Korir alias Gedion Kipkogei Korir v Republic (Criminal Appeal E017 of 2023) [2024] KEHC 13665 (KLR) (6 November 2024) (Judgment)

Neutral citation: [2024] KEHC 13665 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ITEN

CRIMINAL APPEAL E017 OF 2023

JRA WANANDA, J

NOVEMBER 6, 2024

(FORMERLY ELDORET HIGH COURT CRIMINAL APPEAL NO. 144 OF 2019)

BETWEEN

GEDEON KIPLAGAT KORIR ALIAS GEDION KIPKOGEI KORIR ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant was charged in Iten Senior Principal Magistrate's Court Sexual Offence Case No. 42 of 2018 with the offence of attempted defilement contrary to the provisions of law described as "Section 9(1)(2) of the *Sexual Offences Act*, No. 3 of 2006". The particulars were that on 28/09/2018, in Keiyo North sub-County, within Elgeyo Marakwet County, he intentionally and unlawfully attempted to cause his penis to penetrate the vagina of HC, a girl aged 11 years (amended from 12 years). He was also charged with the alternative charge of committing an indecent act with the same child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006.

2. The Appellant pleaded not guilty to the charges and the case then proceeded to full trial in which the prosecution called 8 witnesses. At the close of the prosecution's case, the Court found that the Appellant had a case to answer and placed him on his defence. The Appellant then gave an unsworn statement and did not call any other witness. By the Judgment delivered on 8/08/2019, he was convicted on the main charge and on 23/08/2019, he was sentenced to serve 15 years imprisonment.

3. Dissatisfied with the decision, the Appellant filed this appeal on 30/08/2019, against the conviction and sentence. Reproduced verbatim, the Grounds of Appeal are as follows:

    i. That the trial Magistrate erred in law and fact as she failed to accord the Appellant a fair trial.

ii. That the trial Court erred in law and fact as she failed to observe that the evidence of identification recognition was not conclusively proved.

iii. That the trial Court erred in law and fact as it failed to observe that the prosecution evidence did not prove the Mens Rea.

iv. That the trial learned Magistrate erred in law and fact as she failed to hold that the circumstantial evidence was not credible to prove the offence.

v. That the trial Court erred in law and fact by failing to observe that the parties involved being neighbours, the matter may have developed out of personal differences.

vi. That the learned trial Magistrate erred in law and fact as she ended up shifting the burden of proof from the prosecution to the defence.

Prosecution evidence before the trial Court

4. PW1 was the minor-complainant. She was taken through a voire dire examination and stated that she was 11 years old and a class 6 pupil. She was then allowed to give sworn evidence which she did. Her testimony was that the Appellant lives near her home and that he used to have a wife but chased her away, that he has one young child and the distance between her home and that of the Appellant is about 500 metres. She stated further that on 28/09/2028 at around 1.00 am she was asleep in her home in the bedroom with her elder brother, K and a neighbour's child, EK, that she was asleep on her father's bed alone and the others were asleep on another bed about 2 metres away. She stated that her father had gone to work and her mother had gone to her home and it is another elder brother, G, who was taking care of them and who was asleep in another house which is about 30 metres away. She testified further that her said brother, G, used to go to the centre and only returned to eat then he would go to his house. She stated further that they would close the sitting room door with a shutter but not the bedroom door and that on that night, she did not hear G returning home.

5. She stated further that she had seen the Appellant during the day when she was coming back from school at around 5.00 pm when the Appellant was wearing a navy-blue jacket, that at about 1.00 am, she felt someone touch her on the face and then lie on her, that she felt hair on her face and when she opened her eyes, she recognized the person to be the Appellant. She testified that the Appellant had a green phone, that the roof had holes and thus she could see the moonlight, that the Appellant had the same green jacket and that he spoke to her in Kiswahili and told her; "toa nguo ama nikuue" (remove your clothes or else I kill you). She stated further that the Appellant had a black t-shirt with white sleeves and white collar, that she tried to scream but he held her by the throat and strangled her, that her brother K heard the struggle and shone a D-light torch upon which the Appellant let go of her but grabbed the D-light torch from K and started strangled him instead. She testified that at this juncture, she ran outside screaming upon which a neighbour, Baba D came, that they ran to her brother G's house, that when she creamed, the Appellant ran out of the house and while fleeing, hit the D-light on a rock and it went off, and that when Baba D came, the Appellant had already left. She testified that in the morning, they told the neighbours bout the incident who called the area Chief, that they were taken to the police station where they explained the incident and she was later taken to hospital where she was examined. She stated further the Appellant had left his jacket in the house, that apart from her face, he had also touched her buttocks, that she was covered with a blanket which the Appellant removed, and that she had slept with a skirt and panties which the Appellant did not remove. She also testified that on the day before, she had met the Appellant who asked her about her father's whereabouts upon which she told him that he was away at Kiboin and that he also asked whether her brother G normally

slept in the house upon which she answered in the affirmative. According to her therefore, the accused wanted to do to her "tabia mbaya" (bad manners).

6. In cross-examination, she stated that she also identified the Appellant through his voice and also with the assistance of the moonlight. She denied the Appellant's allegation that he woke up suddenly in a confused state. She reiterated that the bedroom door has no shutter and that only the sitting room door had and stated that they never used to close the door until her brother G returned but that on that date, G did not wake them up. She insisted that the jacket worn by the Appellant was the same one that he was wearing when he saw him during the day and that it was distinct. She however conceded that similar jackets were available for sale and any one could buy.

7. PW2 was also a minor, the complainant's brother by the name KK. He, too, was taken through a voire dire examination and stated that he was 14 years old and a class 7 pupil. He was then allowed to give sworn evidence which he did. He testified that the Appellant's home is near theirs, about 800 metres away, that the Appellant lives alone and that he used to have a wife and a child but they left. He testified further that on 28/09/2018 at around 1.00 pm, he was in the house asleep with a neighbour, EK, on the same bed and that her sister, the complainant, was on another bed sleeping alone, about 1.5 metres away, that they were all in the same room and that the house has one bedroom and a sitting room. He testified further that one enters through the sitting room before reaching the bedroom, that they went to sleep around 8.00pm, that their father was away in Baringo and only used to come over the weekend, that their mother had gone to her parents' home, and that they had remained with their elder brother, G, who sleeps in a separate house, about 100 metres away. He added that when they went to sleep, G was not in the compound, that food is always left for G in the sitting room, that they never used to lock the door and G would only need to push it, and that G never him come for the food on that date.

8. He testified that he heard a man speaking in Kiswahili that "toa nguo na usipige nduru" (take off your clothes and do not scream), and he then heard the complainant's voice sounding like she was being strangled, that he then picked a D-light torch that was on his bed and shone it upon which he saw the Appellant kneeling on the complainant's bed while holding the complainant's neck. He stated further that upon shining the D-light, the Appellant jumped at PW2 and started strangling him too, that the complainant ran out screaming and EK also woke up and they tried to repulse the Appellant. She testified further that the Appellant picked the D-light from him and ran outside, and that he went out and found the D-light broken, and then saw the Appellant running, that the complainant ran up to G's house and G and a neighbour, Baba D came over and saw a jacket in the sitting room which was not there when they went to sleep. It was also his testimony that the jacket belonged to the Appellant as he had seen him before wearing it, that in the morning, they narrated the incident to the neighbours and the area Chief upon which they were taken to Tambach police station where they recorded statements and the complainant was then taken to hospital.

9. In cross-examination, he disputed the allegation that the Appellant woke up in a confused state. Regarding the jacket, he conceded that similar jackets were available for sale and that anyone could buy. He denied that his brother, G, could have come with friends at night but conceded that he did not know what time G returned and stated that it was the first time that G was returning home late. He also stated that G never wakes them up to close the door and that their nearest neighbour lives about 5 metres away.

10. PW3 was EK, also a minor. He, too, was taken through a voire dire examination and stated that he was 13 years old and a class 6 pupil. He, too, was then allowed to give sworn evidence which he did. He testified that the complainant and PW2 were their neighbours, that the Appellant lives alone in the same village as they, that the Appellant used to have a wife who had a child but he does not where she went to, and that the Appellant's home is about 800 metres from the complainant's home. He stated

that on 28/09/2018, he was at the complainant's home sleeping as that is where she used to sleep, that he was sharing a bed with the complainant's brother, K, and the complainant was on her own bed but in the same room and that the beds were about 1 metre apart, that the house has two rooms, a bedroom and a sitting room and that they were in the bedroom. He stated further that they slept at about 7.00 pm, that the complainant's father was away at work in Baringo and her mother was also away, that the complainant and her brother, K, live with their elder brother, G. She further testified that when she arrived, she found the complainant and K having supper, that G was also present but after they had slept, G left to go to his house to also sleep.

11. He stated that about 1.00 am, he heard a man telling the complainant that "toa nguo ama nikuue", that K switched on a D-light and shone it at the Appellant who jumped up at K and strangled him, that the complainant ran outside screaming and the Appellant took the D-light and also ran out. He added that they pursued the Appellant who threw the D-light on a rock as he ran off, that when they returned, they found a coat in the sitting room which was not there earlier when they went to sleep and for this reason, he concluded that it was the Appellant's. He testified further that a neighbour Baba D also came, that in the morning, they informed the Chief who came and took them to Tambach police station and the complainant was taken to the hospital. He added that he had clearly seen the Appellant when K shone the D-light on him, that he was on the complainant's bed kneeling over her and was strangling her, that he was wearing a black t-shirt with white sleeves, collar and on the chest area, that the door was closed but not locked with the shutter, that the bedroom door was also simply pushed back, and that the Appellant used to pass by the house but never entered. He stated further that he also recognized the Appellant by his voice. In cross-examination, he stated that the nearest house was about 10 metres away, and regarding the jacket referred to earlier, he stated that he had never seen the Appellant with it before.

12. PW4 was the said G, the complainant's elder brother. He testified that he is a Form 2 student, that on 27/09/2018 at around 7.00 pm, he was at home with the complainant and their younger brother, K (PW2), and one EK (PW3), a neighbour, that he then left when the three slept, the complainant on one bed and K and EK on another bed, next to each other at an angle, all in the same room, that the house had a sitting room and a bedroom and that he left to go to the centre and returned home at about 11.00 pm to go to sleep. He testified further that he pushed the door but did not lock it, and stated that the children would usually lock the door with a shutter if he arrived before they slept but if he came late and wanted to get inside, he would wake them up but that on the said date, he returned when they were already asleep. He added that the house is about 100-200 metres away, that at around 1.15 am, he heard the complainant screaming from the house and ran there, that when he asked, she responded that the Appellant had gone to their house, strangled her and told her to remove her clothes and that K and EK heard and the Appellant attacked them and so she ran outside. He stated further that he entered the house and found a black jacket on the sitting room and which was not there when he had left earlier, that he gave the jacket to Baba D whom he had met outside, that he also saw a broken D-light outside the house but he did not see the Appellant, that in the morning, he informed one Arap Sang, a "nyumba kumi" official (village elder) who called the area Chief, that they were taken to the police station where they recorded statements and that the complainant was taken to hospital. He added that their mother lives at her ancestral home and their father is a teacher and was away at work. He also stated that the Appellant lives across the valley from their home about 800 metres away, that the Appellant used to pass by there, and that the Appellant lives alone and used to have a wife who had however left with a child. He concluded that on that night, he went straight to his house when he came back from the centre.

13. PW5 was one KLL who stated that the complainant and her siblings are his neighbours, about 10 metres away and that he is the nearest neighbour. He testified that on 28/09/2018, he was asleep when

he heard screams from the complainant's house, that he went outside and the complainant and the other minors told him that the Appellant had gone to their house and tried to rape her, that they had shone a light and the Appellant ran away and broke the light and that he had left a jacket. He stated that he then took the jacket, and in the morning, he called neighbours and told them about the incident, that the Chief was then called and came and the matter was reported to the police where they recorded statements. He confirmed that he never saw the Appellant on that night, that the Appellant lives about 800 metres away, and that G livers in a house that is about 50 metres from the house where the complainant and the others used to sleep. In cross-examination, he stated that he had seen the Appellant wearing the jacket referred to above, that he had not seen anyone else with a similar jacket and that it is was not easy to find such a jacket in the market.

14. PW6 was one Leah Chebet, a Clinical Officer. She stated that she is the one who filled the P3 for the Appellant upon examining her, that results of the examination were that there were no blood stains on the Appellant's clothes and her complaint was that she had been strangled by a person known to her on 28/09/2018 at about 1.00 am in an attempt to defile her, that there was slight tenderness on anterior part of the neck, the age of the injuries was about 15 hours, the degree of injury was "harm", and that the genitalia was normal.

15. PW7 was John Kiptalam Letio, the area Assistant Chief. He stated that on 28/09/2018, the Chief called and informed him of a report that the Appellant had tried to rape a girl, that he went there and found a huge crowd of villagers, he was shown the complainant as the girl whom the Appellant had attempted to defile and he was also given a narration of the incident. He testified further that he took the complainant and the other concerned children to the police station where they reported the matter and recorded statements. It was also his testimony that the Appellant disappeared for about 3 weeks before they finally arrested him at his home, that at the time of arrest, he (PW7) was accompanied by the Chief and 2 police officers. He stated further that he also recovered a broken D-light and a dark blue jacket at the scene and took them to Tambach police station. In cross-examination, he stated that the incident occurred on 28/09/2018 and they arrested the Appellant on 21/10/2018, that he knew the Appellant even before the incident and that he had seen him with the jacket referred to. He also agreed that the Appellant had a case with one Arap Sang (apparently the nyumba kumi elder referred to above) but which was however resolved.

16. PW8 was the Investigating Officer, Sergent Brigit Nafula, from Tambach Police Station. She stated that on 28/09/2018 around 9.00 pm, she received a report of the defilement incident and she then narrated the account of the incident as told to him by the complainant. She testified that the Appellant was arrested after about 1 month, that she issued the complainant with a P3 Form which was then filled at Tambach hospital, that during investigations, she established the age of the complainant by way of the birth certificate supplied and that the Chief had also brought a broken D-light and a dark blue jacket said to have been recovered from the scene. She then produced the jacket, broken D-light, P3 Form and certificate of birth. She stated that she never visited the scene and that according to her investigations, the Appellant tried to defile the complainant as he touched her buttocks and told her to remove her clothes. In cross-examination, she stated that she did not visit the scene because the time was short.

Defence evidence

17. After the Court found that the Appellant had a case to answer and placed him to his defence, he gave unsworn testimony as DW1. He stated that on the alleged date, he was at his home sleeping, that in the morning, he woke up and went to work on his farm where he worked for a whole week, that he never received any report of any incident but on 30/10/2018, the area Chief called and told him to go and see him at the Administration Police camp. He stated that he told the Chief that he was far

and would arrive late and that he (Appellant) proposed that they meet on Sunday, but that on Sunday, at around 10.00 am, the Chief came with Administration police officers but declined to disclose to him the reason, that they took him to Tambach police station and on Monday, he was taken to Court and charged. He stated further that he later learnt that the complainant was the daughter of one JC from whom the Appellant was demanding money for the Appellant's tomatoes that were destroyed when the Appellant was arrested in 2017 and that he had a case in 2017 which was brought by the complainant's father, that the case was also for defilement but which the doctor established never happened and the case was thrown out. Regarding the alleged debt, he stated that the complainant's father had taken 2 crates of tomatoes at Kshs 2,500/- and which he did not pay for, that when he sought assistance from the Assistant Chief, the Assistant Chief refused to do so because, according to the Appellant, the Assistant Chief was involved in signing documents used to transfer the Appellant's father's land and which land the Appellant had claimed back. He claimed that the case was a frame up by the complainant's family which is the same family that had previously brought a similar case against him and also that the family had a dispute with the Appellant over land. Regarding the jacket referred to earlier, the Appellant stated that there was no evidence to prove that it belonged to him.

Hearing of the Appeal

18. Although the parties were granted a chance to file written Submissions, only the Appellant's Submissions is on record. Up to the time of concluding this Judgment, I had not come across any Submissions from the Respondent (State).

Appellant's Submissions

19. In his Submissions, the Appellant included what he referred to as Supplementary Grounds of Appeal whereof he stated that he was a 1st offender, that the sentence meted out was harsh, unjust, unfair and inhuman, that he has been in prison for a long time, and that he is remorseful, repentant and reformed as he has learnt a lot during his incarceration.

20. He then made 4-page submissions which dwelt entirely on the issue of sentence and pleading with this Court to reduce it. The Submissions therefore make no reference on the conviction.

Determination

21. As aforesaid, since the Appellant's Submissions is silent on the issue of conviction, and only dwelt on the sentence imposed, it might be justifiable to presume that he has abandoned his challenge against the conviction. However, since he did not expressly state so, I find it fair to nevertheless review both conviction and sentence.

22. On a different matter, as aforesaid, the Charge Sheet describes the provision of law under which the Appellant was charged as "Section 9(1)(2) of the *Sexual Offences Act*, No. 3 of 2006". Needless to state, no such provision exists. The description in the charge sheet was therefore evidently incorrect. It is however clear to me that what was meant to be cited was "Section 9(1) as read with Section 9(3) of the *Sexual Offences Act*, No. 3 of 2006". I have not found any evidence indicating that the Appellant was prejudiced in any way by this error. In any case, the same has not been raised as a ground of Appeal. I will not therefore turn into an issue herein. Further, I believe that the defect is curable under Section 382 of the Criminal Procedure Code which provides as follows:

> "Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant,

charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

23. Similarly, the Court of Appeal, in the case of Fappyton Mutuku Ngui v Republic [2014] eKLR, while dealing with a similar error as herein, namely, inaccurate reference to "Section 8(1) as read with Section 8(2)" as "Section 8(1)(2)" of the *Sexual Offences Act*, held that:

> " 30. We now turn to the issue of the defective charge sheet. The appellant argues that he was charged contrary to 'section 8(1) (2)' of the *Sexual Offences Act* when in fact there is no such section. We note that the appellant did not raise this issue in his first appeal. Despite this, the High Court addressed it in its judgement in light of any prejudice or miscarriage of justice that the appellant may have faced as a result. The High Court relied on Section 382 of the Criminal Procedure Code which provides that:
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> .....
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> 31. The first appellate court was of the opinion that this defect was curable under section 382 cited above; the appellant had participated fully in his trial because he knew the charge that was facing him, and the trial process was fair. There was no prejudice that faced the appellant. We concur with the High Court and learned counsel for the respondent that the appellant was well aware of the charges he was facing, he had sufficient notice of the charges facing him and that he participated vigorously in the trial process. Furthermore, the charge sheet outlines the essential ingredients and particulars of the offence. We therefore find no merit in this ground of appeal and dismiss it."

24. In the circumstances and from the documents and/or pleadings on record, it is evident that the two broad issues that arise for determination in this matter are the following:

    a. Whether the attempted defilement charge against the Appellant was proved beyond reasonable doubt.

    b. Whether the sentence of 15 years imprisonment was justified.

25. Before I determine the issues, I restate that as a first appellate Court, I am obligated to revisit and re-evaluate the evidence afresh, assess the same and make my own conclusions bearing in mind that the trial Court had the advantage of hearing and observing the demeanour of the witnesses (See Okeno vs. Republic [1972] E.A 32).

a. Whether the charge was proved case beyond reasonable doubt

26. Section 9(1) as read with Section 9(2) of the *Sexual Offences Act* under which the Appellant was charged, provide as follows:

    (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. From the above definition, it is evident that the ingredients of the offence, save for "penetration", are the same usual ingredients for the offence of defilement generally, namely, "age" of the child-victim, positive "identification" of the assailant and, instead of "penetration", the prosecution must prove the steps taken by the accused person to execute the defilement but which steps did not eventually succeed.

28. Regarding "age", the manner of proof was well explained in the case of Francis Omuroni v Uganda Court of Appeal; Criminal Appeal No. 2 of 2000, as follows:

> " In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense ....."

29. It is therefore clear that age may be proved by way of Certificate of Birth or age assessment by a qualified doctor or through other credible evidence such as baptismal card, notification of birth or school records or the evidence of parents or guardian.

30. In this case, the Investigating Officer, Sergent Brigit Nafula produced the complainant's certificate of birth which indicated that the child was born on 23/06/2007. The incident having been alleged to have occurred on 28/09/2018, there is no doubt that the complainant was at the time of the incident about 11 years and 3 months old and therefore a minor. In her voire dire evidence, the complainant also confirmed her age to be 11 years. I therefore have no reason to fault the trial Magistrate for her finding that the age of the victim was proved.

31. On the issue of "identification", the Court of Appeal in the case of Cleophas Wamunga v Republic [1989] eKLR expressed itself as follows:

> " Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant wholly depends or to a great extent on the correctness of more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification".

32. In this case, it is not denied that the Appellant lived in the same neighbourhood or village as the complainant and also the other eye-witnesses, PW2 and PW3. The Appellant himself confirmed that he is known to the family of the complainant. Although the time that the incident is alleged to occurred was around 1.00 am in the dead of night, all the eye-witnesses stated that they spotted and recognized him when PW2 shone his D-light (a kind of solar torch) towards the direction of the complainant's bed where they spotted the Appellant struggling with and/or strangling the complainant. The witnesses also testified that apart from the D-light illumination, they also recognized the Appellant by his voice. They also stated that in the midst of the struggle and in making his escape, the assailant left behind a jacket and some of the witnesses (including the complainant) stated that they had previously seen the Appellant wearing the same jacket. In fact, according to the complainant, earlier on the same date of the incident, she had met the Appellant and who, while wearing the same jacket, had "interrogated" her about their sleeping arrangement, including asking for confirmation whether the minors used to sleep alone in the house. As such, the element of mistaken identity of the Appellant would be too remote.

33. On this point, I am guided by the holding made in the case of Anjononi & Others vs Republic [1981] KLR 594, where it was stated as follows:

> " recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."

34. In the circumstances, I find that identification of the Appellant in this case was clearly one of recognition rather than one of identifying a stranger. I therefore, again, have no reason to fault the trial Magistrate for finding that identification of the Appellant was proved.

35. In respect to the "attempt to defile", the phrase "attempt" is defined in Section 388 of the Penal Code in the following terms:

(1) Where a person intending to commit an offence begins to put his intentions into execution by means adopted to its fulfilment manifests his intentions by some avert act but does not fulfil his intentions to such an extent as to commit the offence, he is deemed to attempt to commit an offence.

(2) It is immaterial except so far as regards punishment whether the offender does all that of necessary on his part for completing the commission of the offence or whether the complete 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.

36. In view of the above definition, it is generally agreed that to prove an offence of "attempt", the Prosecution is required to demonstrate an intention to commit the offence and the overt act executed towards the commission of that offence and which act is sufficiently proximate or immediately connected to the attempted offence (see Mwandikwa Mutisya vs. R (1959) EA 18 and also Mussa Said vs. R (1962) EA 454). Further, the following was stated in the case of Mussa s/o Said vs. R (1962) EA 454, 455:

> " The principles of law involved are very simple but it is their application that is difficult. If the Appellant intended to commit the offence of larceny and began to put his intention into effect and did some overt act which manifests that intention, he is guilty of attempted larceny. (Penal Code, s. 380). The burden on the prosecution is therefore first to prove the intention and secondly to prove an overt act sufficiently proximate to the intended offence.
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> The intention will, in the majority of cases, only be capable of proof by inference and it follows in such cases that the act must be of such a character as to be incompatible with any other reasonable explanation. Secondly, even if the intention is established, the act itself must not be too remote from the alleged intended offence."

37. Similarly, in Keteta v. R, (1972) EA 532, 534, Madan Ag, CJ, stated as follows:

> " A mere intention to commit an offence which is in fact not committed cannot constitute an attempt to commit it. There must also be an overt act which is immediately and remotely connected with the offence intended to be committed and which manifests the intention to commit the offence. A remotely connected act will not do."

38. Clearly therefore, in a charge of the nature herein, the "attempt" itself, and not mere acts of preparation, must be proved. As was stated by Odunga J (as he then was) in the case of Stephen Mungai Maina v Republic [2020] eKLR, "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. Likewise, the intention to commit the crime must also be proved".

39. Applying the above guidelines to the facts of this case, the evidence on record is that on the night of the incident, the parents of the complainant were away, the father at work in Baringo and the mother away at her ancestral home. Further evidence on record is that the complainant, her younger sister (PW2) and a neighbour's son (PW3) used to sleep in one bedroom in a house in which one had to access through a sitting room but that the doors did not have locks and were therefore simply pushed back. The testimonies of the complainant, PW1 and PW2 was that the Appellant sneaked into the sitting room at around 1.00 am, climbed into the complainant's bed and tried to forcibly undress her. Further evidence is that when the complainant woke up and resisted, the Appellant began to strangle her while commanding her in Kiswahili to "undress or else he would kill her". The evidence is also that the struggle startled the other two minors (PW2 and PW3) who both woke up, that PW2 then shone his D-light at the direction of the complainant's bed where the struggle was ongoing and they all spotted and recognized the Appellant as the assailant, that at that point, the Appellant let go of the complainant and instead, turned his attention towards PW2 from whom he also attacked managed to wrestle and dispossess of the D-light, that at this juncture, the complainant ran out screaming and the Appellant then also fled outside. The evidence is that the minors tried to pursue him but the Appellant escaped and, in the process, threw the D-light against a rock causing it to break. Further evidence is that the commotion and screams attracted the attention of a neighbour and also the complainant's elder brother who was sleeping in another house within the same compound who both came over to the scene but by which time the Appellant had escaped.

40. I find the above account as recounted separately by each one of 3 minors to be consistent and credible. There were no contradictions or inconsistencies, and the account given was so vivid and elaborate that I find it satisfactorily plausible. The witnesses were not shaken during cross-examination nor were their testimonies discredited in any way. Regarding the D-light said to have been hit against a rock by the Appellant while fleeing and broken, the same was produced. The entries appearing in the P3 Form also showed that the complainant suffered injuries that were consistent with the testimony given, namely, tenderness on her neck and on her thighs. The 3 minors therefore corroborated each other to the required standard. I am therefore satisfied that indeed the Appellant had the intention to defile the complainant and which intention he in fact put into execution save that he did not succeed.

41. I also consider, as already stated, that according to the complainant, earlier on that date, she had met the Appellant and who had suspiciously "interrogated" her about the minors' sleeping arrangement, including asking for confirmation whether the minors used to sleep alone in the house. This strengthens the view that the Appellant had been planning the act of defilement for a long time.

42. In the circumstances, I am satisfied that the two main ingredients of an "attempt" offence, namely, the intention (mens rea) and the execution (actus reus) were proved.

43. The Appellant alleged that he was framed by the complainant's parents with whom he had a dispute over money and who had also allegedly previously instituted a malicious similar defilement claim against him. In my view, apart from failing to substantiate these allegations, the Appellant did not demonstrate that the same amounted to a sufficient motive to frame him for committing such a heinous act. For such framing to succeed, the complainant's parents would have had to rope in their

entire family, the police, and even the hospital staff into the scheme. This would not be a simple or easy feat to achieve and it was also not demonstrated that the complainant's parents managed to "pull off" such a difficult task or that they even had the capacity to do so. In any event, the evidence is that the complainant's parents had even before the incident, been away from home for a considerable period of time raising doubts over their ability to successfully frame the Appellant when they were far away. I am therefore satisfied that no sufficient motive for framing the Appellant was demonstrated.

44. Accordingly, I find that the trial Court had before it, sufficient material to support its finding that the prosecution proved its case beyond reasonable doubt. I cannot therefore find any ground to fault the trial Court for convicting the Appellant for the offence of attempted defilement. The appeal on conviction therefore lacks merit and is hereby dismissed.

b. Whether the sentence of 15 years imprisonment was justified

45. The applicable principles in considering sentence on appeal were restated by the Court of Appeal in Bernard Kimani Gacheru v Republic [2002] eKLR, in the following terms:

> "It is now settled law, following several authorities by this court and the high court, that sentence is a matter that rests in the discretion of the trial court. Similarly, the sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account the wrong material, or acted on the wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist".

46. In applying the above guidelines, I observe, as already cited above, that regarding sentence, Section 9(2) of the *Sexual Offences Act* provides as follows:

> (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.

47. In view of the above, it is clear that the sentence of 15 years imprisonment imposed by the trial Court was within the law. I however still need to determine whether the sentence was manifestly excessive or harsh. In connection thereto, I cite Majanja J, quoting the Supreme Court case of Francis Karioko Muruatetu & Another v Republic [2017] eKLR) in the case of Michael Kathewa Laichena & another v Republic [2018] eKLR, where he stated as follows:

> "The Sentencing Policy Guidelines, 2016 ("the Guidelines") published by the Kenya Judiciary provide a four tier methodology for determination of a custodial sentence. The starting point is establishing the custodial sentence under the applicable statute. Second, consider the mitigating circumstances or circumstances that would lessen the term of the custodial sentence. Third, aggravating circumstances that will go to increase the sentence. Fourth, weigh both aggravating and mitigating circumstances. Since the Guidelines did not take into account the fact that the death penalty would be declared unconstitutional, the Court in the Muruatetu Case (Supra, para. 71), considered that in re-sentencing in a case of murder, the following mitigating factors would be applicable;
>
> (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.

48. Similarly, in the case of Daniel Kipkosgei Letting Vs. Republic [2021] eKLR, the Court of Appeal pronounced itself as follows;

> " With regard to the above, we observe that the purpose and objectives of sentencing as stated in the Judiciary Sentencing policy should be commensurate and proportionate to the crime committed and the manner in which it was committed. The sentencing should be one that meets the end of justice and ensures that the principles of proportionality, deterrence and rehabilitation are adhered to. In this regard we think that the complaint that the sentence imposed was harsh and excessive is valid though it was the only sentence available then. We are therefore inclined to interfere with it. We therefore set aside the sentence of life imprisonment imposed on the appellant. Having considered the mitigation proffered by the appellant on record the sentence that commends to us is 25 years imprisonment."

49. Applying the above principles to the facts of this case and considering the circumstances thereof, I state that the offence of defilement or attempt thereto is a serious one and clearly, the Appellant merited a stiff punishment. In this case, there is evidence that the Appellant used considerable violence on the complainant by strangling her. The Appellant was also given the opportunity to mitigate, which he did by pleading for a lenient sentence. I also consider the evidence that the Appellant, with the intention of avoiding his arrest, disappeared and was only arrested about 1 month when he re-appeared. Further, the trial Magistrate also called for and was supplied with a pre-Sentence Report which indicated that the Appellant has been a nuisance and a threat to the community as he had been committing similar offences, reported and unreported, to the extent that women in the community had resolved not to go to fetch firewood in the forest because they feared that the Appellant would attack and rape them while in the forest. He was also not remorseful during his mitigation. The Report also indicates that the complainant is still psychologically traumatized and has suffered stigma as a result of the incident to the extent that she had to change schools.

50. Whereas the Appellant claims that he has been rehabilitated, the objectives of sentencing, specifically deterrence, remain pertinent when the Court is imposing a sentence.

51. However, I believe that the Appellant still has a role to play in the society. I trust that he has had ample opportunity to reform while in remand and in prison and will at the opportune time be ready to be released back to the society to achieve social re-adaptation and rehabilitation. He is now also evidently remorseful and I believe that he has now suffered substantial retribution for his "sins". I believe that he deserves a second chance in life. I also note that the trial Magistrate did not state the reasons why she found it fit to mete out the sentence of 15 years, 5 years over and above the minimum prescribed.

52. It is upon the Courts to impose sentences that are proportionate to the offence committed. Taking into consideration all the extenuating and aggravating factors in this case, and while acutely aware of

the intrinsic seriousness and gravity of the offence the Appellant committed, I am of the view that the sentence needs to be reviewed.

53. Regarding the Appellant's plea that the period that he spent in custody before sentencing be taken into account, I note that the trial magistrate did not mention whether he took into consideration such period as required by law. Regarding the issue, Section 333(2) of the Criminal Procedure Code provides as follows:

> " (2) Subject to the provisions of section 38 of the Penal Code every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.
>
> Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody."

54. Similarly, the Court of Appeal in Bethwel Wilson Kibor vs. Republic [2009] eKLR stated as follows:

> " By proviso to section 333(2) of Criminal Procedure Code, where a person sentenced has been held in custody prior to such sentence, the sentence shall take account of the period spent in custody. Ombija, J. who sentenced the appellant did not specifically state that he had taken into account the 9 years period that the appellant had been in custody. The appellant told us that as at 22nd September, 2009 he had been in custody for ten years and one month. We think that all these incidents ought to have been taken into account in assessing sentence.

55. On its part, The Judiciary Sentencing Policy Guidelines (2014) provides as follows:

> " The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial."

56. I note from the charge sheet that, as aforesaid, the Appellant was arrested on 21/10/2018 before being arraigned on 22/10/2018. Although the Appellant was granted bail, there is no indication that he paid the same and was released. If so, then it means that he remained in remand custody throughout the trial until 16/07/2019 when he was sentenced. The period between arrest (21/10/2018) and sentence (16/07/2019) is therefore, in aggregate, about 9 months. In view of the proviso to Section 333(2) of the Criminal Procedure Code, the said period must be "taken into account" while determining sentence.

Final Order

57. In the circumstances, I make the following Orders:

    i. The Appeal against conviction fails as the same is upheld.

    ii. The Appeal against sentence however succeeds and the sentence of 15 years imprisonment imposed by the trial Court is hereby set aside and substituted with a sentence of 10 years imprisonment, to be computed from the date of arrest, namely, 21/10/2018.

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

.....

WANANDA J.R. ANURO

JUDGE

Delivered in the presence of:

Mr. Okaka h/b for Ms. Ayuma for the State

Appellant present - acting in person

Court Assistant: Brian Kimathi