousers or remove any of his clothes or any indication to that effect.

7. The appellant relied on the case of *David Aketch Ochieng' v Republic* (2015) eKLR to express the position that for a successful prosecution of an offence of attempted defilement to stand, prosecution must adduce sufficient evidence to the required standards. That prosecution must prove attempted penetration through establishment of bruises or lacerations on the complainant's vagina and /or bruises or lacerations of the culprit's genital organ and a finding made on discharge such as semen or spermatozoa outside the complainant's vagina or innerwear without there being penetration.

8. That in the case herein, no such attempts were made and accordingly, no mention of the penis of the appellant being outside his body or any attempt on his part to force it on the vagina of the complainant was reported. The appellant further relied on the case of *Simiyu Wanyonyi v Republic* (2019) eKLR where it was held that mere intention to commit a crime without putting preparations geared towards realization of the commission of the offence is not enough proof.

9. It was contended that to prove the act of attempted defilement, the evidence tendered must go beyond the preparatory stages and right to the door step of possible commission of the offence. That it ought to be demonstrated that the accused had committed the last act to the actual commission of the specific offence attempted. Likewise, the intention to commit the crime must also be proved.

10. The appellant reiterated that the elementary ingredients of the offence were not proved to the required standards as there were no material evidence to support the respondent's case. That as a matter of fact, there was no evidence of the investigating officer conducting any independent investigations or interviewing persons to form an independent opinion over the events of the material day.

11. He faulted the court for having convicted him on weak evidence thus rendering the said conviction unsafe. That there were so many gaps, missing and broken links that broke the chain link to a safe conviction and further, the court did not warn itself of the dangers of relying on the evidence by PW1 and PW2.

12. He contended that the circumstantial evidence herein did not meet the threshold as set in already decided authorities to wit the cases of *Nzuki v Republic* [1993] KLR and Ernes Abanga alias *Onyango v Republic* No. 32 of 1990.

13. On sentence, the appellant submitted that the same was manifestly harsh and excessive and therefore, this court was urged to set the appellant at liberty.

14. The learned counsel, Mr. Bidan Kihara for the respondent submitted that the key ingredients that the prosecution was tasked to prove were; the age of the victim which was established as 14 years via the birth certificate which was produced as Pex 1 by the PC Lambson Zakau Buna. Reliance to support this proposition was placed on the cases of *Hadson Mwachongo v Republic* [2016] eKLR and *Francis Omuroni v Uganda*, CA No.2 of 2000 wherein it was stressed that apart from medical evidence, age may also be proved by a birth certificate, evidence by the victim's parents or guardian or by observation or common sense.

15. Regarding identification of the perpetrator, counsel submitted that the complainant knew the appellant before as Ishmael Abdirahman alias Oscar. PW2 testified that she knew the appellant very well and also stated that she knew him by his nickname 'Oscar'. It was contended that identity was therefore positive since the appellant was a person well known to the complainant and PW2.

16. On sentence, Mr. Kihara submitted that the same was not only legal but also appropriate bearing in mind the circumstances of the case and therefore the same in his view, ought to be upheld.

17. I have given due consideration to the grounds of appeal, the evidence on record and the written submissions filed by both parties. Having done so, I find that the key issue arising for my determination is whether the prosecution proved its case beyond reasonable doubt by establishing;

    i. The age of the complaint;

    ii. Attempt to penetrate into the complainant's vagina;

    iii. The identification of the perpetrator and;

    iv. Whether the sentence imposed was excessive.

18. As a first appellate court, I am enjoined to carefully and exhaustively scrutinize the evidence adduced before the trial court to arrive at my own independent conclusions regarding the validity or otherwise of the appellant's conviction and sentence. In doing so, I am duty bound to be cognizant of the fact that unlike the trial court, I did not have the benefit of seeing or hearing the witnesses testify and give due allowance for that disadvantage. See the Court of Appeal in *David Njuguna Wairimu v Republic* [2010] eKLR where the Court of Appeal stated: -

> " The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."

19. PW1, DM testified that at the material time, she was 14 years old and that on 07.02.2022 at around 5-6 p.m., together with her two friends, they had gone to fetch water from a dam when she realized that her jerrycan had a hole in it. That she left to go pick a paper to seal the hole and while there, she realized a shadow of someone standing on her way. She stated that upon looking behind, she realized it was Oscar, the appellant herein. It was her evidence that the appellant then covered her mouth with his hand and then locked her head on his left arm against the neck. That the appellant took her lesso and tied her mouth resulting to a struggle to free herself and further called for help. She stated that she struggled and removed the clothe on her mouth as the appellant touched her breasts and further tried to remove her pants.

20. That she held her pants tightly such that the appellant could not pull them down. It was her evidence- that as she kept on calling for help, her two friends showed up prompting the appellant to run away. She stated that she then went to report the incident at Buna Police station where she found a police man who gave her his number to communicate should she spot the appellant. That later when she went to buy milk, she spotted the appellant and so he told Shukri who chased the appellant and given that the appellant had fled to the police station, the gates were closed and the appellant got arrested.

21. PW2, Rahay Abdishukri testified that on the material day, she had accompanied PW1 to fetch water. That given that PW1's jerrican had a hole, she left to fetch apiece of paper to block the leaking hole. She stated that as PW1 was struggling to block the hole, the appellant was slowly approaching her but to the oblivion of PW1. That after a short while, she heard PW1 scream and so she rushed to go find out and upon reaching there, she found the appellant pressing PW1's neck while covering her mouth with a lesso. She stated that the appellant held the complainant's breasts as they struggled. It was her evidence that the appellant ran away after realizing that many people had come to the rescue of PW1.

22. PW3, Lambson Zakau stated that he was the investigating officer and that on 07.02.2022 at around 6.27 p.m., he was called by a police officer on duty informing him of an attempted defilement case. He reiterated the testimony of the complainant to wit that she had gone to fetch water when the appellant held her and covered her mouth with a piece of cloth and then proceeded to touch her breast and buttocks. That the complainant was lucky enough when other children heard her screams and went to her rescue. He stated that he recorded the statements of the witnesses and later on re-arrested the appellant after the villagers apprehended him. He reiterated that despite charging the appellant with the offence herein, the offence that came out clearly was indecent act because the appellant touched the breasts and buttocks of the complainant.

23. The trial court via a ruling delivered on 30.03.2022, held that a *prima facie* case had been established against the appellant thereby placing him on his defence.

24. The appellant in his unsworn testimony stated that indeed, he met the girls on the material day but given that he had also gone to fetch water from the same dam, he simply queued and when his turn reached, PW1 instead went and stood in the said water thus making it dirty. He stated that PW1 declined to get out of water and so he got angry and threw away PW1's jerrycan which ended up cracking. That PW1 became annoyed and so she rushed to the police station to make a report.

25. It was his case that at 7.00 O'clock when he was on his way to watch TV, PW1's brother captured him and asked him why he had defiled his sister. That he was then arrested and taken to the police station and later charged with the offence herein.

26. The appellant was charged with the offence of attempted defilement contrary to Section 9(1) (2) of the *Sexual Offences Act* which provides that;

> " 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 years"

27. To establish a charge of attempted defilement, the prosecution must prove beyond reasonable doubt all the ingredients of the offence of defilement except penetration which is what completes the offence of defilement. It was incumbent upon the prosecution to prove that the victim was a child within the meaning of the *Children's Act*; that the accused was positively identified as the assailant and; the overt acts or steps taken by the accused towards committing the offence of defilement which was not completed.

28. As already mentioned above, it was incumbent the prosecution to prove the above elements to the standard of proof required which is beyond reasonable doubt. It is trite that the burden of proof always

lies with the prosecution and that the same does not shift. In the case of *Stephen Nguli Mulili v Republic* [2014] eKLR the court held that;

> " It is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of *DPP v Woolmington*, (1935) UKHL 1 where the court eloquently stated that the "golden thread" in the "web of English common law" is that it is the duty of the prosecution to prove its case...".

29. Similarly, In *Pius Arap Maina v Republic* [2013] eKLR, the court held that prosecution must prove a criminal charge beyond reasonable doubt and any evidential gaps in the prosecution's case raising material doubts, must be in favour of the accused.

30. The question therefore is whether the elements constituting attempted defilement were proved to the required standards.

31. On the age of the complainant, the *Sexual Offences Act* defines "Child" within the meaning of the *Children's Act* No. 8 of 2001 as "...any human being under the age of eighteen years."

32. Of importance to note is the fact that there are various ways which can be used to prove a victim's age. In the case of *Charles Nega v Republic* [2016] KLR, the court stated as follows:

> " 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."

33. PW1, the complainant herein testified that she was aged 14 years in that she was born on 23.03.2008 and further produced her birth certificate which was later produced as Pex1 by PW3. She stated that she attended school at [Particulars Withheld] Primary School and was in class seven at that time. The court independently perused the same and noted that indeed the complainant was born on 23.03.2008 while the offence herein was allegedly committed on 07.02.2022. As such, the same shows that the complainant was aged 14 years. Therefore, this court is convinced that indeed the complainant was a child.

34. On identification, it was not controverted that the appellant was a person well known to the complainant. This was exhibited by the fact that even the appellant conceded that when he went to fetch water, he met the girls herein. As such, identity of the appellant was one which was positive as the same was by way of recognition.

35. The next issue is whether the act of attempted defilement was committed. To prove the offence of attempted defilement, it must be proved that the perpetrator must have put into motion steps or actions consistent with preparation to penetrate into the victim's genital organ. While faced with a similar scenario, Makau J as he then was had this to say on attempted penetration in the case of *David Aketch Ochieng v R*, [*supra*].

> " .... For a successful prosecution of an offence of attempted defilement, the prosecution must adduce sufficient evidence to the required standard to prove an attempted penetration. This may in my view include bruises, or lacerations from complainant's vagina, and/ or bruises or lacerations of culprit's genital organ and finding male discharge such as semen or spermatozoa outside the complainant's vagina or innerwear without there being penetration."

36. 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."

37. The above piece of legislation brings into focus the main ingredients of an attempted offence; to wit, the *mens rea* which constitutes the intention and the actus reus which constitutes the overt act towards execution of the intention. The *actus reus* must be more than mere preparation to commit an offence. The Court of Appeal in the case of *Abdi Ali Bere v Republic* (2015) eKLR expressed itself on what constitutes attempt to commit an act as follows;

> " 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".

38. From the detailed testimony of the complainant on how she was confronted by the appellant somebody she knew before and further, considering the fact that she gave the appellant's name to the police is a clear indication that she could not have mistaken the appellant for somebody else. Her testimony was further supported by the evidence of pw2 who responded to the shouts for help from the complainant. Although the appellant stated that he differed with pw1 over fetching water in the dam, nobody else witnessed such differences at the water point. This is a story crafted in my view to run away from responsibility.

39. From the conduct of the appellant in accosting pw1, holding her breasts as he tried to undress her, it could certainly be said that the appellant committed an overt act towards the execution of his intention to defile her. As already noted above, it is trite that a distinction must be drawn between mere preparation to commit the offence and attempting to commit the offence.

40. The trial magistrate at page 11 of his judgment made a finding of his own assessment of the truthfulness of the witnesses including that of the complainant. I am alive to the fact that evidence of a minor can not be corroborated by that of a minor. See *Njoki v Republic* (1980) eKLR where the court held that evidence of a minor cannot corroborate that of a minor and that a court should be cautious in relying on such evidence.

41. Pw2 being a child then aged 14 years could not corroborate the evidence of pw1. However, under section 124 of the *Evidence Act*, a court can convict based on the evidence of a single witness in sexual related offences as long as the court is satisfied that the witness is telling the truthful in his or her

testimony. See J.W.A v Republic (2014) eKLR where the court of appeal upheld reliance on section 124 of the *Evidence Act* to convict by stating that in sexual offences corroboration was not mandatory.

42. Having assessed the detailed testimony of pw1 and pw2, am persuaded to find as the trial magistrate did that the evidence of the two witnesses was not a creation of their own imagination but the true position of what transpired on that day. Under Section 124 of the *Evidence Act*, conviction based on the evidence of a single witness is safe as long as the trial court satisfies itself that the witness is truthful. In this case the trial court correctly and properly cautioned itself and satisfied himself that pw1 and pw2 were honest and truthful.

43. I have no doubt in my mind that the conduct of the appellant by touching the breasts of the complainant as he attempted to remove her pant was a clear manifestation of a conduct geared towards the execution of the act of defilement but cut short by the children who heard pw1 screaming for help. In view of the above holding, am satisfied that the appeal herein challenging conviction is not merited hence disallowed.

44. Regarding sentence, this court recognizes the fact that the same is at the discretion of the trial court; therefore, this being an appellate court, it follows that it can only interfere with the said sentence if it finds that the same was excessive or was arrived at based on wrong principles of the law or by considering irrelevant factors. See the principles guiding interference with sentencing by the appellate Court as set out in *S v Malgas* 2001 (1) SACR 469 (SCA) at para 12 where it was held:

> " A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court...However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate"

45. However, where the law provides for a minimum sentence, the court should give the least provided sentence unless there are compelling reasons to warrant enhancement of such sentence. The appellant is a first offender who is in his mid-twenties.The probation report the trial court ordered recommended non-custodial sentence given that the two families had forgiven each other. The appellant needs an opportunity to reform but not total condemnation. In my view, the sentence of 20 years imprisonment meted out was not commensurate with the offence committed and that it was excessive in the circumstances.

46. In the case of *Korir v Republic* (Criminal Appeal 100 of 2019) (2021) KECA 305 (KLR) the court after considering the age of the appellant and general mitigation and circumstances under which the offence was committed reduced the sentence on defilement to the period already served which was 6years. In view of /the above holding, the sentence of 20years is hereby substituted with a sentence of 5years imprisonment to be calculated from the date of sentence.

ROA 14 days

DATED, SIGNED, DELIVERED IN OPEN COURT THIS 22ND DAY OF SEPTEMBER 2023

J.N. ONYIEGO

JUDGE