Gatumu v Republic (Criminal Appeal E060 of 2024)
[2024] KEHC 13799 (KLR) (6 November 2024) (Judgment)

Neutral citation: [2024] KEHC 13799 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL APPEAL E060 OF 2024

LM NJUGUNA, J

NOVEMBER 6, 2024

BETWEEN

JOHN NJERU GATUMU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising from the decision of Hon. Stephen Ngii, PM Siakago Magistrate's Court Sexual Offence No. 215 of 2023 delivered on 23rd March 2024)

JUDGMENT

1. The appellant, being dissatisfied with the decision of the trial court, filed a petition of appeal dated 09th April 2024, seeking that the appeal be allowed, conviction be quashed, the sentence be set aside and the appellant be set at liberty. The appeal is premised on the grounds that the learned trial magistrate erred in both law and fact:

    a. By finding that the offence of attempted defilement was proved based on an assumption;

    b. By failing to record reasons for believing a single witness contrary to section 124 of the *Evidence Act*;

    c. By failing to warn himself of the dangers of believing a single witness;

    d. By failing to find that the ingredients of the offence of attempted defilement were not proved;

    e. In that the evidence on record does not support the findings in the judgment of the court;

    f. By disregarding the appellant's defense without giving cogent reasons yet the said evidence was plausible and it impeached the prosecution case; and

g. By failing to consider the appellant's mitigation and that he is a first offender thereby mitigate the sentence of 10 years imprisonment.

2. The appellant was charged with the offence of defilement contrary to section 8(1) as read together with section 8(2) of the *Sexual Offences Act* No.3 of 2006. The particulars of the offence are that on diverse dates between 18th and 23rd September 2023 at Mbeere South subcounty in Embu County, the appellant intentionally and unlawfully inserted his penis into the vagina of MKM, a girl aged 11 years.

3. He faced the alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*, whose particulars are that on diverse dates between 18th and 23rd September 2023 at Mbeere South subcounty in Embu County, the appellant intentionally and unlawfully touched the vagina of MKM, a child aged 11 years, with his penis.

4. The appellant pleaded not guilty to the main and the alternative charges and the plea was duly entered. The matter proceeded to full hearing.

5. PW1was the victim who stated that she went to the appellant's shop on 3 occasions; the first time to buy doughnuts for her friend, the second time to get sweets for another friend and the third time to buy rice. That when she went the third time, she was sitting at the shop veranda with other people when the appellant told her to go behind the shop to his house. That she went into his house and he followed her, removed her clothes and defiled her. She testified that she felt a lot of pain and the appellant did it many times and urged her not to scream. That she left his house when no one was seeing her and the appellant gave her a lollipop.

6. That this was not the first time he did that to her but she did not tell her friends because she was afraid that they would tell their parents. She stated that she went home and told her mother what had happened and she was taken to 2 different hospitals and then the police station. On cross-examination she stated that when she went to his house, the people who were sitting at the veranda were left sitting there. That she knows the doctor said that there was no evidence of penetration. She denied the allegation that her mother coached her to testify against the appellant.

7. PW2 was the victim's mother who produced the child's birth certificate as evidence that she was a minor at the time of the incident. She stated that on 23rd September 2023, she went home but did not find PW1. She asked her sister to go and look for her at a friend's house and while PW1's sister was going, she met PW1 eating a lollipop but threw it away when she saw her sister. That she asked PW1 where she was, she answered that she was at the appellant's house where he had removed her clothes and defiled her.

8. That she took her to Kiritiri dispensary where she was examined and spermatozoa cells were found on her and they reported the matter to the police. She produced the medical documents as evidence and stated that the appellant had defiled the victim twice before that incident. On cross-examination, she stated that she did not see the need to visit the appellant's house after the incident was reported. That the sperms found were not checked to find out if they were from the appellant.

9. PW3 was Jacinta Wakere Nyaga of Kiritiri Health Center who produced P3 and PRC forms. She testified that she examined the victim after she had been treated at another health facility. She noted that there were lacerations on the outer part of the vagina but the hymen was intact. The lab tests revealed presence of spermatozoa cells. On cross-examination she stated that the victim had been defiled on a Saturday but she was examined on a Monday. That the presence of spermatozoa was consistent with defilement. That the spermatozoa were not tested to ascertain if they came from the appellant.

10. PW4 was P.C. Esther Mutua of Kiritiri Police Station, who was the investigating officer. She stated that PW2 reported the incident at the police station saying that her daughter had been defiled by the appellant. That she went to the appellant's house where the incident occurred and she ascertained the age of the minor before charging the appellant with the offence. On cross-examination, she stated that there was no reason to delay in charging the appellant with the offence following his arrest. That nothing incriminating was found in the appellant's house. That PW3 explained the findings of the medical examination to her, stating that the hymen was intact but there was bruising on the vaginal opening.

11. At the close of the prosecution's case, the appellant was placed on his defense, having been found with a case to answer.

12. DW1, the appellant, stated that on 18th September 2023, he went for an interview at Kanyuambora where he stayed until late in the evening thus he did not see the victim. That on 21st September, he transported people in his vehicle to and from Kiritiri market from 10AM until 8PM. That on 23rd September, he spent the day fetching water for a construction going on at his home thus he did not meet PW1 at any point. That the following day, he was picked up by 3 people and he later learned about the charges. That PW3 testified that the victim was still a virgin and they never tested him to establish his connection whatsoever to the offence.

13. He stated that PW2 had brought him some vegetables to sell for her but when she returned to collect the money, he told her that he had not sold the vegetables and they were turning yellow. On cross-examination he stated that he suspects that PW2 was framing him for the incident because the botched vegetable business he had with her. That he did not call any of the masons working on the construction site at his home neither did he call any witness to corroborate his testimony regarding the matatu business.

14. At the end of the defense case, the trial court convicted the appellant of the offence of attempted defilement contrary to section 9(1) of the *Sexual Offences Act* and sentenced him to 10 years imprisonment. The appellant was convicted pursuant to section 179(1) of the Criminal Procedure Code for an offence other than the one he was charged with.

15. This appeal was canvassed by way of written submissions.

16. The appellant submitted that PW1 failed to properly identify him in court and she referred to him as Musuku, thus her testimony is moot. That there was no evidence of penetration and the other children who apparently sent PW1 to the shop were never called as witnesses. He argued that he should have been subjected to DNA examination to ascertain his connection to the offence but he wasn't. That nothing was recovered from his house that links him to the offence. He urged the court to allow the appeal.

17. The respondent submitted that the elements of the offence of attempted defilement were proved through the evidence adduced. It relied on the provisions of section 9(1) and (2) of the *Sexual Offences Act* and section 388 of the Penal Code. Further reliance was placed on the case of Moses Kabue Karuoya vs Republic [2016] eKLR where the court discussed the elements of attempted offence. It was its argument that the appellant was properly identified by the victim and it relied on the case of Reuben Taabu Anjononi & 2 Others v Republic [1980] eKLR. That the trial court considered the defense offered by the appellant before convicting him. It urged the court to uphold the findings of the trial court on both conviction and sentence.

18. The issues for determination are as follows:

a. Whether the prosecution has proved the case beyond reasonable doubt;

b. Whether the sentence is excessive.

19. The appellant was charged with the offence of defilement but was convicted of the offence of attempted defilement. The trial court was guided by the provisions of section 179(1) of the Criminal Procedure Code in reaching this finding. Through this appeal, the appellant contends, inter alia, that the trial court reached its decision based on assumptions. It is the role of the first appellate court to review the evidence at trial and reach its own conclusion. These were the sentiments of the Court of Appeal in the case of Okeno vs. Republic [1972] EA 32. I agree with the court when it held:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion. It must make its own finding and draw its own conclusions only then can it decide whether the magistrate's finding should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

20. The prosecution called 4 witnesses in their bid to prove the offence of defilement against reasonable doubt. PW3 testified that the victim's hymen was intact but there were lacerations on the outer part of the vagina. She also noted the presence of spermatozoa cells on the victim's genitals. It is this evidence that gave rise to the offence of attempted defilement. Section 9(1) of the *Sexual Offences Act* provides:

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

21. An attempted offence is one which would eventually give rise to the substantive offence if the intention was completed. Section 388 of the Penal Code defines "attempt" as:-

> " (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."

22. In my view, attempted defilement is sufficiently proved where the following elements are satisfied:

a. The age of the complainant- that the complainant was a child;

b. An unlawful act was done which if fully executed, would have led to penetration; and

c. The perpetrator was positively identified.

23. According to the minor's birth certificate she was a minor within the meaning provided under the *Children Act* as at the time of the incident. The second element to be proved is that an act was done which would have resulted in penetration, but the actual penetration did not occur. PW1 testified that the appellant inserted his penis into her vagina. However, PW3 observed that the hymen was not broken thus penetration was not achieved but there were lacerations on the outer parts of the vagina and there were spermatozoa. In the case of David Ochieng Aketch v Republic [2015] eKLR the court observed as follows:

> " .....What is attempted defilement? It can safely be stated to be the unsuccessful defilement. 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. There was absence of penetration or evidence linking the culprit with the offence of attempted defilement."

24. The appellant decried the trial court's findings and stated that the prosecution's evidence identifying him as the perpetrator was not corroborated. Section 124 of the *Evidence Act* permits the court to go by the identification testimony of the victim alone of a sexual offence. Such evidence does not need to be corroborated. The appellant defended himself at the trial by pleading alibi but he did not call any witnesses to support his testimony that he was not present at the scene on the days when the offences occurred. I find that the appellant was the victim's assailant in this case.

25. In the case of Otieno v Republic (Criminal Appeal E006 of 2022) [2022] KEHC 10559 (KLR) the court stated:

> " The two main ingredients of an attempted offence are the intention (mens rea) and the execution of the intention (actus reus). The prosecution must thus among other things, prove the steps taken by the accused to execute the defilement which did not succeed."

26. PW1 narrated that the appellant is known to her and he owns a shop where she frequented. She said that the appellant told her to go to his house behind the shop and when he followed her there, he removed his clothes and hers and then inserted his penis into her vagina. The victim also testified that the appellant had done this to her twice before. Even though there was no medical evidence proving actual penetration, there was sufficient evidence proving an attempted penile penetration and he bore the mens rea to commit the offence.

27. The trial magistrate sentenced the appellant to 10 years imprisonment which is the mandatory minimum sentence prescribed under section 9(2) of the *Sexual Offences Act*. The mitigation presented at the trial was considered and this court has no legal basis to review this sentence. The Supreme Court in the recent case of *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023*) [2024] KESC 34 (KLR) stated that for as long as the sentences prescribed under section 8 of the *Sexual Offences Act* remain constitutionally sound, the mandatory sentences ought to be applied as prescribed. It stated:

> "(66) We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound

> legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious."

28. Therefore, I find that the appeal lacks merit and the same is hereby dismissed.

29. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 6TH DAY OF NOVEMBER, 2024.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent