Epara v Republic (Criminal Appeal 4 of 2024)
[2024] KEHC 9132 (KLR) (30 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9132 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIBERA

CRIMINAL APPEAL 4 OF 2024

DR KAVEDZA, J

JULY 30, 2024

BETWEEN

AMOS IBRAHIM EPARA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the original conviction and sentence delivered on 22nd December 2023 at Kibera Chief Magistrate's Court Sexual offence case No. E003 of 2021 Republic v Amos Ibrahim Epara)

JUDGMENT

1. The Appellant was charged and after full trial convicted by the Subordinate Court of the offence of defilement contrary to section 8(1) as read with 8(3) of the *Sexual Offences Act* No. 3 of 2006 (the Act). The particulars were that on diverse dates between 11th October 2020 and 22nd October 2020 within Nairobi County, he intentionally caused his Penis to penetrate the Vagina of MW, a child aged fourteen (14) years. He was also convicted on the alternative count of committing an indecent act with a child contrary to section 11(1) of the *Act*.

2. The appellant was sentenced to serve 10 years imprisonment on the main charge and 10 years imprisonment on the alternative count. Being dissatisfied, he has filed an appeal against the conviction and sentence in line with his petition of appeal.

3. This is the first appellate court and in *Okeno v. R* [1972] EA 32, the Court of Appeal for East Africa laid down what the duty of the first appellate court is. It is to analyse and re-evaluate the evidence that was before the trial court, and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court but bearing in mind that it never saw the witnesses testify.

4. With the above, I now proceed to determine the substance of the appeal. In his Petition of Appeal and written submissions, the appellant has raised four grounds of appeal. The appellant complains that the

prosecution failed to prove its case beyond reasonable doubt since penetration was not conclusively proven and that he was not properly identified as the perpetrator. He further complains that the trial magistrate erred by failing to realise that the complainant's behaviour was of a person above eighteen years old. The appellant also complained that the trial court erred by failing to acknowledge that he deserved a statutory defence as stipulated under section 8(5) of the *Act*.

5. To succeed in a prosecution for defilement, it must be proven that the accused committed an act that caused penetration with a child. "Penetration" under section 2 of the *Act* means,

> " the partial or complete insertion of the genital organs of a person into the genital organs of another person."

6. The prosecution called five witnesses to prove its case. The complainant (PW1) gave sworn testimony and stated that sometime in October 2020, she absconded from home and went to live with one, Baraka. She stayed there for one week. She went on to narrate that she would often meet with Amos, the appellant herein, who was her boyfriend, and they would go to his house and in her words, 'have sex'. She added that she would ask Amos to pick her and once they had sex, he escorted her back to Baraka's place. PW1 stated that they had sex on several occasions.

7. Later, she went to visit her classmate but the classmate's parent called her teacher reporting that PW1 had been found. PW1's parents went for her and took her to Nairobi Women's Hospital. She later went to stay with her grandmother. Three months later, she realised that she had conceived a child, who, at the time of her testimony, was one year and three months old.

8. PW1 gave a clear and graphic testimony on the series of events and remained steadfast that the appellant was the one with whom she engaged in sexual intercourse on the material time. The appellant, being her boyfriend, was someone well known to her and their conduct went on for some time that PW1 would be able to easily tell who the perpetrator was. I therefore hold that the appellant was the perpetrator in this case.

9. To corroborate the testimony of PW1, the prosecution called LN, PW1's mother (PW2), who testified that in October 2020, PW1 was troublesome and would abscond from home on several occasions that she even reported to the school. PW2 was later called by the teacher who informed her that PW1 had been found. Later, when PW1 was at her grandmother's place, PW2 was called and informed that five boys, the appellant included, had gone to look for PW1. PW2 went there with police and the appellant was arrested. She confirmed that PW1 had confessed that indeed the appellant was her boyfriend. PW2's testimony is consistent with that of PW1 to the extent that it confirms that PW1 had the habit of absconding from home and that the appellant was her boyfriend.

10. The prosecution further called Pamela Khamala Okello, a government analyst (PW3), who produced the DNA report relating to PW1, the appellant, and the infant, AN She examined samples from the three and it was established by 99.99+ that the appellant was the biological father of the infant, AN, who was conceived by PW1.

11. Additionally, the prosecution John Njuguna, a clinician at Nairobi Women's Hospital (PW5), produced the medical report concerning PW1, which was prepared by his colleague Denis Ndolo, who was no longer working at the facility. He stated that the minor was taken to the facility on allegations of defilement. Though PW1 denied having any penile penetration, the examination revealed that her hymen was broken with an old tag. This finding, in my view, is consistent with PW1's evidence that she had had sex with the appellant on several occasions. In such a scenario, one would not expect to find signs of fresh penetration, unless violence or excessive force was applied. Therefore, given the history, it is my finding that penetration was sufficiently proven.

12. The foregoing notwithstanding, PW1's testimony did not require corroboration within the proviso of section 124 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) if there are to believe that the minor was telling the truth. I have also thoroughly gone through the testimony of PW1 and found that she was consistent throughout her narration, despite being subjected to rigorous cross-examination by counsel for the appellant.

13. The appellant in his defence does not mention anything regarding the charges levelled against him, he opted to remain silent.

14. Even so, in this appeal, the appellant submitted that he was entitled to the statutory defence under sections 8(5) and 8(6) of the *Act*. Subsection (5) states that it is a defence to a charge of defilement if the child deceived the accused person into believing that she was over the age of 18 years and the accused reasonably believed that she was over 18 years. Subsection 6 goes ahead to state that the belief referred to in subsection (5) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.

15. In view of the foregoing provisions, the appellant has submitted that he was deceived by the appellant into believing that she was over the age of 18 years old. He submitted that he did not know that the complainant was a school-going child at the time when they were in a relationship. Even on the day he was arrested, he contends that he innocently went to the complainant's home believing that she was an adult. He concluded that the conduct of the complainant made him reasonably believe that she was an adult.

16. While the appellant raises the statutory defence under section 8(5) and (6) of the *Act*, it is pertinent to note that this defence was not raised during the trial at the lower court. As established in *Okeno v. R* [1972] EA 32(*supra*), the duty of this appellate court is to reanalyse and re-evaluate the evidence presented at the trial court, not to consider new evidence or defences introduced for the first time on appeal. Therefore, the appellant's claim that he was deceived into believing that the complainant was over the age of 18 must be examined based on the evidence available in the trial record.

17. In this case, the complainant, PW1, consistently testified that she had absconded from home and engaged in a sexual relationship with the appellant, who was well-known to her. The evidence provided by PW1, corroborated by her mother PW2, and the DNA analysis by PW3, firmly established the relationship between the appellant and the minor. Furthermore, the medical evidence provided by PW5 confirmed the history of repeated sexual activity, which aligned with PW1's testimony.

18. Even if the statutory defence were to be considered, the appellant has failed to provide any substantial proof or credible evidence that he took reasonable steps to ascertain the age of the complainant. The burden of establishing this defence rests with the appellant, and it cannot be satisfied by mere assertions without supporting evidence. The appellant's failure to raise this defence during the trial further weakens his argument. This ground is therefore dismissed.

19. On the age of PW1, the trial court considered the birth certificate produced in evidence by PW4, which indicated that she was born on 6th August 2006. Therefore, by October 2020, she was aged 14 years. There is no doubt that PW1 was a minor. The conviction on the main count of defilement is therefore affirmed.

20. However, the trial court convicted the appellant on both the main charge and the alternative charge. In doing so, the trial court fell into error. It is trite law that a conviction cannot be made on both the main

charge and the alternative charge. This position was stated by the Court of Appeal in *David Ndumba v Republic* [2013] eKLR thus:-

> " On the issue of the alternative charge, we find that nothing turns on the fact that the trial court did not make a pronouncement on the same. In *M.B.O. v Republic*, Criminal Appeal No. 342 of 2008, this Court held,
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> > " The practice of charging offences in the alternative is one of abundant caution and that is why no finding is made on such charge once there is ample evidence to support the main charge."

21. The charge is an alternative to and not an addition to the main charge and therefore once the trial court found that the prosecution had proved the main charge of defilement, the trial magistrate had no business in proceeding to convict the Appellant on the alternative. For that reason, I partially allow the appeal on conviction by setting aside the conviction on the alternative charge of the offence of indecent act with a child, contrary to Section 11(1) of the *Sexual Offences Act*, No. 3 of 2006.

22. On the appeal against the sentence, the appellant has urged this court to invoke section 333(2) of the *Criminal Procedure Code* and consider the period spent in custody from the date of his arrest, 5th January 2021. I have perused the lower court record and noted that the appellant was released on surety bond on 9th August 2021. He was out until the date of conviction. The appellant therefore spent 7 months and 4 days in pre-trial custody.

23. Section 8(3) of the *Act* provides that a person who commits an offence of defilement with a child aged between twelve and fifteen years is liable upon conviction to imprisonment of not less than twenty years

24. The Trial court, upon considering the pre-sentence report, exercised discretion and sentenced the appellant herein to serve ten years imprisonment in the main charge of defilement.

25. Sentences are intended, inter alia, to not only punish an offender for his wrongdoing but also aim to rehabilitate offenders to renounce their criminal tendencies and become law-abiding citizens.

26. In assessing the appropriate sentence for the appellant, it is crucial to consider the circumstances surrounding the offence and the nature of the relationship between the appellant and the complainant. The trial record reveals that the appellant was 19 years old at the time of the offence, and the complainant was 14 years old. This age gap, while significant in the context of the law, also points to the fact that both individuals were teenagers. The relationship between them appears to have been consensual, and their interactions can be characterized as akin to the "Romeo and Juliet" scenario, where both parties were young and engaged in a romantic relationship.

27. The primary objective of sentencing, as highlighted, is not solely to punish but also to rehabilitate and reintegrate offenders back into society as responsible citizens. The trial court sentenced the appellant to ten years imprisonment, which, although lawful, may be deemed excessive given the context of their relationship and the appellant's status as a first-time offender.

28. The appellant has demonstrated remorse for his actions and has already spent a significant amount of time in pre-trial custody. Additionally, the nature of their relationship, coupled with the fact that the appellant was just above the age of majority, suggests that a more rehabilitative approach could be beneficial for the appellant.

29. Considering the principles of sentencing, including proportionality, rehabilitation, and the need to protect the public, I find that placing the appellant on probation would serve the ends of justice.

Probation would allow the appellant to undergo supervision and counselling, which can aid in his rehabilitation and prevent future offences.

30. For the above reasons, I hereby set aside the sentence of ten (10) years imprisonment on the main charge of defilement and substitute it with a probation sentence of two (2) years.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 30TH DAY OF JULY 2024

D. KAVEDZA

JUDGE

In the presence of:-

Appellant present in person

Mr. Mong'are for the Respondent

Nelson Court Assistant