Murathi v Republic (Criminal Appeal E029 of 2023)
[2024] KEHC 14821 (KLR) (20 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14821 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL APPEAL E029 OF 2023

LW GITARI, J

NOVEMBER 20, 2024

BETWEEN

MOSES MURATHI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The appeal arises from the Judgment in the Principal Magistrate's Court at Tigania Sexual Offences Case No. E007/2020. The appellant was charged with Attempted defilement Contrary to Section 9(1)(2) of the *Sexual Offences Act* No. 3/2006.

2. The particulars of the charge were that on 14/10/2020 at Kianjai Location in Tigania West Sub-County within Meru County, the appellant intentionally and unlawfully attempted to cause his penis to penetrate the vigina of WK a child aged nine years.

3. In the alternative the appellant was charged with committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3/2006. The learned trial magistrate found the appellant guilty on the charge of attempted defilement, convicted him then served ten years imprisonment.

4. The appellant was dissatisfied with the conviction and sentence and filed this appeal based on the following grounds: -

    1. The Honourable trial magistrate erred in law and fact by failing to find that the prosecution did not prove its case to the required standard of beyond reasonable doubt

    2. The Honourable trial magistrate erred in law nd fact by proceeding to convict the appellant on evidence that did not prove the material ingredients of the charges.

    3. That the Honourable trial magistrate erred in law and fact by convicting the appellant upon evidence that was not credible, disjointed, uncorroborated and inclusive.

4. The Honourable trial magistrate erred in law and fact by failing to accord and or consider the weighty evidence in defence thereby occasioning a miscarriage of justice.

5. That the Honourable trial magistrate erred in law and fact by failing to find that the appellant was framed despite there being a plethora of evidence in that direction.

6. That the Honourable trial magistrate despite having called for pre-sentence report failed to and or ignored to be guided by its contents and instead relied upon extraneous factors thereby occasioning a miscarriage of justice.

7. That the judgment in the face of the evidence on record is untenable.

5. The appellant prays that the appeal be allowed, the sentence be set aside and he be set at liberty. The respondent opposed the appeal and prays that it be dismissed.

The Prosecutions:

6. WK PW1 was the complainant. She testified that she was at her aunt RK's home at Kianjai with her cousin PM aged five (5) years. Her aunt had walked to the toilet when the appellant entered the house and placed the complainant on sofa set and then placed her on his thighs. Then appellant then lifted her skirt and he began pulling her under-wear as he pinned her down to face upwards. On her part, the complainant pulled her underwear upwards and together with P.M. they started screaming to draw the attention of P.M who appeared and removed the appellant who was on top of her. The appellant slapped R and fled from the homestead. PW2 testified she had gone out to the toilet when she heard P.M and W.K scream from inside the house. She rushed to her house and found Murathi who was seated on W.K.'s thighs. By then W.K. was half naked since her skirt had been raised. R took W.K. to Kianjai Police Post where the matter was reported. The complainant was referred to hospital at Miathene Sub-County with torn pants. However her labia majora and hymen were intact. The doctor (PW2) concluded that it was a case of attempted defilement. The appellant gave unsworn defence and stated that he did not meet the complainant that day. He said he had a grudge against complainant's family which had caused burns on his body. He said the case was false as he had another case with the father of the child.

Appellant's Submissions:

7. Ground 1-3 – It is submitted that the appellant is charged with attempted defilement contrary to Section 9(1) as red with Section 9(2) of the *Sexual Offences Act* which provides that 'a person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement."

> "A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment of a term of not less than ten years."

8. He submits that for an offence of attempted defilement to be proved it should satisfy the ingredients stated in Benson –v- Republic (2019) eKLR which include:-Age of the complainantPositive identification of the assailant.Steps taken by the assailant to execute the defilement which did not succeed.

9. The counsel submits that the age of the complainant was not proved with regard to steps taken by the appellant it is submitted that Section 2(1) Sexual Offence Act defines indecent act as follows:-

> " a) Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another but does not include an act that causes penetration.
>
> b) Exposure or display of any pornographic material to any person against his or her will."

10. He submits that from the testimonies of PW1 &PW2 it did not disclose the steps taken by the appellant to execute the defilement which did not succeed. He submits that the respondent failed to proof the charge beyond any reasonable doubts and the conviction of the appellant should be quashed. The case of Phillip Ltipayon Suruat-v- Republic (2018) eKLR cited.

Ground 4-5:

11. It is submitted that the family of the minor and that of the appellant had a personal vendetta after the father of the minor burnt the appellant. The appellant was on medication due to the burn injuries he had suffered. That it was impossible for him to do the atrocious act. That the learned magistrate failed to consider that evidence.

Grounds 6-7:

12. The counsel submits that the leaned magistrate never considered the presentence report which was supposed to guide her with advisory information when giving her verdict. He relies on Nicholas Kipchirchir –v- Repbulic (2020) eKLR where it was stated on presentence report-

> "it provides advisory information to the courts with a view to the court making sentencing verdicts, including decision on alternative measures to imprisonment."

13. He prays that the appeal be allowed.

Respondent's Submissions:-

14. The respondent was given an opportunity to file their submissions.

15. On 23/9/2024, Ms Wakoli informed the court that she had filed the submissions through E-filing. However I have gone through the CTS severally but did not come across any submissions filed by the respondent. I will therefore proceed and file submissions without the benefit of the respondents submissions.

Analysis and Determination:

16. I have considered the record of appeal and the submissions. The issue which arises for determination is whether the prosecution proved the charge against the appellant beyond any reasonable doubts.

    1. The appellant is charged with attempted defilement under Section 9(1) & (2) of the Sexual Offences. In the case cited by the appellant, Benson-v- Republic (supra) the ingredients of the charge of defilement are the same as those of defilement apart from proof of penetration. It was held in the case that the ingredients of attempted defilement are-

        a. Must proof the age of the complainant

b. Positive identification of the assailant

c. Steps taken by the assailant to execute the defilement.

Proof of Age

17. The complainant (PW1) testified that she was nine years old. She gave her date of birth as the year 2010. The doctor who examined the complainant observed that she was nine years old at the time of examination. The complainants was examined by a doctor at Miathene Sub-County Hospital and an assessment notes dated 15/10/2020 was filed. The report states that the complainant was examined and according to her dental formation she is nine years old. I find that as per observation by the learned magistrate the complainant was intelligent and understood the proceedings. She stated her age and he year of birth. I find that she was able to give her age and on the other hand the age assessment report by the doctor offered conclusive and credible evidence on prove of her age. Her age was proved to the required standard.

Identification of the Perpetrator:

18. The complainant identified the appellant in court as the person who harassed her. PW3 testified that the complainant is her nice and that at the material time she was living with her. On 14/10/2020 while she was in the toilet when she heard her daughter screaming while she was inside the house. She rushed thee and met the appellant inside the house. He grabbed him and he in turn slapped her on the face. She told the court that she knew the appellant quite well and is her neighbor. The complainant saw the appellant in broad daylight. This rules out the possibility of mistaken identity. Her identification was corroborated by the testimony of PW3 who knew the appellant very well.

19. I find that the appellant was positively identified as the perpetrator. Steps taken to by the appellant to execute the defilement.

20. The prosecution has a duty to proof the means which were adopted to commit the offence. In other words the prosecution has to proof the means that the appellant put in place to carry out the intention to commit the offence but fell short of achieving but there was the attempt but not the deed. For an act to constitute an attempt to defile, the prosecution must proof the intention and must be manifested by acts that that point to attempts to defile but failed to execute the act of defilement. In other words there must be evidence to show that the perpetrator's intention was to commit an act that causes penetration but the penetration did not happen. The term attempt is defined underSection 380 of the Penal Code as follows:-

    (a) a mark, other than a trade mark registered under the *Trade Marks Act*, lawfully used by any person to denote any chattel to be an article or thing of the manufacture, workmanship, production or merchandise of such person or to be an article or thing of any peculiar or particular description made or sold by such person; or

    (b) any mark or sign which in pursuance of any law in force for the time being relating to registered designs is to be put or placed upon or attached to any chattel or article during the existence or continuance of any copyright or other sole right acquired under the provision of such law."

21. In this case the evidence by the Clinical Officer was that the complainant was escorted to the hospital on allegation of attempted defilement and upon examination he patients' pant was torn but labia minora and majoras as well as the hymen were all intact.

22. The testimony of PW1 & PW2 on what constituted the attempt was contradictory. PW1 on being cross-examined stated that, "the only thing that accused did to me was pin me down and pull up my skirt." PW3 on the other hand that is RK stated as follows:-

> "Murathi was seated on W's thighs, he was struggling to remove Winfred's skirt, W was half naked."

23. These facts fall short of demonstrating that he was attempting to defile the complainant. In Keketa – v- Republic (1972) E.A 532 @ 534 Madan, Ag CJ (as he was then) stated as follows:-

> A mere intention to commit an offence which is infact 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."

24. This means that the acts attributed to attempt to commit the offence must be such that they show that one thing, attempt to defile.

25. In this case I must come to the conclusion that the evidence in support of attempted defilement are insufficient and o not demonstrate that there was an intention to commit the act which is the mensrea of the offence.

26. They failed to establish the actus reus or that the appellant had the specific intention to commit the underlying crime.

27. I find that the charge was not proved to the required standard of beyond any reasonable doubts.

Conclusion:

28. I find that the appeal has merits. I allow the appeal. The conviction is quashed, the sentence is set aside. The appellant is set at liberty unless he is otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MERU THIS 20TH DAY OF NOVEMBER 2024.

L.W. GITARI

JUDGE