Sigei v Republic (Criminal Appeal E007 of 2022)
[2024] KEHC 1949 (KLR) (29 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1949 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CRIMINAL APPEAL E007 OF 2022

RL KORIR, J

FEBRUARY 29, 2024

BETWEEN

ARON KIPKEMOI SIGEI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the Conviction and Sentence in Sexual Offence Case Number E012 of 2021 by Hon. Omwange J. in the Magistrate's Court at Sotik)

JUDGMENT

1. The Appellant was charged for the offence of attempted defilement contrary to Section 9(1) of the *Sexual Offences Act*. The particulars of the charge were that on 19th February 2021 in Sotik sub-county, he intentionally attempted to cause his penis to penetrate the vagina of S.C, a child aged 9 years.

2. The Appellant pleaded not guilty to the charge before the trial court, and a full hearing was conducted. The prosecution called seven (7) witnesses in support of its case.

3. At the close of the prosecution case, the trial court ruled that a prima facie case had been established against the Appellant and he was put on his defence.

4. At the conclusion of the trial, he was convicted on the charge of attempted defilement and sentenced to serve ten (10) years in prison.

5. Being dissatisfied with the Judgment dated 26th January 2022, Aron Kipkemoi Sigei appealed to this court on 2nd February 2022 citing several grounds reproduced verbatim as follows: -

    i. THAT I pleaded not guilty to the charges and I maintain the same.

    ii. THAT the learned trial Magistrate erred in both law and fact by relying on uncorroborated, inconsistent, contradictory evidence.

iii. THAT the learned trial Magistrate erred in both law and fact by failing to analyze the entire evidence of the medical officer.

iv. THAT the learned trial Magistrate erred in both law and fact by not considering that the Prosecution side fails its mandate by not providing enough evidence to prove that I committed the said crime.

v. THAT I pray to be present during the hearing of this Appeal.

6. The Appellant further filed Amended Grounds of Appeal and relied on the following grounds which I reproduce verbatim: -

i. Thatthe trial Magistrate erred in law and fact by relying on non-factual evidence without any tangible or concrete evidence or proof from the police.

ii. Thatthe trial Magistrate erred in law and fact by giving unsafe, unjustified sentence and the identity of the Appellant was not proved as required by the law.

iii. Thatthe trial Magistrate erred in law and fact, by not considering the Appellant's mitigation and gave a harsh and excessive sentence which was not tallying with the evidence adduced.

7. This being the first appellate court, I have a duty to re-evaluate the evidence on record afresh. This duty was succinctly stated by the Court of Appeal in Njoroge vs. Republic (1987) KLR 19 where it held: -

> " As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of the first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and to make due allowance in this respect (see Pandya V. R [1957] E.A 336, Ruwalla vs. R. [1957] E.A 570)."

The Prosecution's Case.

8. It was the Prosecution's case that the Appellant defiled S.C (PW1) on 19th February 2021. PW1 testified that on the material day as she was going to school at around 7 a.m., the Appellant covered her nose and mouth with a hat and she screamed for help as she fell down. That the Appellant ran away when a motor vehicle approached.

9. Kibet Kirui (PW5) who was the clinical officer testified that he examined the victim on 19th February 2021 and found bruises on her lips and forehead and also found that her genitalia was normal.

The Accused/ Appellant's Case.

10. The Appellant, Aron Kipkemoi Sigei testified that on the material day he was at Sotik until 2 p.m. and when he went back home, he was arrested on the allegation of defiling a child.

11. Aaron Kiprono Bii (DW2) testified that he knew both the Appellant and the victim and on the material day they woke up at 7 a.m. and went to school and later came back to sleep at 7 p.m.

12. Winny Rotich (DW3) testified that the Appellant was her son and that the Appellant spent the night of 18th February 2021 at her home. That the Appellant left on 19th February 2021 at 8 a.m.

13. On 22nd February 2023, this court directed that this appeal be dispensed off by way of written submissions.

The Appellant's Submissions.

14. It was the Appellant's submission that the Prosecution witnesses did not show where and what time he was arrested. That he had gone for work in Sotik until 2 p.m. and he was arrested on his way back home for an offence he did not commit. It was his further submission that the Prosecution did not bring one Kennedy who allegedly arrested him to court because they knew that he had been charged with an offence he did not commit.

15. The Appellant submitted that his identity was not proved as required by the law. That the victim did not clearly identify him. That the Prosecution should have conducted an identification parade and further that dock identification could not be used to secure a conviction.

16. It was the Appellant's submission that when the victim informed Esther (PW3), uncle Geoffrey (PW4) and her mother (PW2) of what occurred, she was unable to give a description of the Accused.

17. On sentence the Appellant submitted the 10 year sentence was harsh. That the trial court did not consider his mitigation that he was the sole bread winner and that did casual jobs to earn a living.

The Prosecution's/Respondent's Submissions.

18. The Respondent conceded the Appeal. In submissions dated 4th April 2023 the learned Principal Prosecution Counsel submitted that the facts of the case pointed to physical assault of the victim by the Appellant but not a sexual assault. That the Appellant did not remove the victim's clothes or touch her genitalia or breasts.

19. It was the Respondent's submission that the Appellant wrestled the victim to the ground and that the assault did not amount to the sexual offence of attempted defilement. That the trial court therefore improperly convicted of the offence of attempted defilement.

20. I have gone through and given due consideration to the trial court's proceedings, the Memorandum of Appeal filed on 2nd February 2022, the Appellant's Amended Grounds of Appeal and written submissions both filed on 20th February 2023 and the Respondent's written submissions dated 4th April 2023. The following issues arise for my determination:-

    i. Whether the Prosecution proved the offence of attempted defilement to the required legal standard.

    ii. Whether the Defence places doubt on the Prosecution case.

    iii. Whether the Sentence preferred against the Accused was fair and just.

i. Whether the Prosecution proved the offence of attempted defilement to the required standard.

21. The offence of attempted defilement is premised under section 9 of the *Sexual Offences Act* 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.

    (3) The provisions of section 8(5), (6), (7) and (8) shall apply mutatis mutandis to this section.

22. The term attempt is defined by section 388 of the Penal Code as follows: -

1. When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.

2. It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfilment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.

3. It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence.

23. The ingredients of the offence of attempted defilement were outlined by Kemei J. in the case of Benson Musumbi vs. Republic (2019) eKLR as follows: -

> " The prosecution in an offence of attempted defilement must prove the other ingredients of the offence of defilement except penetration; it must prove the age of the complainant, positive identification of the assailant, and then prove steps taken by the assailant to execute the defilement which did not succeed. Attempted defilement is as if it were a failed defilement, because there was no penetration."

24. The same was reiterated by Odunga J. (as he then was) in Stephen Mungai Maina vs Republic (2020) eKLR, where he stated that:-

> " .....since the appellant was charged with the offence of attempted defilement contrary to section 9(1) (2) of the *Sexual Offences Act*, the prosecution must prove the ingredients of defilement (age, positive identification) except penetration and the steps taken by the Appellant to execute the defilement which did not succeed."

25. I now proceed to analyse the evidence for proof of the following ingredients.

i. The age of the complainant

ii. Positive identification of the assailant

iii. The overt act (attempted penetration)

Age of the victim

26. The importance of proving the age of a victim in a defilement case has been restated in several authorities. The Court of Appeal in Hadson Ali Mwachongo vs. Republic (2016) eKLR held thus: -

> " The importance of proving the age of a victim of defilement under the *Sexual Offences Act* by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of victim. In Alfayo Gombe Okello vs. Republic Cr. App. No. 203 of 2009 (Kisumu). This Court stated as follows;
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> > "....In its wisdom Parliament chose to categorize the gravity of that offence on the basis of the age of the victim, and consequently the age of the victim is a necessary

ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1).?"

27. It is now an established principle that the age of a victim can be proven in several ways. The Court of Appeal in Malindi in Mwalengo Chichoro Mwajembe vs. Republic, Msa. App. No. 24 of 2015 (UR) held as follows: -

> " .....the question of proof of age has finally been settled by decisions of this court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. See Denis Kinywa - vs – Republic, Criminal Appeal No. 19 of 2014 and Omar Uche Vs Republic, Criminal Appeal No. 11 of 2015. We doubt if the courts are possessed of the requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond reasonable doubt. This form of proof is a direct influence by the decision of the Court of court Appeal of Uganda in Francis Omuroni is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable....."

28. In this case, No. 106608 (PW7) produced a Birth Notification and the same was marked P.Exh 4. The Birth Notification indicated that S.C (PW1) was born on 11th May 2011. The authenticity of the Birth Notification or its production was not challenged during the trial. I find the Birth Notification admissible and based on its contents, it is my further finding that at the time of the commission of the alleged offence, S.C was aged 9 years.

Identification of the perpetrator

29. Regarding identification, since there was no eye witness to the alleged offence other than the victim. As such, this court must carefully evaluate the victim's evidence on identification. From the victim's (PW1) testimony, the Appellant met her as she was going to school before engaging her in a conversation about a cow. The Appellant sought the victim's assistance with tracing the cow and as they walked, he grabbed her and covered her mouth and nose using his hat. PW1 testified that the Appellant ran away when a motor vehicle approached.

30. There is no doubt in my mind that PW1 positively identified the Appellant. She had seen his face earlier as they engaged in a conversation about a cow and there was no evidence of any other person being on the scene. Additionally, PW1 positively identified the Appellant in the dock. In the case of Muiruri & Others vs Republic (2002) KLR 274, the court held that: -

> " .....We do not think that evidence will be rejected merely because it is dock identification evidence. The court might base a conviction on such evidence if satisfied that on the facts and circumstances of the case the evidence must be true and if prior thereto the court duly warns itself of the possible danger of mistaken identification."

31. It is my finding that the aspect of identification was clear and adequately proven.

Proof of the attempt

32. The Prosecution had to prove whether the overt act of attempted penetration was committed by the Appellant. Penetration is defined under section 2 of the *Sexual Offences Act* as follows: -

> " penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person.

33. It follows then that in a case of attempted defilement, the Prosecution must demonstrate that an Accused took all the necessary steps to begin an act of penetration but was unable to complete the same either at his own volition or through the intervention of another. There must be no penetration but only evidence of its attempt as held by Makau J in David Aketch Ochieng vs. Republic (2015) eKLR as follows: -

> " ....For a successful prosecution of an offence of an 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."

34. As stated earlier in this Judgment, S.C (PW1) testified that the Appellant covered her mouth and nose using his hat and PW1 screamed for help as she fell to the ground. It was also her testimony that the Appellant ran away once a motor vehicle approached.

35. It was PW1's testimony that after the Appellant ran away, she rushed to Esther's (PW3) home to inform her what had happened. That PW3 then took her to her uncle Geoffrey (PW4) who then took her home to her mother (PW2). It was her further testimony that she was later taken to hospital.

36. Kibet Kirui (PW7) who was the clinical officer at Kiptulwo Health Centre testified that he examined PW1 on 19th February and found that her genitalia was normal. He also found that PW1 had bruises on her lips and forehead. The other Prosecution witnesses did not witness the alleged offence.

37. I agree with the Prosecution's submission that the Appellant did not remove the victim's clothes or touch her breasts or genital organs. That the circumstances of the case pointed towards a physical assault and not an attempted defilement.

38. The totality of the evidence by the victim and the clinical officer show that the Appellant suddenly covered the victim's face with his hat and she fell down and sustained bruises on her lips and face. There is nothing that indicated that the Appellant had initiated the act of attempted penetration or taken steps towards the initiation of the act. The Appellant covered the victim's nose and mouth with his hat and the injuries sustained by the victim and evidenced by the clinical officer amounted to an assault on the person of the victim. The evidence only creates suspicion in the mind of the court that the Appellant may have had intention to defile the victim. I am thus unable to find that there was attempted penetration by the Appellant on the material day.

39. The three ingredients of defilement or attempted defilement must be proved conjunctively and not disjunctively. When an ingredient cannot be adequately established, it creates doubt and that doubt however small must go to the benefit of an Accused.

40. It is my finding therefore that the Prosecution having failed to prove all the ingredients of the offence of attempted defilement failed to prove its case against the Appellant to the required legal standard which is beyond reasonable doubt. The conviction was unsafe.

41. In the end, I find the Appeal merited. I hereby quash the conviction and set aside the sentence. The Appellant is set at liberty forthwith unless otherwise lawfully held.

42. Orders accordingly.

JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 29TH DAY OF FEBRUARY, 2024

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R. LAGAT-KORIR

JUDGE

Judgement delivered in the presence of Ms. Boiyon holding brief for Mr. Njeru for the State, Appellant present in person and Siele (Court Assistant)