Nyakundi v Republic (Criminal Appeal E029 of 2021) [2024] KEHC 6574 (KLR) (30 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6574 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CRIMINAL APPEAL E029 OF 2021

WA OKWANY, J

MAY 30, 2024

BETWEEN

JAMES NYAKUNDI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an Appeal against the Judgment of Hon. W. C. Waswa (Mr.) RM Nyamira dated and delivered on 30th September 2020 in the original Nyamira Chief Magistrate's Court Sexual Offence Case No. 36 of 2020)

JUDGMENT

1. The Appellant herein, JNO, was charged with the offence of Attempted Defilement contrary to Section 9 (1) (2) of the *Sexual Offences Act*. The particulars of the offence were that on 12th May 2020 in Manga Sub-County within Nyamira County intentionally attempted to cause his penis to penetrate the vagina of RMM (particulars withheld) a child aged 13 years.

2. The Appellant pleaded not guilty to the charge and a trial was conducted in which the prosecution presented the evidence of 3 witnesses as follows: -

3. PW1, RMM (particulars withheld), the victim, was on 12th May 2020 sent by her mother (PW2) to the Appellant's home to deliver some money. It was alleged that upon arriving at the said home, the Appellant grabbed her hand and inserted a Kshs. 50/= note inside her dress on the left breast. The victim rejected the money and tossed it out but the Appellant pulled her into the house towards a bed and started to undress her. He tore her skirt in the process but was unable to remove her skin tights. PW1 screamed and her mother PW2 and an aunt, one R, rushed to the scene before the Appellant could accomplish his intentions.

4. PW2, GOM (particulars withheld), the victim's mother was in her farm when she heard the victim screaming at the Appellant's home. She rushed to the scene where she found PW1 crying. PW1

informed her that the Appellant had attempted to defile her. She noticed that the victim's skirt and blouse were torn. She also found the Appellant at the scene. She reported the matter to the police and later to the police station. She produced the victim's Birth Certificate as P Exhibit 1.

5. PW3, No. 241275 PC JK was the Investigating Officer. She received the victim and her mother at the station on 31st May 2020. She recorded their statements and issued the victim with a P3 Form. She produced the complainant's torn skirt as P Exhibit 2.

6. At the close of the prosecution's case, the trial court found that the prosecution had made out a prima facie case against the Appellant so as to warrant his being placed on his defence.

7. The Appellant opted to give a sworn statement in his defence and did not call any witnesses. He testified that PW2 had gone to his home to pluck avocado on 2nd April 2020 and that when he protested, PW2 warned him that he will do something to him. He explained that PW1 went to his home on 12th May 2020 to get some money and started to scream when his mother told her that she did not have the money. He stated that PW1 later claimed that he wanted to rape her but later changed her mind and claimed that he wanted to take her phone. He denied the charges and stated that they had usual home disputes.

8. At the close of the hearing, the trial court found that the prosecution had proved its case against the Appellant beyond reasonable doubt. The Appellant was consequently convicted for the offence of Attempted Defilement and sentenced to serve 20 (twenty) years imprisonment.

9. Aggrieved by the decision of the trial court, the Appellant filed the instant appeal and listed the following rounds of appeal in the Petition of Appeal: -

    1. My lord right from the start I pleaded not guilty, which I still maintain the same for this was a mere frame up.
    2. That my lord the trial learned magistrate erred in both law and facts to have relied a mere made up story that had no prove to confirm the act or attempt said.
    3. That my lord the subordinate court faulted in law and facts, to have convicted me having no medical report that was tabled as demonstrated in court to confirm the act.
    4. That my lord the magistrate equally failed in law and facts to based conviction and sentence on only a single witness the said girl PW1 against the book of God 1 timothy 5:19 and Deuteronomy.
    5. That my lord the magistrate further erred in law and fact to have not even invited the mother of the girl to confirm the same.
    6. That my lord the trial learned magistrate faulted in law to have on relied on prosecution side while the complainant failed to answer even one question that was able to ask her in court.
    7. That your lordship, I further failed to understand how the age of the complainant can be 13 years yet they confirmed that she was in form 3.
    8. That my lord the trial court never realized that there was no sign of attempted to defilement since there was no screaming at any point.
    9. That my lord, the court further failed to find if there was injury to confirm struggle of any kind.

10. The appeal was canvassed by way of written submissions which I have considered.

11. The Appellant challenged the legality of the sentence passed by the trial court and stated that it was excessive and way beyond the minimum sentence stipulated under Section 9 (1) of the *Sexual Offences Act*.

12. The Appellant took issue with the credibility of the investigations conducted by the police and argued that the same was shoddy and scanty.

13. He also faulted the trial Magistrate for applying the wrong principles in convicting him and for shifting the burden of proof to him. He further argued that the trial court did not consider his tender age of 18 years while sentencing him.

14. The Respondent, on the other hand, submitted that all the ingredients of the offence of Attempted Defilement were proved to the required standards. It was however submitted that the sentence passed was not appropriate as the period that the Appellant spent in custody, while awaiting his trial, was not considered and deducted from his sentence period.

15. The duty of the first appellate court is to carefully and exhaustively scrutinize the evidence presented before the trial court with a view to arriving at its own independent conclusions regarding the validity or otherwise of the appellant's conviction and sentence. In doing this, the appellate court must remind itself that it neither saw or heard the witnesses testify and give due allowance for that disadvantage. See: *Okeno vs. Republic*, [1972] EA 32.

16. I have carefully considered the record of appeal and the parties' respective submissions. I find that the key issues for determination are as follows: -

    i. Whether the evidence presented before the trial court proved the guilt of the appellant as charged beyond any reasonable doubt.

    ii. Whether the sentence imposed on the appellant was harsh and excessive in the circumstances of the case.

17. On the first issue, in order to establish a charge of attempted defilement, the prosecution must prove, beyond doubt, all the ingredients of the offence of defilement except penetration which is what completes the offence of defilement. The prosecution must therefore prove that the victim was a child within the meaning of the *Children's Act*; that the accused was positively identified as the assailant and the overt acts or steps taken by the accused towards committing the offence of defilement which was not completed.

18. An attempt to commit an offence is defined in 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.
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> 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."

19. I will now apply the above provisions to this case and analyse the evidence on record in order to ascertain if the essential ingredients of the offence preferred against the Appellant were established to the required standard of proof.

20. Regarding proof of age, it is noteworthy that age of the victim is a critical factor under the *Sexual Offences Act* as the prescribed sentence is determined by the age of the victim. In Mwalengo Chichoro Mwajembe vs. Republic, Criminal Appeal No. 24 of 2015 (UR) the court stated as follows on the various ways in which the age of the victim can be proved: -

> " ....the question of proof of age has finally been settled by a recent 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 if 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 Ucher -Vs- Republic Criminal Appeal No. 11 of 2015). We doubt if the courts are possessed of requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decisions of the Court of Appeal of Uganda in Francis Omuroni -Vs- Uganda Criminal Appeal No. 2 of 2000. We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable..."

21. In the instant case, I note that even though the Appellant did not dispute the age of the complainant as stated in the charge sheet, PW2, the victim's mother produced her Birth Certificate as P.exhibit1 which revealed that the victim was born on 26th October 2006. The offence was committed on 12th May 2020. This means that the victim was 13 years old at the time in question.

22. Section 2 of the *Children's Act* defines a child as a person under the age of eighteen (18) years. Given the above evidence, I am satisfied that the prosecution presented credible evidence to prove that the complainant was a child at the time the offence was committed.

23. The question I must now grapple with is whether the prosecution tendered sufficient evidence to prove that the appellant attempted to defile the child victim as alleged. In her sworn testimony, PW1 narrated that her mother had sent her to the Appellant's home where, upon arrival, the Appellant grabbed her hand, placed Kshs. 50 note on her left breast, pulled her into the house towards a bed and started to undress her. According to PW1, her skirt was torn in the struggle and the Appellant could have achieved his mission to defile had he not been stopped by the skin tights that she was wearing.

24. The victim's evidence was materially corroborated by the evidence of her mother (PW2) who immediately responded to her screams and rushed to the scene where he found the Appellant in the company of the victim. I note that the victim's torn skirt was also produced in evidence as P.exhibit2.

25. When placed on his defence, the appellant chose to make a sworn statement and did not call any witness. In his statement, he admitted that he knew the complainant and her mother (PW2) as his neighbours and that he had differences with PW2 over avocados. According to the Appellant, PW2 had threatened to do something to him when he asked her why she had plucked their avocado. He

stated that the charges were false as the victim had also claimed that he wanted to take her phone before changing her story to be that of attempted defilement.

26. After my own appraisal of the evidence on record, I am unable to fault the finding of the learned trial magistrate on conviction. I am satisfied that the victim and her mother presented candid evidence which was supported by victim's torn skirt which was produced as proof of the fact that the Appellant attempted to defile her. I am in agreement with Makau J when he held as follows in *David Aketch Ochieng vs. R*, [2015] eKLR: -

> "….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 made discharge such as semen or spermatozoa outside the complainant's vagina or innerwear without there being penetration."

27. For the foregoing reasons, I have come to the same conclusion, as the learned trial magistrate, that in this case, the prosecution proved its case against the appellant beyond any reasonable doubt. I am satisfied that the Appellant's conviction was safe.

28. Turning to the sentence imposed by the trial court, I note that the Appellant complained that the sentence was manifestly harsh and excessive. He argued that he was sentenced to serve 20 years imprisonment, double the minimum term prescribed by the law despite the fact that he was a first offender.

29. As I have already stated in this judgment, the Respondent conceded that the sentence imposed by the trial court was manifestly harsh in view of the fact that the Appellant was a first offender and had stayed in custody for over 3 years while awaiting his trial. The Respondent faulted the trial court for failing to consider the period that the Appellant had spent in remand custody when passing the sentence.

30. It is trite that even though sentencing is at the discretion of the trial court, that discretion must be exercised judiciously in accordance with the law taking into account the facts and circumstances of each case.

31. The law prescribes a minimum of ten years imprisonment and a maximum of life imprisonment for the offence of attempted defilement. The record shows that the appellant was a first offender and he had spent about three and a half years in remand custody while awaiting his trial.

32. I note that the trial court did not give any reasons for sentencing the appellant to twenty years imprisonment which was double the minimum sentence prescribed by the law.

33. It is trite that sentences are not only intended to punish an offender for his wrong doing but also aim at rehabilitating or reforming offenders to renounce their criminal tendencies and become law abiding citizens. I have no doubt that the sentence imposed by the trial court in this case was lawful but considering that the appellant was a first offender, I find that the sentence was harsh and manifestly excessive.

34. For the above reasons, while I uphold the conviction, I set aside the sentence passed by the trial court and substitute it with a sentence for the period that the Appellant spent in custody while awaiting his trial and the period that he has so far spent in prison from the date of his sentence. I am satisfied that the period that the Appellant has spent in custody is sufficient punishment for the offence of attempted defilement. Consequently, I direct that the Appellant be set at liberty forthwith unless he is otherwise lawfully held.

35. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NYAMIRA VIA MICROSOFT TEAMS THIS 30TH DAY OF MAY 2024.

W. A. OKWANY

JUDGE