Republic v Muchui alias Ben (Criminal Appeal E067 of 2022)
[2024] KEHC 6588 (KLR) (30 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6588 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL APPEAL E067 OF 2022

LW GITARI, J

MAY 30, 2024

BETWEEN

REPUBLIC ..... RESPONDENT

AND

BENSON MUCHUI ALIAS BEN ..... RESPONDENT

JUDGMENT

1. This appeal arises from the Judgment in Chief Magistrate's Court Meru Sexual Offences Case No.6/2020 where the appellant here in was charged with three counts of attempted defilement contrary to Section 9(1) as read with Section 9(2) of the *Sexual Offences Act* No.3 of 2006.

2. The particulars of the charges were that on diverse dates between 1/12/2019 and 31/3/2020 at Imenti North Sub-County within Meru County intentionally and lawfully attempted to cause his penis to penetrate the genital organ namely, vagina of S.N a child aged five (5) year, L.N aged nine (9) years and E.M aged eight (8) years as per the respective charges.

3. The appellant was also charged with three alternative charges of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*.

4. Upon being arraigned in court the appellant denied all the charges. A plea of not guilty was entered and a full trial was conducted. In a Judgment delivered by the learned trial magistrate, she found the appellant guilty on the 1st and 2nd Count of attempted defilement and convicted him. He was ordered to serve ten (10) years imprisonment on each count and sentence to run consecutively. The appellant was acquitted on the 3rd count. The appellant was dissatisfied with the conviction and sentence and filed this appeal and initially raised eight (8) grounds of Appeal. He however addressed these grounds and filed amended grounds of appeal. These are:-

1. That the learned trial magistrate erred in matters of law by failing to order the sentences to run concurrently instead of consecutively, despite being that the offence committed at the same time according to the evidences of PW1 and PW2.

2. That the learned trial magistrate erred in both law and facts by failing to note that the period spent in custody (pre-trial) under Section 333(2) of the *Criminal Procedure Cod*e (CPC) was not considered.

3. That the learned trial magistrate erred in matters of law by failing to note that this case was not proved beyond reasonable doubt.

4. That the learned trail magistrate erred in law and fact by not observing that the evidence adduced by the prosecution witnesses were inconsistent, un-collaborating and contradicting.

5. That the learned trial magistrate erred in law and fact by failing to note that this case was fabricated due to an existing grudge.

6. That the learned trial magistrate erred in law and fact by dismissing the appellant defense without giving cogent reasons.

The appellant prays that the appeal be allowed, the conviction be quashed, the sentence be set aside and the appellant be set free in the interest of justice.

5. The brief facts of the case are that the complainants in this case are minor children of tender years. The complainant in the 1st count S.K. was aged five (5) years at the time the offence was committed while the complainant on the 2nd count E.M was aged eight (8) years. On diverse dated between 1/12/2019 and 31/3/2020 the appellant would call the children separately and after blocking their mouth with zero tape would place them on the bed, remove their pants and do what they called 'Tabia Mbaya', that is inserting his penis in their vagina. He would then release them and told them not to tell anyone what happened. The appellant also used to remove his penis and tell them to touch and feel that he had eggs. This was done to S.N. (PW1) and E.M (PW2). Eventually, S.N (PW1) reported to her grandmother who in turn reported to her mother. The appellant according to the witnesses owned a shop. Sometimes when E.M went to the appellant's shop, he held her hand and took her to his house which also served as a shop. The appellant removed her clothes and did "tabia Mbaya". On another occasion E.M took S.N who is her sister to the shop of the appellant and while there he told them to touch his penis and feel if he has eggs. They refused. The appellant also did "tabia Mbaya" to E.M (PW2) inside his house and after removing her dress and pant he sodomised her by inserting his penis in her anus. E.M went home and reported to her mother.

6. The parents of the children reported to the police. The appellant was arrested by members of the public and handed over to the police.

7. The complainants were issued with P3 forms and P.CR. Forms and were escorted to hospital for treatment. The doctor (PW3) who is Morbert Mwangangi examined S.N (PW1) found that no abnormalities were noted but attempted defilement could not be ruled. As for E.M, the doctor found the nature of offence was defilement as the hymen was broken. He produced the treatment notes, P3 Forms and PCR Forms. The appellant was then charged with these offences.

8. The appeal was canvassed by way of written submissions. The appellant submits that the charges were not proved beyond any reasonable doubts. He also faults the court for ordering the sentences to run consecutively instead of concurrently. In this regard he cites Section 14(1) of the *Criminal Procedure Code* and the cases of *Peter Mbugua Kabui –v- Republic* (2016) eKLR and Christopher Kimathi Njagi-v-Republic (citation not given). The appellant submit that the learned trial magistrate failed to consider

his defence that he was framed by the complainant's grandmother. The appellant submits that there were inconsistences in the evidence of the witnesses. He has finally urged this court to find that the trial magistrate failed to take into account the time spent in custody while awaiting trial.

9. The respondent has opposed this appeal and urges the court to uphold the conviction, sentence and dismiss the appeal. The respondent has urged the court to find that the charges were proved to the required standards. The prosecution relied on the case of *Moses Kabue –v- Republic* (2016) eKLR. That the appellant was well known to the victims. He has urged the court to rely on the evidence tendered by the witnesses.

10. With regard to the appeal on the sentence, he relies on *Peter Mbugua Kabui* (2016) eKLR and *Sawedi Mukasa s/o Abdulla Aligwaisa* (1946) 13 E.A.CA

Summary of the Evidence.

11. "PW1 a minor SN in her evidence before court stated that she knew the accused person as a neighbour. On the material date the accused person called her and asked her to go pick a phone. She went and he locked her in his house where he put her on a bed put cello tape on her mouth and then removed her underpants and a short he was putting on and then did "tabia mbaya" to her. He then removed the cellotape from her mouth and let her go. She went home and told her grandmother who then told her mother. She was taken to hospital for treatment and the matter was reported at the police station.

12. PW2 EM also a minor in her evidence before court stated that she knew the accused person as a neighbour. On the material date she had gone to the accused persons shop to buy cakes. The accused person took her hand and took her to his house where he tied her mouth using cellotape and threatened to cut her if she told her mother. He removed her underpants and did "tabia mbaya" to her on her anus. She told her mother about the incident. She was taken to hospital and the matter was reported at the police station.

13. PW3 ZG in her evidence before court stated tht she is the grandmother to PW1 with whome she stays with. PW1 came to her and told her that she had been defiled by the accused. She called PW's mother and later PW1 ws taken to hospital for treatment. The police wre notified. The accused was arrested and charged.

14. PW4 PK in her evidence before court stated that EM PW2 was her daughter. She called by PW3 who told her that the accused person had been defiling children including her daughter. She later went home and asked her daughter PW2 who confirmed the sentiments. The child was taken to hospital for examination and the matter was reported at the police station.

15. PW5 Dr. Norbert Mwangangi produced medical records for the complainants PW1 and PW2 i.e PRC Forms and P3 Forms. The P3 forms produced confirmed the offence of attmpted defilement. PW6 PC Woman Idegwa Alice in her evidence before court stated that she was the investigating officer in this case. She charged the accused person upon completing her investigations. She produced documents including copies of birth certificates and the minors in this case.

16. The accused was put on his defence. He gave sworn evidence and called one witness.

17. DW1 Benson Muchui in his evidence before court denied commiting the offence. He blamed his woes on a one Gakii who had apparently refused to pay his debt.

18. DW2 Damaris Gakii in her evidence before court stated that the accused had sent her to a one Gakii to ask for his debt of Kshs.5000/- and that is when the accused was arrested."

Issues for Determination

19. - Whether the charges were proved beyond any reaonsable doubts.

- Whether the court should interfere with the sentence.

Analysis and determination:

20. This is a 1st appeal and the duty of this court is to consider the evidence adduced before the trial court, analyse and evaluate it then come up with its own independent finding. It must however leave room for the fact that it had no opportunity to see the witnesses when they testified to assess their demenor and leave room for that, See *Okeno-v- Republic* (1972) E.A 32.

(a) Proof of penetration

b) Proof that the complainant is a child (Under the age of 18)

c) Proof that the accused was indeed properly identified as the perpetrator.

1. Whether the charge was proved beyond any resonable doubts

21. The appellant was charged with attempted defilement under Section 9 (1) & (2) of the *Sexual Offence Act*. The Section provides:-

> "(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."

22. The prosecution has the burden to proof the age of the victim and the identity of the perpetrator which are the same ingridients of defilement apart from penetration which is not supposed to be proved where the allegation is attempted defilement and not the deed. The victim is supposed to narrate the acts of the perpetrator in executing the offence of attempted defilement. The prosecution called six witnesses including the victims of the offence. The two PW1 and PW2 gave evience after a voire dire examination. The trial magistrate found as fact that the appeallant was positively indentified by the victims as well as PW3 &4 who all confirmed that the appellant was well known to them as he was their neighbour. The age of the complainants was proved by the production of their birth certificates. PW1 was 5 years and PW2 was eight years old. The testimony of the complainants was corroborated by the medical evidence by PW5. In deed the doctor confirmed that in one of the complainant's there was defilement as the hymen was missing. I find that the evidence tendered by minor victims show beyond any reasonable doubts that there was attempted defilement. The appellant did offer a plausible defence. He alleged that he was framed by the grandmother of the victim and yet it is the victim who reported what the appellant did to her and the testimony was corroborated and confirmed by medical evidence adduced by PW5. The offence of attempted rape is proved where the acts enumerated under Section 388 of the *Criminal Procedure Code* are disclosed. The Section provides:-

> "(1) The Director of Public Prosecutions may at any time direct a magistrate to hold an inquiry, in accordance with section 387, into the cause of a particular death to which the provisions of that section apply and shall in the case of missing person believed to be dead give such directions as he deems fit.

(2) When an inquiry has been terminated under section 387, and it appears to the Director of Public Prosecutions that further investigation is necessary, the Director of Public Prosecutions may direct the magistrate to reopen the inquiry and to make further investigation, and thereupon the magistrate shall have full power to reopen the inquiry and make further investigation and thereafter to proceed in the same manner as if the proceedings at the inquiry had not been terminated.

Provided that the provisions of this subsection shall not apply to an inquiry at which a magistrate has recorded his opinion that the offence of murder or manslaughter has been committed by a person.

(3) When giving any direction under this section, the Director of Public Prosecutions may also direct whether the body is to be disinterred and examined.

(4) Upon receiving a report under section 387 (6) the Director of Public Prosecutions shall after considering the recommendations of the magistrate direct him to make an order as to the period which should be recorded before the death is presumed and upon the expiration of such period the Registrar-General shall be empowered on the production to him by the proper officer entitled to apply for and receive a grant of representation under the *Law of Succession Act*, of a court certified copy of the magistrate's order, to issue to that person an appropriate certificate of death in accordance with the *Births and Deaths Registration Act*."

23. These type of offences were dealt with by Mativo J. Extensively in the case of *Moses Kabue Karuoya – v- Republic* [2016] eKLR where the learned Judge expressed himself as follows:

> " The essential ingredients of an attempt to commit an offence have been laid down in the following words:-
>
> > "In every crime, there is first intention to commit it, secondly, preparation to commit it, thirdly to commit it. If the third, that is, attempt to successful, then the crime is complete. If the attempt fails, the crime is not complete but the law punishes the act. An 'attempt' is made punishable because every attempt, although it fails of success, must create an alarm, which, of itself, is an injury, and the moral guilt of the offender is the same as if he had succeded."

24. Thus, for there to be an attempt to commit an offence by a person, that person must:-

a. Intend to commit the offence;

b. Begin to put his intention to commit the offence into execution by means which are adapted to its fulfilment. This means that the accused begins to carry out his intention to commit the offence in a way suitable to bring about what he intends to achieve.;

c. Do some overt act which manifests his intention; that is, the accused performs an act which is capable of being observed by another (although it may not have been and which in itself makes clear his intention to commit the offence,

But in fact he does not commit the whole offence. For the offence of or attempting to commit an offence to be proved, the prosecutor must prove each of those three elements beyond reasonable doubt."

25. There can be no doubt from the testimony of PW1 that what the appellant did by placing her on the bed undressing her and did "tabia mbaya" using his penis was in furtherance of attempted to defile her. Similarly PW2 gave details of how the appellant severally took her to his bed, undressed her and did 'tabia mbaya' on her vigina and anus using his penis. I find that the evidence met the threshold for proving attempted defilement. The actions by the appellant as testified by minor complaints constitutes acts in furtherance of his attempt to defile the minors. The prosecution had the burden to proof the charges against the appellant. Section 107 of the *Evidence Act* provides that :-

> "(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

26. It has been held that proof beyond reasonable doubts does not mean proof beyond any shred of doubt. The prosecution is adduced evidence which roved the charges beyond any reasonable doubts. Both legal and Evidential burden under Secion 107, 108 & 109 of the *Evidence Act* was discharged.

27. The appeallant submits that the trial magistrate erred by failing to find that he had a grudge with the complainant's grandmother over a debt issue. Nothing can be far from the truth. The allegation of the debt was put to the P3 when she testified and she state as follows:-

> " The accused is a relative. I got married in the family prior to the incident our relationship was good."

28. See page 20 of the record line 13-14. This was stated in the evidence in chief. During cross-examination the witness stated as follows:-

> "Before the incident we were living cordially. You difiled the child. I did not fabricate this case against you." Page 20 line 21-22. On the other hand the trial magistrate held that-
>
> " As for the evidence by the accused I find his evidence to be untruthful as it has been greatly overwhelmed by that of the complainant. He tried to raise the issue of a debt between him and Gakii but the credibility of the witness (ess) was not shaken."
>
> It is well demonstrated by the record that the defence was considerd and cogent reasons given for rejecting it."
>
> The learned trial magistrate had the opportunity to see the witnesses and foudn that the credibility of the prosecution witnesses was not shaken.
>
> I must leave room for the fact that I had no opportunity to see the witnesses when they testified. I agree with the trial magistrate that the appellant was not framed.

29. The appellant submits that the evidence was contradictory and there was no corroboration. The charge sheet states that the incident took place between 1st December 2019 to 30/3/2020 and 30/3/2020. This means that the offence was committed between those dates without giving any specific dates. It

is not indicative of the number of times the appellant attempted to defile the minor. The ground has not merits. Defects on the charge which do prejudice the appellant and were not raised during the trial are not raised. On appeal when the appellant could have raised them in the trial court. Section 382 of the *Criminal Procedure Code* 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."

30. The appelalnt submits that the learned trial magistrate erred in law in failing to order that the sentence should run concurrently. Section 14 of the *Criminal Procedure Code* provides as follows:

> "(1) Subject to subsection (3), when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefore which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.
>
> (2) In the case of consecutive sentences, it shall not be necessary for the court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to impose on conviction of a single offence, to send the offender for trial before a higher court.
>
> (3) Except in cases to which section 7 (1) applies, nothing in this section shall authorize a subordinate court to pass, on any person at one trial, consecutive sentences -
>
> (a) of imprisonment which amount in the aggregate to more than fourteen years, or twice the amount of imprisonment which the court, in the exercise of its ordinary jurisdiction, is competent to impose, whichever is the less; or
>
> (b) of fines which amount in the aggregate to more than twice the amount which the court is so competent to impose.
>
> (3) For the purposes of appeal, the aggregate of consecutive sentences imposed under this section in case of convictions for several offences at one trial shall be deemed to be a single sentence."

31. The Court of Appeal in the case cited by the appellant *Peter Mbugua –v- Republic* (2016) eKLR emphasised that;-

> As a general principle, the practice is that if an accused peson commits a series of offences at the same time in a single transaction a concurrent sentence should be given." (emphasis mine)

32. The offence must be committed in a series of offences at the same time and in a single transaction. This can be for example where a person breaks into a house and steals items belonging to different people. The breaking constitutes a single act while and series of offences are the crimes committed therein. The Court of Appeal in the said decision stated-

> "If separate and distinct offences are committed in different criminal transactions, even though the courts are on the same charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment."

33. The offences were committed on diverse dates on different complainants. They were minors who could not give the exact dates. Defilement or attempted defilement is not capable of being committed in the same transction unless the victim is the same person. Where more than one victim (s) is involved, they are distinct offences committed in different criminal transactions. The decision is binding on this court. This was also held in the persuasive decision in *Christoper Kimani Njagi-v. Republic*. See also *Sawedi Mukasa s/o Atigwaisha –v- Republic* (1946) 13 E.A. CA 97 court held that it is still good practice to pass consecutive sentence. The appellant was sentence to serve ten years imprisonment on each count. The offences were serious and for some victims there was prove of defilement. In my view the sentence was not excessive. Based on the above authorities, the learned trial magistrate was right in ordering the sentences to run consecutively. The ground is without merits.

34. The appellant has urged the court to consider the time spent in custody as the same was not considered by the learned trial magistrate. He relies on Section 333(2) of the *Criminal Procedure Code* which provides:-

> (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."

35. He has also relied on the case of *Ahamad Abolhfathi Mohammed & Another –v- Republic* Court of Appeal, (2018) eKLR. The appelalnt submits that he was arrested on 10/10/2020 and was sentenced on 24/4/2022. The appellant submits that he was in remand throughout the entire trial. The record of the trial court shows that although the appellant was granted bail, he remained in custody throughout the entire trial. The time spent in custody was not considered. This ground has merits.

Conclusion:

36. For the reaons given in this Judgment, I find that the appeal lacks merits.

37. I order that:-

> 1. The appeal is dismissed.

2. The sentence to run from 10/10/2020 the date the appellant was placed in custody to await trial in compliance with Section 333(2) of the *Criminal Procedure Code* (supra).

DATED, SIGNED AND DELIVERED AT MERU THIS 30TH DAY OF MAY 2024.

L.W. GITARI

JUDGE