Erosa v Republic (Criminal Appeal E012 of 2023)
[2024] KEHC 7808 (KLR) (25 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7808 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CRIMINAL APPEAL E012 OF 2023

JN KAMAU, J

JUNE 25, 2024

BETWEEN

PETER EROSA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

((Being an Appeal from the Judgment of Hon S. K. Manyura (RM) delivered at Hamisi in Senior Principal Magistrate's Court in Sexual Offence Case No E026 of 2022 on 26th June 2023)

JUDGMENT

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No 3 of 2006. He was also charged with an alternative charge of the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*.

2. He was convicted by the Learned Trial Magistrate, Hon S. K. Manyura (RM), on the charge of defilement and sentenced to twenty (20) years imprisonment.

3. Being dissatisfied with the said Judgement, on 9th June 2023, he lodged the Appeal herein. His Petition of Appeal was dated 29th May 2023. He set out six (6) grounds of appeal. In his Written Submissions that were dated 6th October 2023 and filed on 10th January 2024, he incorporated four (4) Supplementary Grounds of Appeal.

4. The Respondent's Written Submissions were dated and filed on 7th March 2024. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.

Legal Analysis

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

6. This was aptly stated in the case of Selle & Another vs Associated Motor Boat Co Ltd & Others [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify and thus make due allowance in that respect.

7. Having looked at the Appellant's Grounds of Appeal and Supplementary Grounds of Appeal it appeared to this court that the issues that had been placed before it for determination were as follows: -

    a. Whether or not the Appellant's right to fair trial was infringed;

    b. Whether or not the Trial Court erred in failing to undertake a voire dire examination on the complainant;

    c. Whether or not the Prosecution proved its case beyond reasonable doubt; and

    d. Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant herein by the Trial Court was lawful and/or warranted.

8. The court dealt with the said issues under the following distinct and separate heads.

I. Right to Fair Trial

9. This issue was dealt with under the different sub-heads.

A. Supply of Prosecution Evidence

10. Grounds of Appeal Nos (2) and (3) of the Petition of Appeal were dealt with under this head.

11. Both the Appellant and the respondent did not submit on this issue. However, the Appellant raised it in his petition of grounds of Appeal. The court therefore deemed it prudent to address the issue as he had not abandoned the same.

12. The Appellant asserted that the Trial Court did not comply with the provisions of Article 50 (2)(c) and 50(2)(j) of *the Constitution* of Kenya, 2010.

13. He pointed out that he was not supplied with a copy of the Birth certificate and the Clinical Officer's Medical Report for him to have reasonable access to the Prosecution's evidence.

14. Article 50(2)(c) of *the Constitution* of Kenya, 2010 provides that: -

> " Every accused person has the right to have adequate time and facilities to prepare a defence"

15. Article 50(2)(j) of *the Constitution* of Kenya further provides that: -

> " Every accused person has to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence."

16. A perusal of the proceedings of the lower court showed that on 9th September 2022, the Appellant informed the Trial Court that the Prosecution had supplied him with witness statements. He averred that he was ready to proceed with the hearing of the case.

17. If the Appellant had not been furnished with any document that he needed or if he needed time to prepare for his defence, he ought to have informed the Trial Court before the trial commenced. He did not do so.

18. As he did not deny this fact, this court was satisfied that he was supplied with the statements and documentary evidence that the Prosecution intended to rely on during trial and he had been given adequate time to prepare for the trial.

19. In the premises foregoing, the Grounds of Appeal No (2) and (3) of the Petition of Appeal were not merited and the same be and are hereby dismissed.

B. Voire Dire Examination

20. Supplementary Ground of Appeal No (2) was dealt with under this head.

21. The Appellant submitted that a voire dire examination was not conducted to ascertain the intelligence of the Complainant (hereinafter referred to as "PW 1").

22. He placed reliance on the case of Maripett Loonkomok vs Republic [2016] eKLR where it was held that voire dire examination on children of tender years had to be conducted and that failure to do so did not per se vitiate the entire prosecution but the evidence that was taken without determining the intelligence of a child of tender years or his or her understanding of the nature of the oath could not be used to convict an accused person.

23. On its part, the Respondent submitted that the role of voire dire examination was to establish whether a child was possessed of sufficient intelligence to understand the nature of an oath and that the same was crucial to children of tender years. It argued that PW 1 was aged thirteen (13) years at the time the offence was committed and was therefore not a child of tender years.

24. It placed reliance on the case of Johnson Muiruri vs Republic (1983) KLR where it was held that where in any proceeding before any court a child of tender years was called as a witness, the court was required to form an opinion on a voire dire examination as to whether the child understood the nature of an oath in which case his or her sworn evidence would be received.

25. It further cited Section 2 of the Children's Act, 2022 which defined a child of tender years to be one under the age of ten (10) years.

26. It asserted that the Trial Court did not carry out voire dire examination on PW 1 based on her age and that the Appellant was given an opportunity to cross-examine her and hence, no prejudice was occasioned to him.

27. It was evident that on 9th September 2022, the Trial Court did not conduct a voire dire examination before PW 1 gave her sworn statement.

28. Section 19 of the *Oaths and Statutory Declarations Act* Cap 15 (Laws of Kenya) stipulates as follows: -

> " Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is

possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section."

29. In addressing what age would be appropriate for a trial court to conduct a voir dire examination, this court had due regard to the case of Maripett Loonkomok vs Republic (Supra) where the Court of Appeal found and held that children under the age of fourteen (14) ought to be taken through a voire dire examination. It rendered itself as follows: -

> " ...the definition in the *Children Act* is not of general application; that it was only intended for the protection of children from criminal responsibility and not as a test of competency to testify. It follows therefore that the time-honoured 14 years remains the correct threshold for voir dire examination. It follows from a long line of decisions that voir dire examination on children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child's intelligence or understanding of the nature of the oath cannot be used to convict an accused person. But it is equally true, as this Court recently found that;
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> "In appropriate case where voir dire is not conducted, but there is sufficient independent evidence to support the charge... the court may still be able to uphold the conviction."

30. Notably, the age at which a voir dire examination ought to be conducted depends on the circumstances of a particular case and was not cast on stone. Indeed, a court was obligated to enquire into the mental incapacity of a child irrespective of his or her age with a view to conducting a voire dire examination to determine if he or she should adduce sworn or unsworn evidence. Indeed, a child could be aged seventeen (17) years but have the mental capacity of a two (2) year old child due to many health complications.

31. The ascertainment of whether such a witness understood the meaning of taking an oath could not therefore be taken lightly as an accused person could be convicted on the basis of sworn evidence of such a witness.

32. According to the Certificate of Child Dedication that was tendered as evidence during trial, PW 1 shown to have been born on 3rd July 2008. The offence herein was said to have been committed on 12th May 2022. This put her age at thirteen (13) years at the material time of the incident which was just two (2) months shy of age fourteen (14) years.

33. Bearing in mind the holding in the case of Maripett Loonkomok vs Republic (Supra), this court found and held that the Trial Court could not therefore have been faulted for having not conducted a voir dire examination because at the time PW1 testified before the Trial Court on 9th September 2022, she had attained the age of fourteen (14) years. Indeed, he cross-examined her thus testing the veracity or otherwise of her testimony. It was this court's view that the failure to conduct a voire dire examination on PW 1 by the Trial Court did not prejudice the Appellant herein in any way and if it did, he did not demonstrate the same to this court.

34. In the premises foregoing, Supplementary Ground of Appeal No (2) was therefore not merited and the same be and is hereby dismissed.

II. Proof of Prosecution's Case

35. Grounds of Appeal Nos (4), (5) and (6) of the Petition of Appeal and Supplementary Grounds of Appeal Nos (1) and (3) were dealt with under this head as they were all related.

36. In determining whether or not the Prosecution had proved its case to the required standard, which in criminal cases is proof beyond reasonable doubt, this court considered the ingredients of the offence of defilement.

37. It is now settled that the ingredients of the offence of defilement are proof of complainant's age, proof of penetration and identification of the perpetrator as was held in the case of George Opondo Olunga vs Republic [2016] eKLR.

38. This court dealt with the aforesaid Grounds of Appeal and Supplementary Grounds of Appeal under the following distinct and separate heads.

A. Age

39. Neither the Appellant nor the Respondent challenged and/or submitted on the age of PW 1.

40. No 85554 PC Daniel Otieno (hereinafter referred to as "PW 6") produced the aforesaid Certificate of Child Dedication.

41. In the case of Kaingu Elias Kasomo vs Republic Criminal Case No 504 of 2010 (unreported), the Court of Appeal stated that in a charge of defilement, the age of a minor could be proved by medical evidence, baptism cards, school leaving certificates, by the victim's parents and/or guardians, observation or common sense as was held in the case of Musyoki Mwakavi vs Republic [2014] eKLR.

42. In this case, PW 1's age was proven by the Certificate of Child Dedication. Consequently, this court was satisfied that the Prosecution had proved that PW 1 was a child at the material time.

B. Identification

43. The Appellant and the Respondent did not also submit on this issue.

44. PW 1 testified that on the material day, at around 4.00 pm, she was from [Particulars Withheld] having been sent to buy oil by her grandmother and that on her way back the Appellant waylaid her and took her under the trees and defiled her. She stated that she knew him as his father's friend and that he used to sell chang'aa by the road. She positively identified him as her perpetrator by pointing at him at the dock.

45. CM (hereinafter referred to as "PW 2") corroborated her evidence. He testified that when he went to PW 1's school, her teacher told him that PW 1 had been absent and when she was found, she said that she had been with the Appellant and had had sexual intercourse.

46. There would have been no possibility of a mistaken identity because the incident occurred during the day when it was still daylight and favourable for a positive identification of the perpetrator of the offence herein.

47. Having said so, this court noted contradictions in PW 1's evidence and that of PW 2. Whereas PW 1 testified that the Appellant was PW 2's friend and used to sell chang'aa, PW 2 only stated that he used to see the Appellant selling changáa by the roadside. He did not allude to them as having being friends.

48. The inconsistencies may appear minor but the same went to the root of the veracity of PW 1's and PW 2's evidence.

49. This court therefore took the Prosecution's assertions that it proved the ingredient of the Appellant's identification as the perpetrator of the offence with a pinch of salt.

C. Penetration

50. The Appellant submitted that the Prosecution's evidence did not describe the act of penetration. He added that although PW 1 indicated that it was her first time to have sexual intercourse, the evidence tendered in court did not prove that. He further argued that the Prosecution witnesses' evidence was full of contradictions and inconsistencies. He asserted that whereas PW 1 testified that she was defiled on 12th May 2022, PW 4 stated that PW 1 told him that she was defiled on 15th May 2022 and that PW 2, PW 3 and PW 5 stated that PW 1 had said that she was defiled on 17th May 2022.

51. On its part, the Respondent reproduced the evidence of PW 1 and pointed out that the medical evidence tendered by the Clinical Officer, Brolyn Omondi Ochieng (hereinafter referred to as "PW 4") corroborated PW 1's evidence. It was its case that the ingredient of penetration was proved.

52. It further added that if there were any contradictions on the Prosecution's case as submitted by the Appellant then the same did not go into the core of the case as was held in the case of S.O.O vs Republic [2018] eKLR.

53. According to PW 1, the Appellant removed her underwear and had sex with her. She stated that he gave her Kshs 100# whereafter she went home. She further testified that she told her teacher that the Appellant defiled her.

54. On his part, PW 4 told the Trial Court that PW 1 had whitish discharge in the labia majora, there were no vaginal tears but the hymen was missing. Notably PW4 concluded that PW1 could have been defiled (emphasis court). He concluded that PW 1 could have been defiled. He produced Treatment Notes, P3 form and Post Care Rape (PRC) form as exhibits in this matter.

55. Whereas PW 1 stated that she told the teacher that it was the Appellant who defiled her on the material date, a fact that PW 2 mentioned, Abigael Bulimo Inzai (hereinafter referred to as "PW 5"), PW 1's teacher said that when she interrogated PW 1 on why she had missed school, PW 1 told her that she was at home while PW 2 insisted that she was not at home and that when she realized that they were not getting anywhere, the matter was referred to the police.

56. On his part, PW 6 told the Trial Court that PW 1 was found at the Appellant's house. PW 1 stated that she went home after the incident. PW 2 said that he met her along the way and asked her why she was not at school. On his part, PW 3 said that he met PW 1 and PW 2 at school. These were too many contradictions that this court could not wish away.

57. It appeared that PW 1 had already showered and changed her clothes by the time she was taken for medical examination. Presence of a discharge several days after the alleged incident and absence of hymen was not evidence of defilement as the two (2) observations could be as a result of many reasons.

58. There had to be proof of defilement. Possibility of there being defilement was not proof of defilement especially where there was risk of a person being deprived of his liberty for a long time, a right that was guaranteed in Article 29(a) of *the Constitution* of Kenya was not acceptable.

59. This court noted that the Prosecution's evidence regarding PW 1's penetration had gaps and contradictions. The glaring inconsistencies, gaps, contradictions created doubt in the mind of this court on what really transpired on the material date.

60. It was for that reason that this court found and held that although the Appellant adduced unsworn evidence, the inference of guilt on his part could not be made based on the evidence that the Prosecution witnesses adduced.

61. This court was therefore of the considered view that the Trial Court erred in having convicted the Appellant on evidence that was on a balance of probability and not beyond reasonable doubt, the standard that was prescribed by law for criminal cases.

62. In the premises foregoing, Grounds of Appeal Nos (4), (5) and (6) of the Petition of Appeal and Supplementary Grounds of Appeal Nos (1) and (3) were merited and the same be and are hereby upheld.

III. Sentencing

63. Having found and held that the Prosecution did not prove its case beyond reasonable doubt, the submissions on sentence were rendered moot. However, bearing in mind that this court could be found to have been wrong as regards the proof of the Prosecution's case, this court found it prudent to consider the said submissions.

64. The Appellant submitted that the mandatory sentence under Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* was unconstitutional. He urged the court to consider the time he had spent in custody during trial being from the date of his arrest on 18th May 2020 to 26th May 2023 when he was sentenced in granting him the least prescribed punishment.

65. On its part, the Respondent submitted that the Appellant's sentence was not unconstitutional but lawful. It urged the court to uphold his sentence.

66. The Appellant herein was sentenced under Section 8(3) of the *Sexual Offences Act*. The same provides as follows: -

> " A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years"

67. If the Appellant would have been guilty of the offence complained of, this court could not have faulted the Trial Court for having sentenced him to twenty (20) years imprisonment as that was lawful and was provided by the Law.

Disposition

68. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal that was lodged on 9th June 2023 and the Appellant's Supplementary Grounds of Appeal dated 6th October 2023 were merited. His conviction and sentence be and is hereby set aside and/or vacated as the same was unsafe.

69. It is hereby directed that the Appellant be and is hereby released from custody forthwith unless he be otherwise lawfully held.

70. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 25TH DAY OF JUNE 2024

J. KAMAU

JUDGE