Anyona v Republic (Criminal Appeal E003 of 2022)
[2024] KEHC 9399 (KLR) (29 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9399 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAROK

CRIMINAL APPEAL E003 OF 2022

F GIKONYO, J

JULY 29, 2024

BETWEEN

ALFRED ANYONA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the conviction and sentence of Hon. A.N.Sisenda (R.M) in Narok CM SOA No. E023 of 2020 on 15.03.2022)

JUDGMENT

1. The trial court convicted the appellant and sentenced him to serve 20 years imprisonment for the defilement of a 13-years 11 month's-old girl.

2. Being dissatisfied with the said conviction and sentence he preferred an appeal vide an undated memorandum of appeal filed on 14.04.2022. The appellant filed grounds of appeal as follows;

    i. That penetration was not conclusively proved as required in law.

    ii. That the age of the claimant was not proved by cogent evidence.

    iii. That the prosecution did not serve him the prosecution witness statement in time to prepare for his defence.

    iv. That the judgment was speculative as the totality of the evidence in the record was hearsay.

    v. That his defence was not taken into account.

    vi. That crucial witnesses were not availed.

    vii. That documents like the PRC which fills the P3 form were not availed.

viii. That he is vulnerable and that vulnerability was not taken into account as demanded by the dictate of the constitution.

ix. That the sentence of 20 years is harsh in the circumstances of the case.

Brief facts

3. On 13.11.2020 at the (Particulars withheld) location in Narok South sub-county within Narok county, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of B.R. a child aged 13 years 11 months.

4. PW1 in her evidence during the trial was that on 09.11.2020 she did not go to school as she had been sent home for school fees. She quarreled with her mother and left home for (Particulars withheld) market then (Particulars withheld) junction where she stayed until Friday. She went to a hotel and met the appellant, whom she had seen at (Particulars withheld) . He greeted her and invited her to see his house. She refused at first but later agreed. At his home, they found his sister and grandmother. They had tea and then supper and she went to sleep with the appellant as his sister and grandmother slept in the kitchen. The next morning, she told him she wanted to go home. He asked her to wait until he got her fare. She stayed there until Wednesday night when he forced her to have sexual intercourse with him. He asked her to take off her clothes. She refused and ran out of the house. He locked the door. She then got scared of staying outside alone since it was at night and asked him to open the door. He opened the door and pulled her in, onto the bed. He removed her trousers and panty, then removed his jeans and white shirt, put on a condom, and had sexual intercourse with her. She did not scream as there was no one nearby. The next morning, as she was coming from fetching water, she met her brother and two police officers. They took her to Ololulunga Police Station where she also saw the appellant. They were taken to Ololulunga sub-county hospital for examination and treatment. She then identified the appellant as Alfred anyone, he told her his name when they met at (Particulars withheld) .

5. The appellant was found guilty of the offence and was sentenced to serve 20 years imprisonment.

Directions of the court.

6. The appeal was canvassed by way of written submissions.

The Appellant's submissions.

7. The appellant submitted that the sentence meted upon him was mandatory in nature and thus excessive. The appellant contends that the imposition of mandatory sentences by legislature conflicts with the principle of separation of powers. The appellant relied on the constitutionality of mandatory sentences, Vol 39 No. 1 & 2 Osgoode law Journal, 368(2001), *Evans Wanjala Siibi v Republic* [2019] eKLR, *Eliud Waweru Wambui v Republic* [2019] eKLR,, English House of lords in *Gillick v West Norfolk And Wisbech Area Health Authority [*1985] 3 ALL ER 402, *Daniel Kipkosgei Letting v Republic* [2021] eKLR, Article 10 of The *Universal Declaration Of Human Rights* , Article 25(c) , 28, 159(2)(A), 160of the *Constitution*, Reyes and Woodson,*Christopher Ochieng v Republic* [2018] eKLR, *Jared Koita Injiiri v Republic* [2019] eKLR, *Evans Wanjala Wanyonyi v Republic* [2019] eKLR , *SS v Republic* [2021] eKLR, *Simiyu v Republic* (Criminal Appeal 49 Of 2018) [2021]KECA 295 (KLR) 93Decemeber 2021), *JKM v Republic* [2020] eKLR, *Dismas Wafula Kilwake v Republic* [2019]eKLR, Petition No. 97 of 2021 *Edwin Wachira & 9 Others v Republic* as consolidated with petition no. 88 of 2021, 98 of 2021 and 57 of 2021 at Mobasa High Court, *Joshua Gichuki Mwangi v Republic .*

8. The appellant submitted that the age of the complainant was not conclusively proved. The appellant contends that the birth certificate being the only document produced to prove PW1's age was not

produced by the maker. The appellant relied on *Omar Nache Uchu v Republic* Cr. Appeal No. 11 Of 2015, *Francis Omuroni v Uganda*, Court of Appeal in Criminal Appeal No. 2 Of 2000, *Kaingu Elias Kasomo v Republic* in Malindi Court of Appeal Criminal Appeal No. 504 Of 2010, *Alfayo Gombe Okello v Republic* [2010] eKLR, *Peter Maina Njeri v Republic* Cr. Appeal No. 152 Of 2010, and Sections 33,79, 80, 83 of the *Evidence Act*.

9. The appellant submitted that the maker of the P3 form did not produce the P3 form. The appellant contends that the maker was under disciplinary action. He argued that the failure of the makers of the official documents to produce them in court denied the appellant an opportunity to question them resulting in a miscarriage of justice.

10. The appellant submitted that the penetration was not proved to the required standards. The appellant submitted that the absence of any other medical or physical evidence, a broken hymen is not conclusive proof of penetration. The appellant relied on section 2 of the *Sexual Offenses Act*, *Odhiambo v Republic* Criminal Appeal No. 280 of 2004 [2005] eKLR, and *P.K.W. v Rep* [2012] eKLR Criminal App. No. 186 of 2010.

The Respondent's submissions.

11. The respondent submitted that the age of the child was conclusively proven. The respondent relied on a certificate of birth (P Exh1), evidence of PW1 and PW3, and section 2 of the *Sexual Offences Act*.

12. The respondent submitted that the evidence produced during the trial proved the element of penetration beyond reasonable doubt. The prosecution relied on the evidence of PW1, PW3, and PW6, P3 forms (P Exh5), and treatment notes (P Exh4).

13. The respondent submitted that the appellant was well known to PW1 and PW5 and as such the prosecution proved its case that there was no mistake of identity as to who defiled the complainant. From the evidence that was adduced during the trial, it is clear that the appellant is a person who defiled the victim and there was no possibility of mistaken identity, the appellant was well known to the victim. The respondent relied on evidence of PW1, PW3, and PW4.

14. The respondent submitted that the sentence meted out to the appellant was within the provisions of the law. The appellant relied on *Abdala v Republic* (Respondent) (Criminal Appeal 44 Of 2018) [2022] KECA 1054(KLR) (7 October 2022) (Judgment), and Section 8(3) of the *Sexual Offenses Act*.

15. In the end, the respondent submitted that grounds of appeal on evidentiary issues have no merit. All evidentiary issues on the offence of defilement were well proved beyond reasonable doubt by the prosecution. The case was proven beyond reasonable doubt. The trial magistrate did not error in conviction and sentence as the evidence adduced was solid. The respondent prayed that the appeal be dismissed in its entirety and the conviction and sentence be upheld as it is within the law.

Analysis and Determination.

Court's duty

16. First appellate court is obligated to re-evaluate the evidence and make its own conclusions bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See *Okeno v. Republic* [1972] EA 32

Issues

17. The court has considered the grounds of appeal, the evidence adduced in the lower court, and the respective parties' submissions. The broad issues for determination are;

    i. Whether the prosecution proved its case beyond a reasonable doubt.

    ii. Whether the sentence was manifestly harsh and excessive

Elements of the offence of defilement

18. 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* which provides:

> " 8(1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> 8(3) A person who commits an offence of defilement with a child aged twelve and fifteen years is liable upon conviction be sentenced to imprisonment for term of not less than twenty years."

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:

    1) The complainant is a child-Age;

    2) Penetration in accordance with Section 2(1) of the *Sexual Offences Act* did occur of the complainant, see *Mark Oiruri Mose v R* [2013] eKLR; and

    3) The accused was the assailant.

20. See the case of *Charles Wamukoya Karani v Republic*, Criminal Appeal No. 72 of 2013.

21. PW1 testified that she was 14 years old and in class 8 at the time of the offence.

22. PW3, a mother of PW1 testified that her child was aged 14 years. She produced her certificate of birth as P Exh1 which showed that she was born on 08.12.2006.

23. Based on the evidence adduced, the age of the victim was 13 years 11 months old.

24. PW1 in her evidence during the trial was that on 09.11.2020 she did not go to school as she had been sent home for school fees. She quarreled with her mother and left home for [particulars withheld] market then (Particulars withheld) junction where she stayed until Friday. She went to a hotel and met the appellant, whom she had seen at (Particulars withheld) . He greeted her and invited her to see his house. She refused at first but later agreed. At his home, they found his sister and grandmother. They had tea and then supper and she went to sleep with the appellant as his sister and grandmother slept in the kitchen. The next morning, she told him she wanted to go home. He asked her to wait until he got her fare. She stayed there until Wednesday night when he forced her to have sexual intercourse with him. He asked her to take off her clothes. She refused and ran out of the house. He locked the door. She then got scared of staying outside alone since it was at night and asked him to open the door. He opened the door and pulled her into the bed. He removed her trousers and panty, then removed his jeans and white shirt, put on a condom, and had sexual intercourse with her. She did not cream as there was no one nearby. The next morning, as she was coming from fetching water, she met her brother and two police officers. They took her to Ololulunga police station where she also saw the appellant. They

were taken to Ololulunga sub-county hospital for examination and treatment. She then identified the appellant as Alfred Anyona, he told her his name when they met at (Particulars withheld) .

25. PW6 a medical practitioner testified that upon examination of the minor, there was gross swelling and abrasion around the external genitalia. She had a smelly discharge and numerous pus and epithelial cells in the lab tests. Her hymen was broken, though it was not indicated freshly or long-standing. She produced treatment notes, and P3 form as P Exh 6, and 3 respectively.

26. The analysis of the evidence yields the conclusion that the prosecution proved to the required standard that penetration did occur of B.R.

27. Accordingly, the medical evidence supports the claim that there was a penetration of the child. But by whom?

28. PW1 testified that she knew the appellant very well.

29. The appellant opted not to give his testimony but to await the decision of the court.

30. Based on the evidence adduced, the appellant caused the penetration of B.R.

31. The evidence by the prosecution places the appellant at the scene and identifies the appellant as the person who defiled BR.

32. The court, therefore, finds that the appellant was properly convicted based on evidence that proved the guilt of the accused beyond reasonable doubt.

33. In the upshot, the appeal on conviction is dismissed.

On sentence.

34. The relevant penalty clause under which the appellant was sentenced is Section 8 (3) of the *Sexual Offences Act* which section provides that:

> " 8(3) A person who commits an offence of defilement with a child aged twelve and fifteen years is liable upon conviction be sentenced to imprisonment for term of not less than twenty years."

35. The prosecution submitted that the sentence was within the law.

36. Section 8(3) of *SOA* is one of sections which prescribes a minimum sentence. Some say it is merely the least sentence prescribed. Whilst others posit that it prescribes a mandatory minimum sentence because it excludes discretion to impose a lesser sentence which may be appropriate to the circumstances of the case. Which brings the court to a passage in *Samuel Onduso Moreka* [2024] eKLR cited below:-

> " New jurisprudential hints
>
> Jurisprudential hints coming through from the Supreme Court are that; minimum sentences set the floor rather than the ceiling when it comes to sentence. What is prescribed is the least severe sentence a court can issue leaving it open to the discretion of the courts to impose a harsher sentence. Although sentencing is an exercise of judicial discretion, it is parliament and not the judiciary that sets the parameters of sentencing for each crime in statute. See. the Supreme Court in *Republic v Joshua Gichuki Meangi and Initiative for Strategic Litigation in Africa (ISLA) and 3 Others* Supreme Court Petition No. E018 of 2023.

> But, the Supreme Court did not foreclose interrogation of constitutionality or otherwise of minimum sentences in 'a proper case', or whether trends elsewhere in dealing with the subject could apply to Kenya. It may profit the debate to have a discussion around; the teleological exercise of discretion towards 'the ceiling'; whilst limiting exercise of discretion below 'the floor' in sentencing; whether such approach fits within the constitutional concept of least severe sentence; as well as what, 'it is Parliament...that sets the parameters of sentencing for each crime in statute', means or entails; setting the stage for proper situating of the legislative function to prescribe penalty for an offence in a contest between judicial sentencing, and 'legislative sentencing'."

37. The 'proper case' should not, nonetheless, mean that there is no work which has already gone into the subject of minimum or mandatory minimum sentences by courts, lawyers and other multi-disciplinary eminent scholars and practitioners in Kenya.

38. Be that as it may, the Court of Appeal in *Dismas Wafula Kilwake v. Republic* [2018] eKLR stated that: -

> " We hold that the provisions of section 8 of the Sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter the commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing."

39. The trial magistrate considered the pre-sentence report and noted that the appellant had been in custody since 23/11/2020 when he was first arraigned in court. The trial court, therefore, exercised its discretion in sentencing the appellant. The appellant was sentenced to 20 years imprisonment to commence from 23/11/2020- which serves the purport of section 333(2) of the *CPC*.

40. The court has also considered that the offence is serious. The victim was a child. The manner the offence was committed was brutality causing her injuries. These kinds of offences normally cause dire post-traumatic effects; manifesting in a feeling of loss of personal worth and integrity of person apart from agonizing memories of the incident. Moreover, this kind of offences leaves the victim with post-traumatic experiences. In addition, the fact that the prevalence of the offence justifies a 20 years' imprisonment in this case. Therefore, a deterrent sentence is necessary.

41. Whereas punishing the offence as well as deterring others from committing similar serious offences is important, a sentence should also give a person an opportunity to be reintegrated back into society and eke a living as a free man at some point

42. In the circumstances, the 20-year imprisonment sentence is appropriate and is upheld.

Conclusion and orders

43. The appeal on conviction and sentence is dismissed.

44. The appellant's 20 years imprisonment is upheld.

45. It is so ordered.

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 29TH DAY OF JULY, 2024.

F. GIKONYO M

JUDGE

In the presence of: -

1. Appellant

2. Ms. Sauli for DPP

3. Otolo C/A