Baya v Republic (Criminal Appeal E050 of 2023)
[2024] KECA 1469 (KLR) (25 October 2024) (Judgment)

Neutral citation: [2024] KECA 1469 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL E050 OF 2023

AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA

OCTOBER 25, 2024

BETWEEN

JUMA HAZIZ BAYA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Malindi (S. M. Githinji, J.) delivered on 25th June 2023 in HCCRA No. E015 of 2022)

JUDGMENT

1. The genesis of the second appeal before us is that the Appellant, Juma Haziz Bayawas charged with defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that, on the 20th day of July 2020 within Kilifi County in the Coast Region, he unlawfully and intentionally caused his penis to penetrate the vagina of MMS a girl aged 13 years.

2. In addition to defilement, the appellant was charged with an alternative count of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* the particulars being that, on the date and place aforesaid, the appellant unlawfully and intentionally touched the vagina of MMS, a minor aged 13 years with his penis.

3. At the trial, the prosecution called 7 witnesses, including the complainant, MMS (PW1), who was sworn in after the trial court conducted a voir dire examination. Her testimony was that, on 20th July 2020 at 9.00 am, she had gone to harvest sisal roots and fetch firewood in the company of HSM (PW2), DDM (PW3), one R and one O; that, while in the bush, the appellant approach them with his face covered with a piece of cloth; that, when they started running away, he told them to relax; that, when she bent to pick her firewood, the appellant grabbed her from below her breasts and carried her away into the bush; that she knew the appellant, whom she had seen twice before; that he had removed his

face cover before telling them to relax; that PW2 and other children ran away as the appellant led her into the bush where he removed her panty, took off his pants and inserted his penis into her vagina; that when she screamed, the appellant threatened to kill her; that the appellant's penis could not enter her vagina, but that he urinated on her, released her and told her to go; that she ran and found DDM, R and a woman called S together with two boys whom she did not know; that, when her parents came, they all returned to the bush, but the appellant had disappeared; and that she was taken to Kilifi County Hospital and later reported the incident at Kijipwa Police Station where she recorded a statement.

4. PW2 and PW3 also testified on oath after the trial court conducted a voir dire examination on each of them. Their testimony confirmed the incident as related by PW1. In addition, PW2 identified the appellant and stated that she used to see him as he headed to the market; that she had seen him for one week; and that he was the one in court. According to her, the appellant had approached them and requested for a rope, but that they declined; that he pretended to leave, but turned and came towards them; that he grabbed MMS and dragged her into the bush; that they ran and shouted for help, but that, on return in the company of other people, they found that the appellant had disappeared; and that she clearly saw the appellant's face.

5. On her part, PW3 testified that she had never seen the appellant before; that she saw his face and identified him as the man in court.

6. PW6, EMK, testified that PW1 was her neighbour; that she saw the children (PW 1, 2, 3 and R and O) go to the bush and, shortly thereafter, ran back to report that PW 1 had been grabbed; that she followed the children back to the bush and saw PW1 running towards her; and that PW1 led her to the scene where she saw pangas, ropes and underpants.

7. PW1's father, PW7, testified that he was at his farm when he heard screams from the children, who informed him of the incident and led him and other villagers to the scene; that PW1 had sperms dripping from her left leg; that she was taken to Kilifi County Hospital by her mother in the company of some neighbours; that the matter was later reported at Kijipwa Police Station where PW1 recorded a statement; that, after three days; the police were led to the scene of crime where they took photographs; that he knew the appellant; and that he had no grudge with him.

8. Dr. Ruth Nyangi (PW4), a pathologist at Kilifi County Hospital testified in place of Dr. Kaingu, who had examined and treated PW1 on 20th July 2020. PW4 produced, on Dr. Kaingu's behalf, the P3 form dated 17th August 2020, the post rape care form dated 17th August 2020 and treatment notes dated 20th July 2020. According to PW4, the examination disclosed attempted defilement, but that there was no penetration; that PW1's genitalia were intact with an intact hymen, but that she had some discharge on both Lebia; that she had no visible injuries; and that she was not pregnant. PW4 confirmed that PW1 was born on 25th April 2007.

9. The investigating officer, PC Nancy Mungumbu (PW5) based at Kijipwa Police Station, testified that she investigated the matter and recorded the statements of PW1, PW2, PW3 and EMK (PW6); that the matter was reported at the station by the complainant's father, PW7 and PW1; and that, on 8th September 2020, the appellant was produced at the station by his family members and members of the public whereupon he was re-arrested.

10. When found to have a case to answer, the appellant gave a sworn statement in his defence. He stated that, on the material date, he was at Lango Baya and not within the location of the incident when the offence was committed; that it seemed suspicious that the assault, fleeing and the arrival of the villagers all took 15 minutes; and that there has been an ongoing dispute between his mother and PW7 who constantly threatened her with a panga and accused her of being a witch.

11. In his defence, the appellant called his sister, RBA (DW2), his mother, MNB (DW3), the village elder, RMM (DW 4), and his nephew, MCK (DW5), to testify on his whereabouts on the material day and time of the offence.

12. DW2 stated that she stayed with the appellant in Lango Baya from 10th April 2020 to 7th September 2020 when the appellant returned to Majajani; that, during this period, the appellant assisted her to take care of her twin children after her husband was locked down in Mombasa due to Covid 19 restrictions; and that DW3 rang and requested the appellant to return home because of, in her own words, 'this case'.

13. DW3 testified that it was impossible for the appellant to have defiled PW1 while he was away at Lango Baya from April 2020 through June 2020; that Lango Baya was very far from Majajani; and that, at times, the appellant would be in Malindi, Ukunda and Mnarani where he played football.

14. It was DW4's testimony that, on 15th August 2020, DW3 reported to him that PW7 had threatened her with a panga and accused her of being a witch; that, despite summoning PW7 to appear before him twice to address the accusations, he never appeared; that, failing attendance, he forwarded the matter to the sub chief; and that the appellant left for Lango Baya in April 2020 to stay with DW2.

15. DW5 testified that he accompanied DW3 to report the threats received from PW7 to DW4; that, when PW7 and DW3 appeared before the sub chief to address the dispute, PW7 "started beating" DW3, forcing the chief to report the matter to the police; that the allegations of defilement arose at the police station; and that the appellant was away at Lango Baya from April 2020.

16. In a judgement dated 2nd March 2022, the trial magistrate found the appellant guilty of the minor cognate offence of attempted defilement contrary to section 9(1) as read with section 9(2) of the *Sexual Offences Act* and sentenced him to 10 years imprisonment.

17. Dissatisfied with the learned Magistrate's decision, the appellant filed an appeal to the High Court of Kenya at Malindi in Criminal Appeal No. E015 of 2022 on the grounds that the prosecution did not prove its case to the required standard; that he was convicted on the basis of contradictory and uncorroborated evidence; that his alibi defence was not considered; that the evidence presented "did not support the charge or particulars of the charge"; and that the genesis of the allegations was the hostility between PW7 and DW3.

18. In its judgment dated 5th June 2023, the High Court (S. M. Githinji, J.) found that the testimonies of the prosecution witnesses were not shaken in cross-examination by the appellant and, as such, the prosecution case was proved beyond reasonable doubt. According to the learned Judge:

> " 41. In this appeal, this court has considered that attempted defilement is a minor and cognate offence to defilement which the accused was charged with. The elements of the offence of attempted defilement are deeply ingrained in the elements of the offence of defilement and as such, I am satisfied that the appellant was properly convicted of attempted defilement under section 179 of the Criminal Procedure Code even though he was not charged with that particular offence and had not pleaded to it."

19. Aggrieved by the decision of S. M. Githinji, J., the appellant lodged the instant appeal challenging the High Court decision on the grounds set out in his undated memorandum of appeal, namely that the learned Judge erred in law by: failing to consider that the critical elements of proof of defilement being penile penetration and the identity of the alleged perpetrator in light of the conflicting evidence were not proved; failing to consider that the charges as preferred were incurably defective since the evidence

adduced did not relate with the charges preferred; failing to consider that the matter was marred with contradictions and discrepancies; and by disregarding section 333(2) of the Criminal Procedure Code, thereby rendering the sentence harsh and excessive.

20. In addition to the grounds aforesaid, the appellant filed an undated "Supplementary Grounds of Appeal" containing 4 additional grounds, the first three being repetitive of some of the grounds advanced on appeal. The only additional ground is that the learned Judge erred in failing to consider his alibi defense.

21. In support of the appeal, the appellant filed undated written submissions citing the cases of Daniel Kipyegon Ng'eno vs. Republic [2018] eKLR for the proposition that there is special need for caution before accepting identification evidence; Tekerali s/o Kirongozi & 4 others vs. Republic [1952] 19 EACA 259 on the importance of giving the description of a suspect in the first report made to the police; Joseph Ngumbao Nzaro vs. Republic [1991] 2 KAR 212, highlighting the possibility of error or mistake during identification or recognition by a witness; and Woolmington vs. DPP [1935] AC 462, submitting that the burden lay on the prosecution to prove their case beyond reasonable doubt.

22. In reply, the respondent filed written submissions dated 5th May 2024 and prepared by Miss. Nyawinda Kernael, Principal Prosecution Counsel. Counsel cited the cases of Moses Nalo Raphael vs. Republic [2015] eKLR requesting this Court to only consider matters of law, unless it is shown that the two courts below considered matters of fact that should not have been considered, or failed to consider matters that they should have considered, or that they were plainly wrong in looking at the evidence; Abdi Ali Bere vs. Republic [2015] eKLR, highlighting what constitutes an attempt to commit an act, and that a distinction must be drawn between mere preparation to commit the offence and attempting to commit the offence; Benson Musumbi vs. Republic [2019] eKLR on what the prosecution should prove with regard to the ingredients of the charge of attempted defilement – it must prove the other ingredients of the offence of defilement, except penetration; and David Mutai vs. Republic [2021] eKLR, submitting that an appellate Court cannot interfere with the sentencing Court's discretion, unless it is established that there was real error on application of the sentencing guidelines.

23. Our mandate on a second appeal, as is the one before us, is confined to consideration of matters of law by dint of section 361 of the Criminal Procedure Code. In Karingo vs. Republic [1982] KLR 213, the Court stated:

> "A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence."

24. Having carefully considered the record of appeal, the impugned judgment, the respective submissions and the law, we find that this appeal stands or falls on our holding on two main issues of law, namely: whether the appellant was convicted on a defective charge; and whether the prosecution had proved the ingredients of defilement against the appellant to the required standard. The remaining grounds relating to the severity of the sentence, the defence of alibi and the alleged contradictions and discrepancies in the prosecution evidence, are matters of fact, which we cannot re-open on 2nd appeal to this Court.

25. In Adan Muraguri Mungara vs. Republic [2010] eKLR, this Court set out the circumstances under which it will disturb concurrent findings of fact by the trial court and the first appellate court in the following terms:

> "As this court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no

reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere." [Emphasis added]

26. On the 1st issue as to whether the appellant was convicted on a defective charge, we hasten to observe that the appellant had not raised any objection in this regard before the trial court, and that he raised the issue for the first time on appeal to the High Court where it was not considered in the impugned judgment. For whatever it is worth, it has been raised yet again before this Court on second appeal.

27. In his submissions, the appellant contend that the prosecution evidence was at variance with the charge; and that the trial court did not order amendment of the charge, which failure was, in his view, prejudicial to him. In conclusion, the appellant proceeds to make the following self-defeatist statement, namely that: "... the provisions of section 179 CPC allow trial court to convict on a minor offence though not charged with it."

28. With regard to this issue, the Principal Prosecution counsel submitted thus in response:

> "We submit that the offence of attempted defilement is a minor and cognate offence considering that they have the similar element and that one is an attempt and the other is a complete offence."

29. Section 179 of the Criminal Procedure Code provides that:

> 179.
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> (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.
>
> (2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.

30. With regard to the power of a trial court to convict the appellant of the cognate offence without affording the appellant an opportunity to address the issue, this Court in Robert Mutungi Muumbi vs. Republic [2015] eKLR expressed itself as hereunder:

> "As is apparently clear, section 179 of the Criminal Procedure Code empowers a court, in some particular special circumstances, to convict an accused person of an offence, even though he was not charged with that offence. The court contemplated by section 179 can be either the trial court or the appellate court ...
>
> .... An accused person charged with a major offence may be convicted of a minor offence if the main offence and the minor offence are cognate; that is to say, both are offences that are related or alike; of the same genus or species. To sustain such a conviction, the court must be satisfied on two things. First, that the circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by the charge, constitute the minor offence. Secondly, that the major charge has given the accused person notice of all the circumstances constituting the minor offence of which he is to be convicted....
>
> That conclusion is reached at the stage of judgment when it is not practical to require the accused person to plead afresh to the minor offence. It is a decision premised on the

discretion of the court based on the evidence adduced at the end of the trial." (See also Robert Ndecho & Another vs. Rex (1950-51) EA 171 and Wachira S/O Njenga vs. Regina (1954) EA 398).

31. Save for the fourth ingredient of penetration, defilement with which the appellant was first charged is proved by the very same ingredients required for the offence of attempted defilement. The ingredients common to the two offences are: the age of the victim; the identity of the accused; and the sexual/indecent act, which would otherwise cause penetration. For the avoidance of doubt, section 9(1) of the *Sexual Offences Act*, 2006 reads:

> 9. Attempted defilement
>
> (1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.

32. That said, it is not lost to us that defilement occurs only where the act complained of causes penetration (see section 8(1) of the Act). In view of the foregoing, we reach the considered view that the two courts below were not at fault in sustaining the appellant's conviction for the offence of attempted defilement despite the fact that he had been charged with the major and cognate offence of defilement. To our mind, the courts below properly exercised their discretion pursuant to section 179 of the CPC, a power which the appellant concedes; that, even though the appellant was not charged with the offence of attempted defilement, the trial court could nonetheless convict him therewith pursuant to section 179 of the Act; that the main offence of defilement with which the appellant was charged is cognate to the minor offence of attempted defilement; that the two offences are related or alike, of the same genus or species; and that the circumstances or ingredients of defilement necessarily constitute attempted defilement. Accordingly, the 1st issue stands settled and the appeal fails on this score.

33. On the 2nd and final issue as to whether the prosecution proved the charge of attempted defilement beyond reasonable doubt, we only need to satisfy ourselves whether the appellant was properly identified or recognised by PW1, PW2 and PW3; the age of the complainant; and the wrongful act that fell short of penetration.

34. The fact that the complainant was aged 13 years was confirmed on assessment at Kilifi County Hospital and the medical age assessment report issued, and which was produced by PW5 as "PEX. 4". It is noteworthy that the complainant's age assessment report was not challenged in the two courts below and neither is it in issue before us.

35. With regard to the appellant's identity, the complainant and PW2 were emphatic that they knew the appellant by appearance and by name. It is also noteworthy that the appellant was well known to PW6 and PW7, whose testimony in that regard was uncontested. It is no surprise, therefore that the appellant alleged the existence of a grudge between PW7 (the complainant's father) and the appellant's mother (DW3), even though DW3 stated that they were not neighbours. Clearly, the two minors knew and recognised the appellant as the perpetrator of the offence complained of.

36. In view of the foregoing, the appellant's allegation that he was at a place other than the scene of crime, or that he was not properly identified, does not hold. He was not a stranger to the complainant, and neither were the circumstances such as would have impaired his recognition as the assailant. Addressing itself to the issue of recognition, this Court in Peter Musau Mwanza vs. Republic [2008] eKLR expressed itself thus:

> "We do agree that for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not

a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for some time, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question."

37. In the same vein, Madan J.A in Anjononi and Others vs. The Republic [1980] KLR had this to say on the matter:

> " ... This, however, was a case of recognition, not identification, of the assailants; 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."

38. As to the unlawful act which fell short of penetration to prove defilement, the three children (PW1, PW2 and PW3) testified to the sexual assault on the complainant. On rushing to their aid, PW7 testified to seeing semen dripping from PW1's left leg. PW6 saw the complainant's panty at the scene. Likewise, the attempted defilement was confirmed by PW4, who produced the P3 form, the medical treatment notes and the post rape care form. The medical evidence confirms PW1's testimony to the fact that the appellant's penis could not penetrate her vagina and that, consequently, he "urinated" (apparently ejaculated on her as testified by PW7) on her and told her to go.

39. In sum, the three ingredients of attempted defilement were proved beyond reasonable doubt. Our consideration of the record of appeal, the impugned judgment, the rival submissions, the cited authorities and the law, lead to our conclusion that the appeal fails and is hereby dismissed. Consequently, the judgment of the High Court of Kenya at Malindi (S. M. Githinji, J.) dated 25th June 2023 is hereby upheld. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 25TH DAY OF OCTOBER, 2024.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR