Kirui v Republic (Criminal Appeal E022 of 2022)
[2024] KEHC 9589 (KLR) (31 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9589 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CRIMINAL APPEAL E022 OF 2022

RL KORIR, J

JULY 31, 2024

BETWEEN

AMOS KIRUI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Original Conviction and sentence in Criminal Case No. SO No. 17 of 2020 at the Principal Magistrate's Court in Bomet by Hon. L. Kiniale on 25th May 2022)

JUDGMENT

1. The Appellant 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. The particulars of the charge were that on the 14th day of March 2020, at about 2100hrs at Bomet County intentionally caused his penis to penetrate the vagina of DC, a child aged 13 years.

2. In the alternative, the Appellant was charged with the offence of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*, No. 3 of 2006. The particulars of the alternative charge were that on the 14th day of March 2020, at about 2100hrs at Bomet county intentionally touched the vagina of DC a child aged 13 years old with his penis.

3. The Appellant took plea before the trial court on 8th April 2020 and denied the main and alternative counts. The matter proceeded to a full trial where the Prosecution called 7 witnesses and adduced 3 exhibits into evidence. At the close of the trial, the Appellant was convicted of the main count and sentenced to serve a period of 10 years imprisonment.

4. Aggrieved by the decision of the trial court, the Appellant brought the present Appeal through a Petition of Appeal filed on 5th June 2022 where he raised 7 grounds of appeal as follows: -

    1. That he pleaded not guilty at the trial and still maintained the same position.

2. That the learned trial magistrate erred both in law and in fact by relying on evidence which was not corroborated.

3. That the learned trial magistrate erred both in law and in fact by relying on evidence adduced by the Prosecution which was inconsistent and full of irregularities.

4. That the learned trial magistrate erred both in law and in fact by failing to analyze that the entire evidence was manufactured, manipulated and framed to meet the predetermined goal of fixing him.

5. That the learned trial magistrate erred both in law and in fact by failing to analyze that the entire evidence adduced by the Prosecution was wrong because he was not medically examined, and DNA was not conducted as stipulated by section 36 (1) of the *Sexual Offences Act* No. 3 of 2006.

6. That the learned trial magistrate erred both in law and in fact by rejecting his plausible defence without any further explanation of it.

5. That he prayed to be present during the hearing of the appeal.

6. The Appeal was admitted by this Court on 28th September 2022 and directions were given on 17th October 2022 for it to be canvassed by way of written submissions.

The Appellant's Submissions

7. The Appellant's submissions were filed on 16th November 2022. He submitted that the victim PW1 contradicted herself when she said that she knew the appellant as her neighbour and then stated that she did not know him prior to the date of the offence during cross-examination. He submitted that it was also not clear what the two minors were doing at Kapkoros Factory up to 9.00 p.m. when he met them. He also pointed out that the victim contradicted herself when asked whether she slept at her home on 13th April 2022 and when she testified on who rode the motorbike they boarded on the material night.

8. He also submitted that no age assessment was conducted on him as he claimed to be a minor with no national identity card. He further submitted that it was not clear why Aaron the owner of the motorcycle and the house where the victim was allegedly defiled was still at large yet he could have been availed to record a statement.

9. The Appellant submitted that Geoffrey the Nyumba Kumi member who claimed to have seen him dropping the complainant and PW2 at Kapkoros Tea Factory on 15th March 2020 neither recorded any statement nor was called to testify in court yet he was a key witness.

10. On 22nd November 2022, the Appellant filed further submissions through his Counsel Caleb Koech who submitted on one main issue being whether the charge of defilement was proved beyond reasonable doubt to warrant the conviction of the Appellant. He cited the case of Miller vs. Minister of Pensions (1942) AC in explaining the standard of proof and further cited the case of George Opondo Olunga vs. R (2016) eKLR in outlining the ingredients of the offence of defilement.

11. It was his submission that the Prosecution did not adduce any evidence of penetration save for the victim's testimony and that the medical examination report and the P3 Form did not indicate whether the victim had been penetrated. Further, that the PRC Form and the P3 Form provided contradicting evidence in that, the PRC Form under Part A – General Examination of the Survivor indicated that the

hymen was intact and the vagina had some foreign materials but no injuries were noted on the genitalia while the P3 Form indicated that the hymen was broken with injuries on the labia minora and majora.

12. Counsel also submitted that there were contradictions on when the victim was allegedly defiled since the Charge sheet indicated that she was defiled at 2100hrs while the victim testified that she was defiled at around midnight. Another contradiction pointed out was the date of examination which according to the Investigating Officer was 15th March 2020 while the P3 Form and the Clinical Officer's testimony indicated that the victim was examined on 16th March 2020, 4 hours after the incident. The third contradiction submitted by Counsel was that the Investigating Officer testified that she took the minor for medical examination at Longisa District Hospital for examination where the P3 Form was filled on 15/3/2020 while the PRC and P3 Forms bore the stamp of Kapkoros Sub-County Hospital where the Clinical Officer was based. It was Counsel's submission that these contradictions made it difficult to prove the ingredient of penetration to the required standard.

13. Counsel also submitted that the Court ought not to convict on the sole testimony of the victim because she was not a credible witness as her testimony was full of inconsistencies. Further, he submitted that there were glaring inconsistencies in the medical records.

14. Counsel further submitted on the alternative charge even though a finding was not made by the trial court and stated that the victim's testimony did not reveal whether the Appellant touched her private parts, breasts or buttocks because she only testified that the Appellant inserted his penis into her vagina. That the term insert was not synonymous with touch citing the decision in Paul Otieno Okello vs. R Criminal Appeal No. 3 of 2019 (2019) eKLR by Mrima J and Abid Ismail Moulid vs. R (2019) eKLR.

15. It is trite that the duty of the first appellate court is to re-examine and reanalyze afresh the evidence from a trial court and arrive at its own findings and conclusions. This principle has been stated severally in many authorities. (See Okeno vs. Republic [1972] EA, 32; Ramkrishna Pandya vs. Republic [1957] EA 336; Shantilal M. Ruwala vs. Republic [1975] EA, 57; Kiilu & Another vs. Republic [2005]1 KLR 174; Peters V Sunday Post [1978] E.A. 424 and Mark Oiruri Mose vs. R [2013] eKLR.)

16. Having read the trial Record, the grounds of appeal on the Petition of Appeal and the rival submissions of the parties, I discern the following issues for my determination: -

    i. Whether the Prosecution proved the offence of defilement beyond reasonable doubt.

    ii. Whether the Defence placed doubt on the Prosecution's case.

    iii. Whether the sentence was excessive.

I. Whether the Prosecution proved the offence of defilement beyond reasonable Doubt.

17. The offence of defilement is premised on section 8 (1) of the *Sexual Offences Act* No. 3 of 2006 and subsection 3 which is relevant to this case. The said sections provide as follows: -

    8. Defilement

        (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

        (2) .....

        (3) 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.

18. In the case of Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013, the court outlined the ingredients of the offence of defilement thus: -

> " The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."

(see also George Opondo Olunga vs. Republic [2016] eKLR.)

Proof of the age of the victim

19. The importance of proving the age of the victim in a sexual offence case was stated in the case of Kaingu Kasomo vs. Republic Criminal Appeal No. 504 of 2010 where the Court of Appeal held thus: -

> " Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim".

20. The age of a victim can be proven in several ways as outlined by the Court of Appeal in the case of Edwin Nyambogo Onsongo vs. Republic (2016) eKLR: -

> " ... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, 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." ...." we think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable."

21. In this case, the age of the victim was not in contention. She testified that she was 13 years old and in class 7 at Kiplokyi Primary School. PW4 the victim's mother also testified that she was 13 years old and produced her Birth Certificate (P.Exh1). I have re-examined and found that the victim was born on 27th March 2006. The offence was allegedly committed on 14th March 2020. She was therefore 13 years old on the day of the offence. I find that this first ingredient was adequately established.

Proof of Penetration

22. The second ingredient is penetration. It is defined under section 2 of the Act as follows:-

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

23. It follows then that penetration need not be complete. This was determined in the case of Mark Oiruri Mose vs. Republic [2013] eKLR where the Court held thus:

> " In any event the offence is against penetration of a minor and penetration does not necessarily end in the release of sperms into the victim. Many times the attacker does not fully complete sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ."

(See also George Owiti Raya vs. Republic [2013] eKLR)

24. The Prosecution adduced the evidence of the victim (PW1) and the clinical officer (PW3) to prove the ingredient of penetration. They also adduced 2 exhibits: the P3 Form (P.Exh1) and PRC Form (P.Exh2). The victim testified that the Appellant penetrated her on the said date. She testified as follows:-

> "We stayed in the house and sat on the sofa until midnight. The house had 2 rooms. Amos came and took me to the room where he was sleeping. He removed my trouser. He removed his and then inserted his penis into my private parts. After he was done, he took me back to the sofa where Chebet was sleeping..."

25. Her testimony was corroborated by that of PW2 her friend who testified that the house where the Appellant took them had two rooms, and that the Appellant went to sleep in one room while they slept on the sofa. She testified that she heard the Appellant call the victim at around midnight, but she refused to go so he came and took the victim to the room. PW2 also testified that she heard the Appellant tell the victim to remove her clothes and then the victim later returned to the sofa at 3.00 a.m. On cross-examination, she testified that she heard the two have sex.

26. The medical evidence by Dr. Philip Mutai (PW3) revealed that the victim had hyperaemia (excess blood vessels/excess blood flow at a particular point), bruises on both labia and thick blood-stained discharge from her vagina with a broken hymen. He produced the PRC and P3 Forms which I have re-examined.

27. According to the PRC Form (P.Exh2), the victim's pant was stained, she had sperm cells on her genitalia but her hymen was intact and there were no physical injuries on her body.

28. The P3 Form (P.Exh1) on the other hand indicated that PW1 had dry blood stains on both the pant and biker, hyperaemia, bruises on the labia and a broken hymen with thick bloody discharge.

29. The Appellant through Counsel submitted that the evidence of penetration was contradictory. The contradiction or inconsistency that the Appellant's counsel referred to was the different findings on the status of PW1's hymen.

30. It is incumbent on this Court to re-analyze these inconsistencies and determine whether they go to the root of the Prosecution's case. Inconsistencies and contradictions were explained by the Court of Appeal of Nigeria in the case of David Ojeabuo vs. Federal Republic of Nigeria [2014] LPELR-22555 (CA) as follows:-

> "Now, contradiction means lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains."

31. Similarly, the Court of Appeal in *Joseph Maina Mwangi vs. Republic CA No. 73 of 1992* held that:-

> "In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the working of Section 382 of the Criminal Procedure Code, viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence."

32. The PRC form which was filled on 15th March 2020 indicated that PW1's hymen was intact while the P3 Form which was filled on 16th March 2020 indicated that her hymen was broken. As earlier noted in this Judgement, penetration need not be complete or deep to prove penetration. Partial penetration is also proof of penetration and that means that there could be penetration and the hymen of a victim would still be intact. The Court of Appeal in John Mutua Munyoki vs Republic (2017)eKLR observed that:-

> " .....There must be penetration of the genital organ and such penetration need not be complete or absolute. Partial penetration will suffice."

33. It is my finding that the different findings contained in the two forms regarding the status of PW1's hymen were mere discrepancies as the findings, as they were, were sufficient to prove penetration. The only problem this court has with the two forms (P.Exh1 and P.Exh 2) is that they were filled and signed by one person, Philip Mutai (PW3). It may have been an error to write 'intact' or 'not intact' respectively and since PW3 cannot be recalled to clarify this hurts the credibility and his testimony as he could not examine PW1 and come up with two different conclusions or findings regarding her hymen. This considerably lowers the probative value of the medical evidence. As such I am disinclined to use the P3 and PRC forms as evidence with respect to whether or not the hymen was present or missing.

34. That said, the production and reliance of medical evidence in such cases is not mandatory as was held in George Kioji v. Republic, Cr. App. No. 270 Of 2012 (Nyeri), where the Court of Appeal stated:-

> " Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the *Evidence Act*, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."

35. In the premise, I am left to consider whether the sole testimony of the victim will be sufficient in arriving at a finding of conviction or acquittal. Section 124 of the *Evidence Act* states thus: -

> Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:
>
> Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

36. The above section means that an accused person can be convicted on the sole testimony of a victim in the absence of a medical report and that such evidence does not need further corroboration.

37. DC (PW1) stated that on the material day, she went with her friend MC (PW2) to a shop in Kapkoros Tea Factory to get a certificate and she found the Appellant there. That the Appellant's friend called Amos came with a boda and when the Appellant borrowed it, he carried DC and MC to a house which

had two rooms. DC further testified that later in the night, the Appellant came to where they (DC and MC) were sleeping and took her to his room.

38. It was DC's further testimony that while in the Appellant's room, the Appellant removed his trouser and inserted his male organ into her female organ and when he was done he took her back to the sofa where she was sleeping with MC (PW2). It is my finding that PW1's testimony to be cogent and believable.

39. To buttress my finding on PW1's truthfulness, MC (PW2) corroborated PW1's evidence by confirming that the Appellant took them (PW1 and PW2) to a house and when the Appellant called PW1 to his room, she heard him asking PW1 to take off her clothes. When she was cross examined, she confirmed that she had PW1 and the Appellant having sex.

40. It is my finding based on the testimony of PW1 that there was penetration.

Positive identification of the perpetrator

41. The third ingredient is the positive identification of the perpetrator. PW1 the victim and PW2 her friend both testified that it was the Appellant who took them from the shop at Kapkoros Tea Factory to a house where they spent the night with him. The Appellant never controverted this part of their testimonies throughout the trial. PW4 the victim's mother also testified that she went to inquire on the whereabouts of the victim on 14th March 2020 at Kapkoros and was informed that she was had been seen around the place with the Appellant and MC (PW2). She testified that she knew the Appellant well because he was their neighbour. I am therefore satisfied that the issue of identification was not in question in this appeal.

II. Whether the Defence placed doubt on the Prosecution's case.

42. I have considered the Appellant's defence where he stated that on the material day, he met Aron Kigen who carried him with a boda up to the factory. That Aron told him to carry PW1 up to her home but PW1 refused and insisted that Aron should carry her. It was his further defence that when she declined, he went to watch a football match and never saw them again. He stated that he left the factory at 9 pm and went home where he slept alone.

43. I have considered the defence and I have noted that it did not place any doubt on the Prosecution's case. The Prosecution were able to place the Appellant and PW1 in the same room and were able to prove all the ingredients of defilement beyond reasonable doubt. There is nothing on the Appellant's defence that shook or hurt the Prosecution's case.

III. Whether the Sentence was excessive

44. In Nelson Ambani Mbakaya vs Republic (2016) eKLR, the Court of Appeal stated that:-

> " Sentencing of an accused person after conviction involves the exercise of discretion by the trial court. That discretion must of course be exercised judiciously rather than capriciously, depending on the circumstances of each case. As what is challenged in this appeal is essentially the exercise of discretion by the trial court, this Court is normally slow to interfere with that exercise of discretion unless it is demonstrated that the trial court acted on the wrong principle; ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive....."

45. The penal section for a defilement case for a child of 13 years is provided by Section 8 (3) of the *Sexual Offences Act* which states that:-

> 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.

46. The aforementioned Section is couched in mandatory terms as it provided for a mandatory minimum sentence in the event of a conviction. Mandatory minimum sentences are not illegal and the same was clarified by the Supreme Court in the case of Francis Karioko Muruatetu and Another vs Republic, Petition no. 15 & 16 (consolidated) of 2015 it was held that:-

> " We therefore reiterate that, this Court's decision in Muruatetu did not invalidate mandatory sentences or minimum sentences in the Penal Code, the *Sexual Offences Act* or any other statute".

47. There has been juridical discourse on the issue of the mandatory minimum sentences and if the court had discretion to issue an appropriate sentence after considering an Accused's mitigation. I agree and am guided by the Court of Appeal in Daniel Kipkosgei Letting vs Republic (2021) eKLR, where it held that:-

> " The trial court sentenced the appellant to life imprisonment which was upheld by first appellate court. Both Courts expressed the view that, that was the only available sentence for the offence. However, the Supreme Court in Francis Karioko Muruatetu v Republic [2017] eKLR, have since held that the mandatory death sentence provided by section 204 of the penal code deprived Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Further that a mandatory sentence failed to conform to the tenets of fair trial that accrue to the accused persons pursuant to article 25 of *the Constitution*. This Court in Jared Koita Injiri v Republic [2019] eKLR guided by the sentiments of the Supreme Court aforesaid observed thus with regard to mandatory minimum sentences:
>
> " If the reasoning in the Supreme Court case was applied to this provision it too should be considered unconstitutional on the same basis—and set aside the sentence for life imprisonment imposed and substituted it therefore with a sentence of 30 years from the date of sentence by the trial court."
>
> With regard to the above, we observe that the purpose and objectives of sentencing as stated in the Judiciary Sentencing policy should be commensurate and proportionate to the crime committed and the manner in which it was committed. The sentencing should be one that meets the end of justice and ensures that the principles of proportionality, deterrence and rehabilitation are adhered to. In this regard we think that the complaint that the sentence imposed was harsh and excessive is valid though it was the only sentence available then. We are therefore inclined to interfere with it. We therefore set aside the sentence of life imprisonment imposed on the appellant. Having considered the mitigation proffered by the appellant on record the sentence that commends to us is 25 years imprisonment."

48. The trial court considered the age of the Appellant which was 21 years old and sentenced him to 10 years in prison, which was way below the mandatory sentence. Upon my consideration of the

circumstances of the offence and the age of the Appellant, I find no reason to warrant interfering with the sentence imposed.

49. In the end, I uphold both the conviction and the Sentence which shall continue to run from the date of his conviction being 25th May 2022.

50. Orders accordingly.

JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 31ST DAY OF JULY, 2023

.....

R. LAGAT-KORIR

JUDGE

Judgement delivered in the presence of Mr.Njeru for the State,Mr.Kipngetich holding brief Mr. Koech for the Accused and Siele(Court Assistant)