Ismael v Republic (Criminal Appeal E001 of 2023)
[2024] KEHC 8166 (KLR) (25 June 2024) (Judgment)

Neutral citation: [2024] KEHC 8166 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL E001 OF 2023

JN ONYIEGO, J

JUNE 25, 2024

BETWEEN

DAUD MAALIM ISMAEL ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence of Hon. P.W. Wasike (P.M.) in SPM's Court at Mandera Criminal Case No. MCSO E008 of 2022 delivered on 25.10.2023)

JUDGMENT

1. This appeal is against the conviction and sentence to 30 years' imprisonment for defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No. 3 of 2006. It was alleged that on 06.03.2022 [particulars withheld] in Mandera East sub County within Mandera County, the appellant intentionally caused his genital organ to penetrate the genital organ of NHA, a girl child aged 7 years old.

2. In the alternative charge, the appellant was charged with the offence of committing an indecent act contrary to Section11(1) of the *Sexual Offences Act* No. 3 of 2006. It was alleged that on 06.03.2022 [particulars withheld] in Mandera East sub County within Mandera County he intentionally touched the genital organ of NHA, a child aged 7 years old.

3. The prosecution called 4 witnesses to prove its case while the defence tendered a sworn evidence without calling a witness.

4. The appellant in his petition of appeal dated 26.10.2023 set out the following grounds of appeal:

    i. That the trial magistrate erred in fact and law by considering extraneous facts in convicting him.

    ii. That the trial magistrate erred in fact and law by convicting him yet there existed a grudge between the complainant's mother and him.

iii. That the trial magistrate erred in fact and law by convicting him yet the case was not proved to the required standards.

iv. The trial magistrate erred in fact and law by meting out a harsh sentence in the circumstances herein.

5. He prayed that this appeal be allowed; conviction be quashed and sentence be set aside or, the court evaluates the evidence and make its own finding in to conviction and sentence. The appeal was canvassed by way of written submissions.

6. The appellant in his submissions dated 26.10.2023 faulted the trial court for having considered extraneous matters in convicting him. He submitted that he was framed up as he did not commit the offence and further, there existed a grudge between him and the mother of the complainant as she owed him Kes. 9,000/-. It was his contention that the prosecution did not prove its case to the required standard hence his conviction was not safe.

7. On sentence, the appellant was aggrieved in that he felt that the sentence meted out was not only harsh but also not commensurate to the circumstances of the case. In the end, he urged this court to quash his conviction and set aside the sentence.

8. Mr. Stephen Kasyoka, the prosecution counsel via submissions dated 04.04.2024 urged the court to hold that the complainant's age was 7yrs as confirmed by the birth certificate which was not in dispute. In buttressing the fact that a complainant's age can be determined by various ways, reliance was placed on the case of Kaingu alias Kasomo vs Republic C.A. 504 of 2010 where the court approved modes of proof of age through medical evidence, birth certificate, clinical card as well as testimonies of parent/s or guardian/s.

9. The respondent on the other hand submitted that penetration was proved beyond reasonable doubt. That the same was supported by the evidence of PW1 and PW2 and further corroborated by the medical evidence produced in court by PW3. Learned counsel contended that the identity of the perpetrator being the appellant was proved beyond reasonable doubt as the appellant was someone well known to the complainant. In conclusion, the respondent submitted that the conviction was safe and therefore, this court should uphold the same as well as sentence.

10. As the first appellate court, I am duty bound to re-evaluate and re-consider the evidence afresh and arrive at my own independent conclusions. I am however reminded to bear in mind that I neither saw nor heard the witnesses testify and give due regard to that fact. [See *Njoroge v Republic* (1987) KLR,

11. Briefly, PW1, NH a minor aged 7 years testified that on 06.03.2024, the appellant defiled her. It was her case that the appellant was a person well known to her as he used to supply them with water. She recalled seeing some white fluid from the appellant's penis directed to her vagina. She stated that in as much as she did not bleed, she felt pain as the appellant had routinely defiled her previously. That upon her mum finding her on the bed naked, she narrated to her what had befallen her thus prompting her mum to call the police.

12. PW2, ASM, PW1's mother recalled that on the material day, she went to the market thus leaving the complainant with her sibling at home. That before reaching home, she called the appellant to confirm whether he had delivered water to her house as he was in the habit of doing so before 10.00 am .

13. She stated that upon reaching home, she found PW1 unable to walk and upon asking her, she told her that the appellant had done her a bad act. She stated that she called the appellant pretending that she wanted to pay him and upon reaching her house, the complainant pointed at him as being responsible for sexually assaulting her. That having reported, the police effected arrest upon the appellant.

14. PW3, No. 11xxxx PC Duncan Wambui stated that he was the Investigating Officer in the case. That while at the station, PW2 in company of PW1 and two border post police officers approached him and told him that, *'afande mtoto huyu wangu ameribiwa na huyu'*. It was his evidence that he recorded the report in the OB, recorded the statement of PW2 and thereafter issued the complainant with a P3 Form. He stated that together with PW2 and PC Hafsa Maalim, they escorted the complainant to Mandera County Referral Hospital. He further narrated how the complainant informed them that the appellant defiled her in PW2's absence. He testified that the complainant identified the appellant herein as having assaulted her sexually. That upon completing the investigation, he preferred the charge herein against the appellant.

15. PW4, Dr. Abdishukri Abdikadir testified that upon examination, the complainant was found to have been penetrated as her hymen was not intact. That upon conducting lab tests, she was found to be HIV negative and no sperms were noted in as much as the urine had a bacterial infection. He produced the P3 Form and the PRC as Pex 1 and 2 respectively.

16. The prosecution upon making an oral application to recall PW3, the same was granted wherein PW3 produced the complainant's birth certificate as Pex 3.

17. I have considered the grounds of appeal, evidence adduced in the lower court and the respective parties' submissions. I find the following broad issues for determination.

    i. Whether the prosecution proved their case beyond reasonable doubt in regards to age, penetration and identification; and

    ii. Whether the sentence was manifestly harsh and excessive.

18. The appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act* which provides that a person who commits an act which causes penetration with a child is guilty of an offence termed defilement and if convicted, shall be sentenced to imprisonment for life.

19. The specific elements of the offence of defilement arising from Section 8 (1) of the *Sexual Offences Act* which the prosecution must prove beyond reasonable doubt are the age of the complainant; proof of penetration in accordance with section 2(1) of the *Sexual Offences Act* and positive identification of the assailant. See *Charles Wamukoya Karani vs Republic*, Criminal Appeal No. 72 of 2013). At this juncture, the court will examine what the evidence holds.

20. On age, PW1 testified that she was seven years old and additionally, PW3, produced the complainant's birth certificate noting that she was born on 13.05.2014. Of importance to note is the fact that the offence herein was alleged to have been perpetrated on 06.03.2022 thus translating to the fact that by the time the alleged offence herein was perpetrated, the complainant was aged 7 years, three months and seven days hence a child.

21. On penetration, Section 2(1) of the *Sexual Offences Act* defines penetration as: the partial or complete insertion of the genital organs of a person into the genital organ of another person." [also see the case of *Mark Oiruri Mose v R* [2013] eKLR].

22. The complainant testified on how the appellant defiled and had previously defiled her about 10 times. PW4 in his testimony stated that the complainant was found to have been penetrated as her hymen was not intact. From the said pieces of evidence, it is my finding that penetration was proved by the prosecution.

23. On identification, it was stated that the appellant was a person well known to not only PW1 but also PW2. This was noted when the victim was questioned by her mother, in which she stated that the appellant was responsible for defiling her and that it was not the first time the same was happening. In the same breadth, it was also stated that the appellant was in the habit of supplying PW2 with water and on the fateful day, he had delivered water to PW2 when he took advantage of the complainant. It therefore follows that the appellant was a person well known to the complainant.

24. There is no doubt that the only direct evidence relied on by the trial court to convict was the evidence of PW 1 a minor. Ordinarily, her evidence ought to have been corroborated. However, in sexual offences, a court can convict under Section 124 of the *Evidence Act* based on the evidence of a single witness without requiring corroboration as long as the court satisfies itself as to the truthfulness of such witness. In this case, the trial court was satisfied that the complainant was honest and truthful. Corroboration was therefore not mandatory.

25. I do not have any reason to doubt the testimony of PW1. She had no reason to frame up the accused person. I did not find any contradictory evidence to infer a frame up. From the flow of PW1's testimony, I do not see any reason to doubt her evidence. The claim that there was a grudge between the accused and PW1's mother is far-fetched. This allegation did not play out during cross examination of PW2. This an afterthought intended to run away from liability.

26. In the foregoing, it is my finding that the prosecution proved beyond reasonable doubt that the appellant penetrated PW1, a child aged 7 years. Therefore, the conviction was proper.

27. On the question of sentence, the *Sexual Offences Act* is emphatic. Sentence for defilement is prescribed based on the age of the victim of the sexual assault. Although the Act does not expressly state the manner the penalty is prescribed, but the implication drawn from the same is that the younger the victim, the more severe the sentence. Therefore, it appears to me that age of the victim of sexual offence is an aggravating factor which the court should always consider amongst others in sentencing.

28. In the instant case, the complainant was of the age of 7 years at the time of the offence. Thus, the appropriate penalty clause is Section 8(2) of the *Act* which provides that a person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

29. The above notwithstanding, it is trite that sentencing is an exercise of discretion by the trial court and the same should never be interfered with unless the trial court acted upon wrong principles or overlooked some material factors or took into account irrelevant factors. [See *Wilson Waitegei vs Republic* [2021] eKLR].

30. The Court of Appeal in the case of *Julius Kitsao Manyeso v Republic* Criminal Appeal No. 12 of 2021, replaced a life imprisonment with a 40-year imprisonment where an appellant had been charged with the offence of defilement of a child aged 41/2 years.

31. In the same breadth, the Court of Appeal in the case of *Joshua Gichuki Mwangi v Republic*, Criminal Appeal No. 84 at Nyeri, where the appellant was charged with the offence of defilement contrary to section 8(1) as read together with section 3 of the *SOA*, substituted the 20-year sentence with a 15-year sentence to run from the time the trial court imposed its sentence.

32. In the instant case, the appellant was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act* 2006 which provides that upon conviction the offender shall be sentenced to life imprisonment. According to the pre-sentence report, the appellant is 30 years old. He is staying with the grand-mother who is blind. Considering his youthful age,

mitigation and his family responsibility, he needs to be given an opportunity to reform as well as reintegrate with the community. In the circumstances, I am inclined to substitute the sentence of 30 years with 20years.

33. In the given circumstances therefore, I hereby dismiss the appeal and instead affirm the conviction and substitute the sentence of 30 years with 20 years.

ROA 14 days

DATED, SIGNED AND DELIVERED THIS 25TH DAY OF JUNE 2024

J. N. ONYIEGO

JUDGE