Abubakar v Republic (Criminal Appeal E024 of 2023)
[2024] KEHC 9073 (KLR) (25 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9073 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KABARNET

CRIMINAL APPEAL E024 OF 2023

RB NGETICH, J

JULY 25, 2024

BETWEEN

ISAAC ETIR ABUBAKAR ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against both conviction and sentence of 20 years imprisonment vide a judgement delivered on the 20th September, 2023 at Kabarnet Law court by Honourable Purity Koskey (SPM)

JUDGMENT

1. The appellant herein, Isaac Etir Abubakar, 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 the accused on the night of 30th April, 2022 at around 2100hours at (particulars withheld) village in (particulars withheld) sub-location in (particulars withheld) Location in Baringo South Sub- County within Baringo County jointly with another not before court intentionally caused his penis to penetrate the vagina of FA a child aged 15 years.

2. The Appellant faced an alternative charge of committing indecent an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that the appellant on the night of 30th day of April, 2022 at around 2100hours at (particulars withheld) village in (particulars withheld) Sub-Location in (particulars withheld) Location in Baringo South Sub-County within Baringo County jointly with another not before court intentionally touched the vagina, breasts and buttocks of FA a child aged 15 years with their hands.

3. The appellant denied the charge read to him on 4th May, 2022.The case proceeded for herein and by ruling delivered on 18th April,2023, the trial court found that the prosecution had established *prima facie case* against the appellant. In his defence, the appellant gave sworn evidence and called 3 witness

in support of his case. By judgment delivered on the trial court found the appellant guilty, convicted and sentenced him to serve 20 years imprisonment.

4. Being aggrieved and dissatisfied with the decision of the trial court the Appellant has filed an appeal to this court on the following grounds:-

   i. That I pleaded not guilty at the trial.

   ii. That the learned magistrate erred by relying on unsatisfactory, unbelievable evidence.

   iii. The learned magistrate grossly erred in law and facts by not observing that the prosecution did not prove their case beyond reasonable doubt.

   iv. That the identification parade was not conducted for the accused person since the incident happened at night.

   v. That the evidence of the medical expert did not link the Appellant to the alleged offence.

   vi. That the trial court erred in convicting the appellant whereas disregarding his testimony in his plausible defense.

   vii. That the Appellant was not subjected to fair trial as he was not supplied with prosecution statements in full.

5. The Appellant prays for the total success of this appeal, conviction be quashed, sentence be set aside and he be set at liberty.

Oral Submissions by State

6. The prosecution counsel Ms. Ratemo submitted that the appellant was charged with the offence of defilement of a girl aged 15 years and prosecution was required to prove age, identification of the assailant and penetration.

7. She submits that on the issue of age, the prosecution produced a birth certificate of the complainant who testified PW2 which indicated the date of birth as 8th April,2007. That according to the charge sheet, the incident occurred on the 30th April,2022 which shows that at the time of defilement, the child was 15 years old. That on the aspect of age, it was proved beyond reasonable doubt that the complainant was 15 old years at the time of the offence.

8. In respect to penetration, the prosecution counsel submits that PW2 properly gave an account of what happened on the 30th April,2022 by stating that the Appellant led her to a bush, removed her clothes and proceeded to have sexual intercourse with her and upon examination, the doctor found that her hymen was broken and she had tenderness around her genitalia. The doctor confirmed penetration and concluded that there was a possibility of infection.

9. On identification, she submits that PW2 in her evidence said that she knew the Appellant prior to the incident and that the Appellant used to seduce her. she described the appellant as a black boy whose mother is known as *blacky*. That there was light which she used to see the appellant who had beards and dreadlocks. That she also said the Appellant talked to her and she was able to recognize his voice. That she also identified the assailant in court and during cross examination of the victim, it was not disputed by the Appellant that he was known to the victim prior to the incident and that it was also not disputed that the Appellant was first born son of the lady called *blacky*.

10. Prosecution Counsel submitted that in respect to the Appellant's defence not being considered by the court, at paragraph 11-14 the court clearly indicated the defence of the Appellant. That the court also

analyzed his defence where he indicated that he was not at the scene at the time of the offence. That in his defence, he indicated that the charges were not true and that he denied the same. That he did not explain where he was at the time of the offence and he only indicated that he worked that day, closed work and went home. She submits that he did not raise any alibi defence at the beginning of the trial to enable the prosecution to validate his whereabouts at the time of the offence. She submits that the prosecution proved their case against the Appellant and the appeal is unmeritious and should be dismissed on conviction.

11. On the issue of sentence, she submits that the accused was sentenced to serve 20 years imprisonment. That the court indicated the mitigating factors as prayed by the Appellant. She submits that the *Sexual Offences Act* provides mandatory minimum sentence and, in this case, the victim was 15 years old. That the minimum sentence is 20 years according to section 8(3) of the *Sexual Offences Act* and that is the sentence meted by the trial court. She submits that the State do not object to the period served in remand being considered by the court.

Analysis and Determination

12. This being the first appellate court, I am required to analyze and evaluate afresh all the evidence adduced before the trial court. This I do while minded of the fact that unlike the trial court, I did not get opportunity to take evidence first hand and observe demeanor of witness. For this I give due allowance. The principle that guide first appellate court were set out in the case of *Okeno vs. Republic* [1972] EA 32 where the Court of Appeal set out the duties of a first appellate court as follows: -

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya vs. Republic* (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M. Ruwala vs. R.* (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters vs. Sunday Post* [1958] EA 424."

13. Similarly the duty of the first appellate court is set in the Court of Appeal for Eastern Africa in *Pandya -vs- Republic* [1957] EA 336 is as follows:-

> " On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

14. In view of the above, I have considered evidence adduced before the trail court together with submissions filed and wish to consider the following:-

    i. Whether ingredients for the offence of defilement were proved beyond reasonable doubt

    ii. Whether the sentence imposed was harsh and excessive

(i) Whether Ingredients for the Offence of Defilement were Proved Beyond Reasonable Doubt

15. The elements constituting the offence of defilement are proof of penetration, the age of the minor and the identity of the assailant (See *CWK v Republic* [2015] eKLR).

(a) Proof of Penetration

16. 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."

17. 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.

18. The complainant in this case testified as PW2. She stated she had been sent to the shop to purchase matchsticks by his brother Yusuf and while at the shops she was called a side by the assailant who convinced her and took her to the bush. She stated that they were two men who took her to the bush and that one of them closed her mouth with his hands so that she could not scream. She said that while at the bush, the accused herein whom she knew since he had been seducing her severally removed her clothes and accused pulled his trouser down and defiled her while the other person was standing waiting. she stated that while at it, they heard a group of people passing by and the two ran away leaving the complainant. She said that she ran home leaving behind her trouser and carried her underpart by hand. She informed his brother Yusuf what had happened and she was taken to the Hospital.

19. PW4 a Clinical Officer confirmed that the complainant was seen at their health facility on the 30th April,2022 being the date of the incident. On examining her, she found that her hymen was not intact, urinalysis done revealed that the complainant had pus and epithelial cells an indication of urinary tract infection. she concluded that the complainant had been defiled. She produced the P3 Form in court as exhibit.

20. Record show that he complainant was candid on how the appellant defiled her and her evidence was corroborated by the evidence of PW1 who was informed of the defilement immediately by the complainant and together they rushed to the scene and found the scene disturbed showing there was struggle at the scene. From the foregoing, there is no doubt that penetration was proved beyond reasonable doubt.

(b) Proof of Age of Victim

21. In respect to age of victim in cases of defilement, the Court of Appeal in *Edwin Nyambogo Onsongo vs. Republic* (2016) eKLR stated as follows: -

> " ... 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."

22. The investigations officer produced a birth certificate for the victim which indicated that the victim was born on 8th April,2007; it confirmed that the complainant was aged 15 years old at the time of the offence. In my view, the birth certificate was sufficient proof of the age of the victim that she was 15 years at the time of the offence.

(c) Proof of Identity of Assailant

23. PW2's testimony is that she knew the accused/Appellant person before the incident as he was their neighbor. She was able to recognize the accused person during the incident and also in the dock as the assailant. She said the assailant had seduced her severally. The appellant was not therefore a stranger to the complainant and it is the complainant who identified the accused at the Mosque as the assailant for purposes of arrest. From the evidence adduced, the complainant recognized the appellant clearly and therefore was no possibility of mistaken identity. I hereby find that the accused was positively identified.

24. From the foregoing, the three ingredients for the offence of defilement were proved beyond reasonable doubt.

(ii) Whether Sentence Imposed was Harsh and Excessive

25. The Appellant's other ground of appeal is that the sentence meted on him was harsh and excessive. The principles applicable in considering whether to interfere with the sentence of a trial court on appeal were enunciated in the case of *Mbogo & Another vs. Shah* (1968) 1 EA. 93 thus:-

> " ...a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."

26. Similarly, the Court of Appeal in the case of *Ogolla s/o Owuor vs. Republic*, [1954] EACA 270, pronounced itself on this issue as follows:-

> " The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."

27. The other principle to be considered is whether the sentence is manifestly excessive in view of the circumstances of the case. (*R - v- Shershowsky* (1912) CCA 28TLR 263) while in the case of *Shadrack Kipkoech Kogo - vs - R*. Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus:-

> " Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also *Sayeka – vs- R*. (1989 KLR 306)."

28. The Court of Appeal, on its part, in *Bernard Kimani Gacheru vs. Republic* [2002] eKLR restated that:

> " It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist."

29. In this case, the offence in which the Appellant was convicted of is the offence of defilement contrary to section 8(1) as read with Section 8(3) of the *Sexual offences Act* No. 3 of 2006. Section 8(3) of the *Sexual offences Act* provides 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"

30. Under *Sexual Offences Act*, sentence for defilement is prescribed based on the age of the victim of the sexual assault. Although the Act does not expressly state, the manner the penalty is prescribed shows that the younger the victim, the more severe the sentence. It is clear that the age of the victim of sexual offence is a determinant factor to be considered while determining sentence.

31. In this case, the complainant was of the age of 15 years at the time of the offence. Thus, the appropriate penalty clause is Section 8(3) of the *Act* which prescribes the mandatory minimum sentence of 20 years imprisonment where the victim is 15 years and below.

32. There is no doubt that the appellant took unfair advantage of the minor and unlawfully defiled her. There is no doubt the child was traumatized by the experience and will have a lifelong effect on the child. By prescribing minimum sentence, the intention of the legislature is to protect innocent children and to ensure consistency in dealing with perpetrators of sexual offence and deter would be offenders. In view of the above, I find sentence imposed appropriate in the circumstances and will not interfere.

33. Final Orders: -

1. Appeal on both conviction and sentence is hereby dismissed.

2. Period served in remand from date of arrest to be computed in the sentence.

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 25TH DAY OF JULY 2024.

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RACHEL NGETICH

JUDGE

In the presence of:

Elvis & Komen – Court Assistants.

Appellant Present.

Ms. Ratemo for State.