Kaaman v Republic (Criminal Appeal E040 of 2021)
[2024] KEHC 10213 (KLR) (26 July 2024) (Judgment)

Neutral citation: [2024] KEHC 10213 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CRIMINAL APPEAL E040 OF 2021

TW OUYA, J

JULY 26, 2024

BETWEEN

ERONGAT LOMWA KAAMAN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

((Being an appeal against the conviction and sentence of Hon. CA Otieno Omondi delivered on 28th November 2019 in Sexual Offences Case No. 06 of 2019 SPM's Court at Kiambu))

JUDGMENT

1. The appellant herein was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No. 3 of 2006. Particulars were that on 29th May, 2019 at Ruiru Sub-County within Kiambu County, intentionally and unlawfully caused his penis to penetrate the vagina of S.M a girl aged 11 years.

2. He was also charged with an alternative offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. Particulars were that on 29.05.2019 at Ruiru Sub-County within Kiambu County, unlawfully and intentionally touched the vagina of S.M, a girl aged 11 years old with his penis.

3. The trial court upon considering the law and facts in the case, reached a determination that the appellant was guilty of the said offence and therefore sentenced him to serve 10 years imprisonment. The appellant having been aggrieved by the conviction and the sentence of the court, filed a petition of appeal dated 28th November, 2019 on grounds cited hereunder:

    i. That the evidence was overly contradictory with material discrepancies, inconsistent, uncorroborated, misperceived and inconclusive to attain a conviction.

ii. That the accused person was not accorded a fair trial as stipulated by Article 50 of *the constitution*.

iii. That the leaned Magistrate failed to appreciate that the threshold of proof was overly wanting and below the required standard of proof.

iv. That the trial magistrate erred in law and fact by reliance on circumstantial evidence which was not proved beyond reasonable doubt.

v. That the defense of the appellant was thrashed without cogent reasons having been adduced contrary to section 169 of the penal code.

vi. That the learned trial magistrate failed to appreciate that vital and critical evidence information to secure conviction on the said charge were not availed contrary to sections 144,146,150 and 155 of the Criminal Procedure Code occasioning grave prejudice.

vii. That the learned trial magistrate erred in law and fact by meting out an excessive and harsh sentence in the circumstances herein.

4. At the hearing of the appeal, the Appellant relied on written submissions which had been filed to canvass the appeal herein. The appellant opted not to make any submissions and indicated to the court that he would rely on the papers he had already filed, to wit; grounds of appeal and petition of appeal both dated 11th June 2021.

5. The Respondent on the other hand opposes the appeal, filed submissions and relied on the same for canvassing his response. The Respondent submitted that they agree with the finding of the lower court that the elements of the offence charged were proved beyond reasonable doubt, the conviction safe and the sentence was proper.

Issues for Determination

6. Upon consideration of the facts of this case, the grounds of Appeal and the submissions made by the parties, the following issues are pertinent for consideration:

i. Whether the offence of defilement was proven to the required standard thereby warranting a conviction.

ii. Whether the sentence imposed was appropriate.

Re- Evaluation of the Evidence

7. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. (See Pandya vs. Republic (1957) EA 336). This being the first appeal, this court takes the liberty to re-evaluate the entire evidence.

8. Pw1 evidence is that she was on her way home in the evening after playing with her friends when the Appellant accosted her and convinced her to go with him to his house because it was late and dangerous for her to walk home alone. She slept on the seat and him on his bed but after switching off the light he carried her to his bed, removed her clothes and inserted his genital organ into her. She resisted but he slapped and threatened her and repeated the act again. He locked her up from outside from outside the following morning and returned in the evening to inform her that her father was looking for her. She used the appellants phone to call her mother PW2 who informed her that she was along the bypass area and was looking for her. She later met her mother along the way as she walked in pain. They proceeded

to report the matter at the police station after which she was taken to hospital, examined and treated. She also saw P3 form being filled. She made reference to P3and PRC forms together with treatment notes from Ruiru Sub-County Hospital. She took police officers to the gate where the accused person lived in an iron sheet house. The accused person was a cobbler known to her as Masai. (she emphasized this during cross examination). Her and her friends would take shoes to him for repair. She was born on 4th April, 2008.

9. PW2 corroborates the complainant's evidence in addition to how PW1 went missing on the material evening and she reported to the police. She looked for the complainant the whole day and found her in the evening after she called with a strange number. She also called back the number and it was picked by a man. PW1 was walking in pain, and informed her that the Appellant had defiled her. They made a report at the police station and thereafter she was taken to hospital, she was examined and confirmed to have been defiled. She makes reference to the P3, PRC forms and the treatment notes. She was present when complainant led the police to the Appellant's house. She confirms the complainant's age and produces her clinic card that complainant was 11years old at that time having been born on 4th April, 2008.

10. PW3 confirms the allegation of defilement through medical evidence, having examined the complainant. The finding was that the complainant walked with abdominal gait and her hymen was freshly open and gaping. This was supported by exhibit numbers 1 to 5.

11. PW4 the investigating officer, confirms what the complainant told her about the defilement incident by the Appellant. The matter was reported and booked at the police station and complainant referred to hospital where the allegation of defilement was confirmed, complainant treated and P3 and PRC forms filled. PW1 led him and other officers to the Appellant's house where he was arrested and later charged. She confirmed that the complainant was a minor aged 11 years at the time of the incident through the mother (PW2) and through the complainant's clinic card.

12. Upon being placed on his defense, the Appellant expressed ignorance and shock as to how he was woken up and bundled into a vehicle to the police station and later charged with defilement in court. He denied knowledge of the complainant or ever seeing him in his house at all.

13. The Trial Court having taken into account the entirety of the evidence arrived at the conclusion of guilt and convicted the appellant. The court then proceeded to Sentence him to 10 years imprisonment after mitigation and receipt of the Appellants probation report.

14. The appellant raised the ground that the evidence relied upon by the trial court was overly contradictory, had material discrepancies, inconsistent, uncorroborated, misperceived and inconclusive.

15. There is no doubt that the complainant was penetrated as is narrated by the complainant in her evidence which is consistent and corroborated by medical evidence adduced by PW3. The evidence that the Appellant had sexual intercourse with the complainant forcefully, twice in his bed at his house after he had assaulted and threatened her is consistent and without contradiction. When PW2 met her, she was walking in pain and narrated how the Appellant had defiled her.

16. The identity of the Appellant is not in doubt. The complainant's evidence is that the appellant was well known to her as Masai, was a cobbler and used to mend shoes for her and her friends. Taking into account the complainants age and level of intelligence' and going by the voire dire there is no doubt that the appellant was known to her. She led the police to the appellant's house for his arrest as corroborated by PW2 and Pw4.

17. The age of the Complainant which is a critical element to be proven, is confirmed by the complainants' testimony, that she was born on 4th April, 2008 and corroborated by PW2 her mother and her clinic card, all confirming that she was a minor 11 years old at the time of the incident. There is no doubt, inconsistency or contradiction of the above evidence.

18. This court having re-evaluated the evidence finds that the prosecution case was water- tight and proved every element of the offence specifically: penetration, identification of the appellant and the age of the complainant. Therefore, the trial court did not misperceive any fact or evidence in arriving at the conclusion that the prosecution case was proved beyond reasonable doubt leading to a conviction. This also answers to grounds 4, 5 and 6 of the Appellants Memorandum of Appeal. The evidence relied upon by the court was not entirely circumstantial but eyewitness account by the four witnesses, corroborating evidence by the said witnesses and medical evidence.

19. The appellant has raised the ground that he was not accorded fair trial by the trial court as stipulated by article 50 (2) (a), and (k) of *the Constitution* and that the threshold of evidence was overly wanting and below the required standard of proof. This court has re-valuated the trial process and noted that the Appellant's rights were adhered to from the point of plea taking where trial ensued upon entering a Plea of Not Guilty. The substance of the charges was read to him in Kiswahili the language he understands which language was used during the entire trial process. The Appellant was not represented but he was present during the entire trial process and had a chance to cross-examine the witnesses. At the point of case to answer, the Appellant's rights were read and explained to him in Kiswahili and he opted to give unsworn defense with no witness. When the defense case was closed the matter was set for judgement which was read in open court in the presence of the Appellant. He was given an opportunity for mitigation. Sentence was also delivered in open court after receipt of the probation report. I therefore note that the trial process was proper and in conformity with the provisions of article 50 (2) on the right to fair trial.

20. This court takes note that the trial court in its judgement addressed itself to the Appellants defense in that the Appellant gave unsworn evidence and called no witness. He denied the charges and stated that the police woke him up in the night and bundled him up in a vehicle to the police station. That he was later brought to court where he heard the charge of defilement. That he did not see the minor in his house. The trial court found that the Appellants defense was that of a general denial which cannot stand in the light of cogent evidence presented by the prosecution.

21. The Respondent/prosecution opposes the appeal in its entirety and prays that the court rejects the grounds of appeal advanced by the Appellant. They submit that they have established the ingredients of the offence beyond reasonable doubt in terms of age, penetration and identity of the accused at the scene.

22. On Age, documentary evidence was adduced vide clinic card, PW1 and PW2 testimony to prove that the complainant was born on 4.4.2008 and was therefore a minor aged 11 years. The respondent relies on the authority of Kaingu alias Kasomo Vs Republic (CA) 504 of 2010 UR "Approved modes of proof of age is through medical evidence where this is professional determined by a doctor. Further approved modes are through a birth certificate, clinical card as well as oral testimonies of parents and guardians.

23. Penetration was established through medical evidence by PW3 through P3 form which confirmed that there had been penetration through the complainant's genital organ. This was corroborated by the complainant's testimony as she narrated that the appellant forcefully had sexual intercourse with her on his bed in his house on the material night.

24. Identification was not in doubt since the identification of the appellant as the perpetrator of the act of defilement was proper. He was familiar and well known to the complainant. He was a cobbler in the neighborhood and the complainant and her friends used to take to him shoes for repair. The complainant led the police to the Appellants house which she aptly describes as mabati house where he was apprehended.

The Law

25. As already noted above, the appellant was charged with the offence of defilement contrary to section 8(1) (2) of the *Sexual Offences Act* No. 3 of 2006. Section 8(1) of the *Sexual Offences Act* provides that "a person who commits an act which causes penetration with a child is guilty of an offence termed defilement." As was correctly held in Charles Wamukoya Karani v Republic, Criminal Appeal No. 72 of 2013, "The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant." Having analyzed and re-evaluated the entire evidence, this court agrees with the respondents' submissions that in the instant case the requisite elements of the charge of defilement were proved beyond reasonable doubt.

26. On the age of the complainant, the *Sexual Offences Act* defines "Child" within the meaning of the Children's *Act No. 8 of 2001* as "...any human being under the age of eighteen years." This court reiterates the authority of Kaingu alias Kasomo Vs Republic (CA)504 of 2010 UR "Approved modes of proof of age is through medical evidence where this is professional determined by a doctor. Further approved modes are through a birth certificate, clinical card as well as oral testimonies of parents and guardians.

27. The Court of Appeal in the case of Edwin Nyambogo Onsongo v Republic [2016] eKLR emphasized that age can be proven by documents, evidence such as a birth certificate, baptism card or 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 and reliable forms of proof.

28. In the instant case, the age of the complainant was proved through oral evidence of the complainant, PW2 (complainant's mother) and corroborated by the complainant's clinic card confirming that she was an 11-year-old minor born on 4th April, 2008.

29. In regards to whether there was penetration, Section 2 of the *Sexual Offences Act* defines penetration to mean the 'partial' or complete insertion of the genital organs of a person into the genital organs of another.

30. In the case of Alex Chemwotei Sakong v Republic [2018] eKLR the court went to a great extent in expressing what penetration entails in a sexual offence as follows;

> " Penetration is defined under section 2 of the *Sexual Offences Act* to mean the partial or complete insertion of the genital organ of a person into the genital organs of another person. This position was explained by the court of appeal (Onyango Otieno, Azangalala & Kantai JJ A) in the case of Mark Oiruri v Republic Criminal Appeal 295 of 2012 [2013] eKLR in which they opined thus:
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> "...and the effect that the medical examination was carried out on her on 16th November, 2008 five days after the event, and that during that time she must have taken a bath and no spermatozoa could be found. 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 the 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..."

31. Penetration in the instant case was proved by the evidence of PW1(complainant) in her oral testimony where she testified that:

> " .....We went to his house and he asked me to sleep on the seat. He put off the lights for us to sleep. He then came and carried me to his bed. I tried to struggle but he slapped me twice. He threatened to cut me using a knife he had if I continued to disturb him. I was afraid and kept quiet. I had on skirt, panty, and along sleeve shirt. He removed my clothes. He then removed his jeans trouser. He got hold of my hands and inserted his penis into my vagina (pointing it out to the court) He had sex with me twice that night. After he was done, I sat on the floor....."

The above evidence was corroborated by PW3 through P3, PRC forms and medical treatment notes. This court finds that the above evidence on penetration is complete and conclusive leaving no doubt that the Complainant was indeed defiled.

32. The identification of the Appellant as the perpetrator was through recognition by the complainant. She testified that he was known to her as Masai, a cobbler who used to mend shoes for her and her friends. He led the police to the Appellant's mabati house leading to his arrest. The complainant described in detail all that happened. She stated that the incident happened inside the Appellant's house on his bed. That it was during the night after he had led her to his house on the guise that it was dangerous for her to walk home and that the appellant would shelter her for the night and escort her in the morning. It therefore follows that identification was by way of recognition as the appellant was a person who was well known to the complainant.

33. In the case of Anjononi & Others v Republic [1989] KLR the court held as follows:

> Recognition is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or another.

This court finds that the appellant was positively identified by way of recognition by the complainant.

34. Based on the above findings; that the age of the complainant as an 11-year-old minor, the act of penetration and the identification of the Appellant as the perpetrator being conclusively proven, this court determines that the prosecution proved its case to the required standard, beyond reasonable doubt. This, court therefore determines that the conviction of the accused was safe and in accordance with the law.

Whether the imposed sentence was appropriate

35. The Appellant appealed against his conviction and sentence. The respondent on the other hand urges the court to uphold the sentence on the basis that it was proper. In determining the propriety of the sentence, this court considers that the appellant herein 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.

36. This court is alive to the recent pronouncement of the Supreme Court of Kenya in the case of Republic V Joshua Gichuki Mwangi and Others Petition No. E018 OF 2023 regarding mandatory sentences. At paragraphs 66, the Court held:

> "We must also reaffirm that, 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. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious. However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the Legislature should then act. Suffice to say, where Parliament enacts legislation, the Judicial arm should adjudicate disputes based on the provisions of the law. However, in the special circumstances of a declaration of unconstitutionality, the process is reversed."

37. In the instant case the Trial Court opted to exercise discretion by sentencing the Appellant to 10 years imprisonment instead of the statutory mandatory life imprisonment sentence. This was outrightly illegal as the court did not have lee way for such discretion given that the mandatory sentence is already prescribed by statute.

38. At paragraph 56: the court held that:

> "Mandatory sentences leave the trial court with absolutely no discretion such that upon conviction, the singular sentence is already prescribed by law. Minimum sentences however set the floor rather than the ceiling when it comes to sentences. 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. In fact, to use the words mandatory and minimum together convolutes the express different definitions given to each of the two words....."

Evans *Nyamari Ayako v Republic criminal Appeal No.22 of 2022* Kisumu court of appeal where life imprisonment was construed to mean a maximum of 30 years imprisonment. The Appellant in the instant case was convicted as charged and was liable to 30 years imprisonment. The trial court in the instant case exercised its discretion and sentenced the Appellant to 10 years imprisonment.

39. From the record, the Appellant was aged 45 years at the time he was sentenced. This court does not find any reason to review the sentence which was given on 5th December, 2019 other than noting that that it was lenient. To date, the Appellant has served approximately half the sentence. The court notes further that the Appellant was given a chance for mitigation and that the sentence was given after consideration of a comprehensive report from the probation officer.

40. In light of the above this court is therefore obliged to align sentence in this matter with the statutory provision and guidance of the highest court of the land. The Appellant's sentence is therefore enhanced from 10 years to life imprisonment.

Findings

I. The conviction of the Appellant by the trial court is upheld

II. The Appeal is dismissed.

III. Sentence is enhanced to life imprisonment

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 26TH DAY OF JULY 2024

ROA 14 days.

HON. T. W. Ouya

JUDGE

In The Presence of:

For Appellant Erongat Loomwa Kaaman In Person

For Respondent Arnold Baraka

Court Assistant Martin Korir