MWANGI v Republic (Criminal Appeal 32 of 2023)
[2024] KEHC 9998 (KLR) (Crim) (26 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9998 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYANDARUA

CRIMINAL

CRIMINAL APPEAL 32 OF 2023

CM KARIUKI, J

JULY 26, 2024

BETWEEN

DUNCAN KIRUBI MWANGI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant herein was charged with the offense of attempted defilement contrary to Section 8 (1) as read with Section 8(3) of the *Sexual Offences Act*. The particulars of the offense being that on the 17th day of August 2017 at [Particularrs Withheld] within Nyandarua West Sub County of Nyandarua County, unlawfully and intentionally caused his penis to penetrate the vagina of LNM, a child aged 12 years.

2. In the alternative count, he was charged with the offense of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006.

3. Subsequently, the trial court conducted a full hearing, and the Appellant was convicted and sentenced to 20 years imprisonment. As a result, the Appellant was dissatisfied with the trial court's conviction and filed the instant appeal, which raised the following grounds of appeal:-

    I. He is 20 years of age, a first offender with a clean criminal record, and the trial magistrate erred in law and fact by not asking for the presentencing report to guide her,

    II That the trial magistrate erred in law and fact by failing to find that the prosecution evidence did not prove that the Appellant caused his genital organ to penetrate the genital organ of the Complainant.

III. The trial magistrate erred in law and fact by failing to find that the medical evidence did not positively connect the injuries to the time of the offense and hence the Appellant.

IV The trial court erred in law and fact by failing to find that the prosecution evidence was full of glaring contradictions and discrepancies that could not sustain the charge facing the accused.

V. The trial magistrate erred in law and fact by failing to find that the Prosecution had not medically connected the Appellant to the offense.

VI That the trial magistrate erred in law and fact by finding that the Prosecution had proved the defendant's charge beyond a reasonable doubt.

VII. That the trial magistrate erred in law and fact in finding a conviction that was against the weight of evidence.

VIII. That the trial magistrate erred in law and fact by passing a harsh sentence under the circumstances and not considering the age of the Appellant.

IX The sentence is too harsh, and I pray it be quashed and set aside.

Appellant Submissions

4. The Appellant submitted that he was convicted based on the mandatory minimum sentence which deprived the court the right to impose the appropriate sentence as per the circumstance of the offense.

5. It was submitted that during the time the act happened, the Appellant was an adult of 20 years, and therefore, ejaculation should have happened, which was proven contrary by the medical doctor who filled the p3 form where he ascertained that there was no spermatozoa found in the Complainant's private part. In this case, the Complainant might have been defiled by a fellow minor friend who could not ejaculate since there was no mention of the perpetrator using any protective material.

6. The Appellant asserted that as for the identification, the Complainant knew the accused persons as their neighbor at a workplace; hence, framing could happen quickly because she can also be able to give every detail of a person she is framing for the offense that was mastermind by her mother for the earlier said grudge they had. He prayed that this honorable court would quash this sentence and conviction and set him free for justice.

7. The respondent did not file submissions.

8. Analysis and Determination

9. This being a first appeal, I am expected to review and analyze the evidence afresh to form an independent opinion and draw my conclusions, bearing in mind that I do not have the benefit of seeing and observing the witnesses. The principles were set out in the case of David Njuguna Wairimu vs. Rep [2010] eKLR, where the Court of Appeal stated: -

> " The first appellate court must analyze and re-evaluate the evidence before the trial court, and itself come to its conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think anything is objectionable in doing so, provided it is clear that the court has considered the evidence based on the law and the evidence to satisfy itself on the correctness of the decision."

10. (See Okeno vs. Republic [1972] E.A. 32 and Kiilu & Another vs. Republic [2005] 1 KLR, 174).

11. Section 8(1) and 8(3) of the *Sexual Offences Act* provides as follows:-

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

12. In a charge for defilement, the Prosecution must prove the age of the Complainant, penetration, and the identification of the perpetrator of the crime.

13. Age of the Complainant

14. In a defilement case., it is essential to establish the victim's age because defilement is a sexual offense against a child, and the age of the child has also been used as an aggravating factor for purposes of determining the sentence to be imposed; the younger the child, the more severe the sentence that is meted.

15. In the present case, the victim was said to be 12 years old. Her child health card confirmed the same, P. Exh 3, which indicates that she was born on 13th July 2005, thus making her 12 years old when the offense was committed. Moreover, the P3 and PRC form corroborated the same. I, therefore, find that the Complainant's age was proved beyond reasonable doubt in the instant case.

16. Penetration

17. The second ingredient is penetration. Penetration is defined under Section 2 of the *Sexual Offences Act* as follows:

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

18. I agree with the court in D.S. v Republic [2022] eKLR, where it was stated that-

> Penetration is proved through the evidence of the victim corroborated by medical evidence. The testimony of the victim in this case, coupled with a medical examination, must be sufficient to determine whether penetration occurred. Where the medical examination may not be available or conclusive, the court ought to weigh, with thorough scrutiny and utmost caution, the evidence of the child in order to determine whether there was penetration.

19. The Complainant, in this case, testified that on the material day at about 7 am, she met the Appellant while her mum had sent her to the saloon. He held her by her hand and pulled her into the house. He removed all her inner wear and pulled her to his bed. He told her to face up and remove her panty. She was wearing a full dress, which she pulled to her waistline. He removed his clothes, i.e., his trousers and t-shirt, and lay facing her. She stated that he started defiling her, so she knew he had removed his clothes for the things he was doing to her. He did terrible manners to her.

20. PW1 stated that the Appellant removed his trouser ad, which he laid on top of her. He opened the zip and removed it. He then defiled her and did things she had never seen. He put his private into hers, which is in between the legs. She asserted that he put it in the middle of her legs at her private part. He put it in the one for short calls and did bad manners to her for 3-4 minutes. After he finished, he told her to wake up and go home.

21. Section 124 of the *Evidence Act*, Cap 80, provides as follows:

> " Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim admitted under that section on behalf of the Prosecution in the proceedings against any person for an offense, the accused shall not be liable to be convicted in proceedings against him unless it is corroborated by other evidence in support thereof implicating him.
>
> Provided that where in a criminal case involving a sexual offense, the only evidence is that of the alleged victim of the offense, 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."

22. PW3, the clinical officer testified that on examining PW1, there were no physical injuries, but in the genitalia, there were blood clots; the hymen was broken and had active bleeding. There were blood clots on the labia majora, and the hymen was torn with bleeding. It was freshly torn. They did high vaginal swabs, and there were numerous red blood cells which means there was active bleeding. They also did an HIV and pregnancy test, which was negative. No spermatozoa and pus cells were seen. She concluded that PW1 was defiled as per the observations and examination.

23. Accordingly, PW1's testimony was credible and reliable in terms of penetration. Further, the medical evidence supports there was penetration of the victim. I conclude, therefore, that the second ingredient, namely penetration, was adequately proven based on the victim's evidence and the medical evidence.

24. Positive Identification of the Perpetrator

25. The final ingredient is identification. PW1's testimony shows that she had seen the Appellant before in the plot where her mother had a saloon. She stated that they found him in that plot and that he used to live there in room no. 2. She asserted that she had known him since May 2016. PW2, the Complainant's mother, confirmed that they knew the Appellant as Dancun and that he used to live where she had a saloon. She even testified that she had confronted him about talking to the Complainant. It is, therefore, plausible that the victim could identify him and recognize him as the person who committed the act. There was no element of mistaken identity of the Appellant as the person who penetrated her genitalia.

26. The Appellant testified that there was a grudge between him and PW2, but I did not find anything that proved a grudge between the two. To me, the defense is a mere afterthought.

27. Consequently, I firmly conclude that the offense of defilement was adequately proven by the Prosecution to the required threshold, and therefore, I uphold the conviction.

28. The Appellant argued that the trial magistrate erred in law and fact by passing a harsh sentence under the circumstances and not considering the age of the Appellant. The trial court applied Section 8 (3) of the *Sexual Offences Act* to convict. The section provides:

> " A person who commits an offense 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."

29. The offense committed was serious, and the Appellant was an adult. I consider that the accused is the first offender. In the circumstances, 20 years imprisonment is not an excessive but appropriate sentence. I see no reason for interfering with the sentence imposed by the trial court. His appeal on sentence fails. Thus, the court orders;

    i. The conviction is upheld, and the sentence is confirmed. Thus, the appeal herein is dismissed.

JUDGMENT DATED AND SIGNED AT NYANDARUA THIS 26TH DAY OF JULY, 2024 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

CHARLES KARIUKI

JUDGE